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1940

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TO
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IN GRATEFUL RECOGNITION OF
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LAHORE HIGH COURT

1940

Chief Justice :

The Hon'ble Sir John Douglas Young, Kt., B.A. (*Cantab*), Bar-at-law.

Puisne Judges :

The Hon'ble Mr. Bakshi Tek Chand, M.A., LL.B.

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169	1940	O 137	325	1940	A 92	477	1940	S 53	660	1940	A 246
171	"	P 135	329	"	C 97	480	"	R 77	662	"	C 286
172	1939	B 455	337	"	M 43	481	"	B 126	667	"	L 217
174	"	L 521	340	"	L 58	482	"	L 87	675	"	B 195
176	"	B 457	341	"	" 36	485	"	B 127	676	"	A 260
179	"	S 340	342	"	M 279	486	"	S 33	677	1939	M 783
181	"	M 976	344	"	L 61	491	"	M 293	681	1940	Pesh 17
182	1940	N 72	345	"	S 30	493	"	S 61	682	"	O 371
183	1939	B 452	348	"	L 53	495	"	R 95	686	"	B 204
184	"	L 513	349	"	P 97	496	"	M 297	687	"	R 148
185	"	M 917	354	"	L 40	497	"	R 72	689	"	C 292
186	"	" 914	356	1941	N 66	498	"	A 195	693	"	R 176
187	"	S 339	359	1940	L 32	499	"	" 201	694	"	S 112
188	"	B 480	360	"	N 120	500	"	" 178	695	"	O 382
190	"	S 341	362	"	A 113	504	"	P 179	697	"	N 410
191	"	P 611	364	"	S 24	505	"	O 323	701	"	L 203
203	"	M 905	368	"	L 15	506	"	R 110	702	"	P 631
204	"	L 529	369	"	M 1	507	"	S 51	705	1939	M 472
209	"	P 659	373	"	R 55	509	"	P 588	706	1940	R 140
211	1940	A 1	376	"	N 184	515	"	R 104	707	"	S 107
214	"	P 375	377	"	M 173	520	"	P 595	708	"	L 192
216	1939	R 427	378	"	L 44	522	"	A 174	709	"	N 110
217	1940	P 313	380	"	" 42	523	"	P 603	711	"	O 369
220	"	A 18	381	"	P 479	526	"	B 181	713	"	N 134
221	"	P 316	383	"	C 147	531	"	Pesh 11	718	"	P 242
227	"	A 7	384	"	P 364	532	"	M 292	719	"	C 277
228	"	O 241	385	"	S 22	533	"	P 163	724	"	S 113
230	"	A 5	387	"	L 84	540	"	L 112	725	"	O 396
232	"	P 184	388	"	M 155	541	"	R 109	727	"	S 124
233	"	O 178	390	"	A 114	543	"	Pesh 10	728	"	O 330
234	"	P 32	391	"	M 216	544	"	N 264	729	"	L 274
235	"	M 55	392	"	R 33	545	"	O 837	730	"	PO 128
236	"	A 3	393	"	M 268	549	"	Pesh 16	734	"	N 249
238	"	M 23	394	"	L 93	550	"	O 348	736	"	O 328
242	"	" 12	396	"	C 163	552	"	M 221	737	"	B 254
245	"	B 14	397	"	M 271	553	"	N 230	738	"	P 417
246	1939	S 337	398	"	" 265	556	"	C 205	741	"	A 386
247	1940	C 59	399	"	S 28	558	"	M 144	742	"	P 361
248	"	S 15	400	"	M 257	559	"	P 198	744	"	O 321
249	"	A 80	401a	"	" 224	561	"	Pesh 6	745	"	N 259
250	"	M 18	401b	"	S 42	563	"	C 250	746	"	P 252
251	"	B 40	402	"	M 183	565	"	Pesh 4	747	"	S 114
252	"	R 26	403	"	" 111	567	"	R 112	750	"	" 97
253	"	B 62	405	"	C 182	568	"	S 65	753	"	N 360
255	1939	C 376	408	"	" 167	571	"	B 129	756	"	L 283
256	1940	B 35	409	"	P 625	573	1939	M 840	757	"	N 186
257	"	P 299	413	"	" 265	574	1940	Pesh 1	766	"	L 233
258	"	A 46	414	"	PC 54	576	"	L 157	768	"	R 171
267	"	P 295	417	"	P 446	577	"	M 230	769	"	M 465
271	"	R 21	419	"	" 492	578	"	P 559	775	"	O 419
272	"	" 32	421	"	M 370	579	"	M 294	777	"	P 410
273	"	B 18	424	"	R 50	580	"	N 263	778	"	O 413
275	1939	M 916	427	"	N 81	581	"	M 509	779	"	L 281
276	"	P 625	433	"	P 486	582	"	C 213	781	"	O 416
281	1940	A 19	437	"	N 218	584	1941	O 14	782	"	N 239
283	"	P 272	442	"	M 196	585	1940	N 283	783	"	C 378
285	"	A 35	445	"	C 30	587	"	P 605	785	"	M 697
287	"	N 181	447	"	R 70	590	"	Pesh 9	787	"	O 424
289	"	" 17	451	"	L 54	591	"	L 129	788	"	S 134
310	1939	S 342	454	"	P 471	599	"	C 290	789	"	C 398
311	1940	P 409	455	"	" 499	617	"	L 208	790	"	R 113
312	"	N 128	457	"	M 623	618	"	A 289	791	"	C 346
313	"	P 109	458	"	R 81	620	"	R 118	792	"	" 350
315	"	N 117	460	"	P 513	621	"	A 259	793	"	N 276
316	"	C 85	463	"	L 95	623	"	C 232	795	"	P 701
317	"	M 134	466	"	C 76	625	"	A 263	796	"	C 371
318	"	P 111	467	"	P 185	627	"	R 129	797	"	R 114
319	"	B 42	469	"	N 227	634	"	L 210	799	"	N 265
322	"	M 138	470	"	P 373	639	"	N 245	801	"	C 336
323	"	" 136	472	"	O 244	645	"	A 291	802	"	S 136
				"	R 68	647	"	C 274	803	"	N 203
				"	P 541	659	"			"	

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IC	A	I	R	IC	A	I	R	IC	A	I	R	IC	A	I	R	IC	A	I	R
1	1940	FO	1	219	1940	PC	3	377	1940	O	113	551	1939	L	183	736	1940	O	134
3	1939	M	384	224	1939	A	705	380	1939	L	521	552	"	R	406	738	"	P	316
5	1940	O	87	225	"	B	492	382	"	B	457	554	"	M	642	744	1939	L	454
6	1939	C	460	227	"	L	531	385	"	M	976	556	"	B	448	745	1940	O	241
11	"	S	315	228	"	B	455	386	"	R	434	557	"	P	522	748	"	P	184
13	"	B	386	230	"	M	304	388	"	A	726	560	"	C	606	749	"	M	33
16	"	M	401	232	"	L	540	390	"	B	489	562	"	M	702	753	"	"	55
17	"	O	674	233	"	A	738	391	"	A	724	569	"	B	445	754	"	O	178
25	1940	O	92	234	1940	PC	11	392	"	S	340	571	1940	PC	17	755	"	M	80
26	1939	M	513	239	1939	M	494	393	"	O	730	573	1939	S	270	756	"	O	214
28	"	S	288	241	"	N	141	395	"	L	548	574	"	R	448	757	"	R	1
30	"	M	586	244	"	S	305	400	1940	N	72	575	1940	PC	30	765	1939	S	291
33	"	N	132	247	"	M	385	402	1939	A	717	578	1939	M	735	766	1940	O	183
37	"	M	849	249	"	C	714	404	1940	P	286	580	"	N	249	767	1939	A	679
41	"	A	617	250	"	P	504	406	1939	A	715	587	"	C	736	768	"	M	299
42	"	M	653	252	"	B	350	408	"	O	723	588	"	L	529	769	1940	P	7
44	"	B	354	254	"	P	591	410	"	B	483	590	1940	PC	19	771	"	O	205
52	"	P	526	256a	"	C	599	411	"	C	741	594	1939	P	659	772	1939	L	453
56	"	B	367	256b	"	A	734	412	"	M	429	597	"	A	687	773	1940	P	32
57	"	S	256	257	"	M	906	413a	"	O	748	598	1940	P	375	774	"	O	231
59	1940	P	147	258	1940	O	67	413b	"	B	452	599	1939	L	565	778	1939	S	361
62	1939	M	503	266	1939	L	523	415	"	L	513	602	"	P	497	780	"	N	302
63	1940	P	155	268	"	S	335	416	"	C	742	605	"	R	421	783	"	A	672
65	1939	L	433	271	"	A	708	417	"	M	917	606	1940	P	261	788	1940	P	270
67	"	S	303	272	1940	O	117	418	"	N	277	608	"	B	12	791	1939	A	668
69	"	L	533	273	1939	P	597	419	"	M	914	609	1939	L	556	793	1940	O	212
70	"	R	296	274	"	L	534	420	"	A	706	611	1940	A	1	795	"	B	14
73	1940	P	151	277	1940	O	116	421	"	M	927	613	1939	L	562	796	"	P	353
75	1939	L	79	278	"	P	371	422	"	L	554	614	"	R	427	799	"	A	3
77	"	M	511	280	"	O	84	424	"	C	709	616	1940	PC	24	801	"	FC	4
79	1940	P	153	284	1939	P	428	426	"	L	501	623	1939	R	375	802	1939	R	446
81	1939	B	403	286	"	C	672	427	"	M	431	624	1940	N	78	804	1940	FC	5
83	1940	P	239	288	"	M	509	428	"	S	339	626	"	P	254	805	1939	L	356
87	1939	S	263	290	1940	O	107	429	"	B	392	628	1939	M	902	807	"	B	419
94	"	O	582	294	"	FO	3	431	"	O	737	630	1940	P	313	808	1940	A	28
99	"	A	593	295	"	O	132	434	"	M	583	632	1939	L	542	809	"	L	9
105	1940	O	93	297	"	P	119	435	"	A	748	634	"	O	595	811	"	C	26
108	1939	N	260	300	1939	O	600	438	"	C	648	638	1940	P	300	813	1939	B	485
111	1940	O	88	301	1940	O	80	440a	"	M	905	641	1939	R	396	816	1940	P	201
113	1939	A	735	302	1939	A	730	440b	"	"	481	644	"	A	699	819	"	R	12
114	1940	O	97	303	"	R	390	441	1940	O	152	647	"	M	611	821	"	PC	36
119	1939	R	388	305	1940	PC	7	454	1939	O	758	648	"	C	627	824	"	M	23
122	"	L	509	310	"	N	66	459	"	M	506	649	"	A	698	828	1939	L	563
123	1940	P	133	314	1939	L	497	460	"	R	432	650	1940	O	226	829	1940	M	12
125	1939	L	508	315	"	B	481	465	"	M	903	652	1939	L	504	832	1939	S	337
126	"	A	660	316	"	L	539	467	1940	O	164	655	"	B	508	834	"	A	696
129	"	P	592	317	"	N	75	476	1939	M	386	660	"	A	657	835	"	S	272
131	"	C	564	318	1940	O	724	480	"	P	678	663	"	R	436	837	1940	A	63
135	"	P	570	319	1939	S	308	483	"	R	385	668	"	A	694	839	1939	B	513
137a	"	L	510	323	"	M	599	486	"	S	360	669	"	B	490	843	"	L	473
137b	1940	O	63	326	"	O	129	487	"	A	713	671	1940	P	482	845	"	S	289
142	1939	R	392	330	1940	A	387	489	"	L	349	675	1939	B	487	847	"	R	428
144	"	P	386	334	"	P	688	495	"	B	505	677	"	M	693	850	"	M	477
145	"	O	490	336	"	O	119	498	"	P	623	682	1940	A	18	852	1940	P	75
149	"	B	342	337	1939	A	725	500	"	M	278	683	1939	S	364	854	"	A	38
151	"	A	710	338	1940	P	129	501	"	A	739	685	1940	P	341	857	"	P	58
154	"	M	374	339	1939	C	718	506	"	B	480	690	1939	A	695	858	1939	L	455
155	"	S	332	341	1940	O	137	508	"	R	315	691	"	C	569	861	1940	A	8
156	"	N	265	342	1939	L	544	513	"	A	723	700	1940	A	7	865	"	P	40
159	"	M	572	343	1940	P	135	514	1940	P	170	701	1939	L	561	870	1939	B	447
162	1940	P	365	346	"	O	83	519	1939	B	477	702	"	S	367	871	"	C	578
169	1939	N	210	347	"	N	281	520	"	L	536	704	"	C	744	874	"	B	414
172	"	A	746	348	"	P	682	521	"	A	751	705	"	R	428	877	"	L	492
178	"	M	411	350	"	R	401	523	"	C	620	709	1940	A	5	880	"	C	626
176	"	L	515	352	"	P	667	526	"	R	408	711	1939	L	498	881	1940	N	94
177	"	O	728	353	"	S	279	529	"	P	611	712	"	M	498	883	1939	R	444
179	"	P	636	364	"	B	494	542	"	B	344	713	"	L	511	884	1940	O	279
203	"	B	465	366	"	O	717	543	"	S	341	714	"	C	354	888	1939	N	312
205	"	R	402	368	1940	O	104	544	"	M	801	726	1940	O	207	889	1940	O	237
208	"	Pesh	47	369	"	N	65	545	1940	N	87	727	1939	N	305	893	"	N	174
210	"	N	274	372	"	O	118	547	1939	O	706	731	1940	O	180	894	1939	L	560
214	"	O	746	373a	"	P	607	549	1940	PC	16	733	1939	R	399	895	1940	O	182
217	1940	PC	1	373b	1939														

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1	1940	P	C 38	171	1939	C	376	349	1940	C	86	542	1940	A	99	709	1940	R	45
7	1939	M	546	172	1940	P	257	350	"	M	8	544	"	O	230	714	"	M	27
8	"	B	495	174	1939	C	369	351	1939	B	518	546	"	O	51	715	"	R	14
17	"	C	669	182	1940	P	299	355	1940	P	472	551	"	O	223	718	1939	L	466
21	"	N	279	183	1939	S	311	357	1939	L	585	553	1941	N	92	719	1940	R	55
22	"	L	460	187	1940	P	56	365	"	S	11	555	1940	C	6	722	"	M	58
25	"	C	699	188	1939	R	347	368	"	P	411	559	"	A	97	723	"	S	24
28	1940	P	9	192	1940	A	46	370	"	N	181	560	"	P	102	726	"	B	49
33	1939	C	379	200	1939	M	561	372	1939	B	468	564	1939	A	626	729	"	A	55
39	"	L	463	203	"	B	431	375	1940	N	108	575	1940	L	58	731	"	N	49
42	"	R	433	208	"	M	691	377	1939	L	372	577	"	"	47	749	"	B	44
44	1940	C	28	210	"	R	365	379	"	M	613	578	"	B	33	753	"	O	138
45	1939	L	330	214	"	M	471	381	1940	O	148	581	"	L	36	763	"	N	91
54	1940	PC	33	215	"	C	601	385	"	P	432	582	"	R	17	764	"	A	113
57	1939	M	891	221	1940	P	283	391	1939	S	342	583	"	N	79	766	"	O	217
58	"	C	711	224	1939	M	916	393	"	B	522	584	"	C	1	770	"	M	451
61	"	B	526	225	1940	P	6	397	"	B	522	588	"	L	37	771	"	L	33
63	"	L	590	226	"	R	21	398	1940	P	384	589	"	O	81	773	"	M	101
66	"	B	464	227	"	P	295	401	"	O	253	590	1939	L	488	775	"	R	67
67	1940	C	59	231	1939	M	890	402	"	P	376	593	1940	C	75	776	"	C	67
68	"	A	16	232	"	P	594	423	"	N	17	594	"	B	37	784	"	P	479
69	"	R	11	235	"	B	427	424	"	P	409	595	"	L	61	785	"	M	173
70	"	B	10	239	"	L	587	426	1939	M	942	597	"	B	58	786	"	P	615
72	1939	C	588	242	1940	E	18	428	"	L	423	599	"	B	58	788	"	L	49
77	"	L	439	244	1939	N	179	431	"	A	744	600	1939	M	799	789	"	O	208
89	1940	N	80	249	"	M	887	435	"	R	417	601	1940	C	92	790	1939	S	293
90	"	M	32	250	1940	N	182	437	1940	P	111	603	"	M	279	793	1940	P	480
92	"	B	13	252	1939	R	384	438	1939	M	886	604	"	L	53	795	"	L	44
93	1939	R	369	253	"	C	690	442	1939	M	940	606	"	C	95	797	"	O	256
95	1940	S	15	255	"	M	432	444	1940	P	109	608	1939	M	499	798	"	P	475
97	"	A	80	256	"	P	625	445	1939	M	788	611	1940	S	30	799	"	L	42
98	"	C	16	261	1940	A	19	449	"	M	788	613	"	A	44	801	1939	A	649
99	1939	A	599	263	1939	P	662	450	"	B	421	614	"	N	217	806	1940	P	364
101	1940	B	40	268	1940	R	32	455	"	M	378	615	"	A	107	807	"	R	65
102	1939	A	642	269	1939	P	630	456	"	M	378	617	"	N	4	809	"	P	377
103	1940	M	18	272	"	S	357	458	"	L	517	623	"	C	105	811	"	A	81
104	1939	A	655	274	"	A	670	459	"	M	974	625	"	P	107	813	"	O	202
105	"	B	493	276	"	C	658	460	"	B	478	627	"	C	89	817	"	B	65
106	"	L	558	279	"	M	402	462	1940	M	52	627	"	P	97	828	"	L	63
109	1940	O	120	283	1940	A	35	468	"	N	128	632	"	M	16	830	"	O	197
118	"	M	42	286	1939	R	355	469	"	M	124	633	"	L	30	832	"	M	135
119	1939	B	454	288	"	B	449	470	1939	M	797	634	1939	M	800	833	"	C	60
120	"	M	733	291	1940	P	54	471	"	S	322	635	"	L	40	838	"	A	83
121	1940	C	24	293	1939	O	320	472	1940	M	29	636	1940	C	77	841	1939	B	353
123	1939	A	646	297	1939	M	915	473	"	N	117	636	"	"	84	843	1940	C	93
125	1940	M	30	298	"	P	601	474	1939	M	797	641	"	L	32	845	"	A	86
127	1939	S	297	300	1940	O	224	477	"	C	85	642	"	B	15	847	"	C	147
129	1940	N	89	302	1939	M	295	481	"	M	134	643	"	L	21	848	"	M	452
133	"	B	35	306	"	L	592	484	"	N	158	646	"	A	57	850	"	P	74
134	"	C	17	307	1940	B	1	486	"	M	124	648	"	L	27	851	"	N	116
136	"	O	173	311	1939	L	339	494	"	B	42	653	"	"	84	852	"	P	88
139	1939	L	578	312	1940	P	272	505	"	M	138	657	1939	B	461	854	"	R	59
141	1940	O	215	314	1939	L	581	509	"	A	92	660	1941	N	66	855	"	P	52
143	"	P	87	316	"	M	932	511	"	M	136	663	1940	O	196	857	"	C	159
144	"	O	243	317	"	L	398	513	"	O	97	665	"	A	90	859	"	P	90
145	1939	L	580	322	"	R	376	514	"	M	113	667	"	O	298	860	"	L	35
147	1940	R	26	323	1940	M	22	515	"	A	108	670	1939	N	301	862	"	M	131
148	"	B	62	324	1939	B	398	518	"	B	20	671	1940	O	249	865	"	P	137
150	1939	M	473	327	"	M	846	519	"	A	95	673	"	C	82	868	"	M	10
152	"	L	210	328	"	L	568	522	"	"	98	674	"	P	81	870	"	P	50
153	"	M	380	332	"	C	668	525	"	B	38	680	"	O	221	872	1939	N	269
155	"	N	197	335	"	R	357	530	"	A	101	681	"	N	120	877	1940	P	158
162	"	L	541	339	"	M	570	533	"	B	41	684	"	R	36	879	"	R	43
163	1940	O	177	343	1940	C	19	536	"	A	104	686	"	P	478	881	"	L	7
164	1939	B	425	348	1939	M	792	540	"	C	87	688	"	N	185	883	"	S	22
167	1940	O	301						"	M	43	689	"	A	24	885	1939	A	619
168	1939	L	178						"	B	63	693	"	L	14	888	1940	P	117
170	1940	P	263						1939	R	413	695	"	B	22	890	"	L	18
									"	S	329	703	"	L	15	891	"	C	137
									1940	R	22	704	"	M	1	895	"	L	84
									"	O	235	708	"	N	184	896	"	M	216

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IC	AIR	IC	AIR	IC	AIR	IC	AIR	IC	AIR
1	1940 PC 54	154	1940 C 9	350	1940 R 75	522	1940 P 504	727	1940 P 161
4	" A 12	155	" O 283	352	" M 89	530	1939 C 705	729	" O 260
8	1939 B 471	161	" N 81	353	" P 497	531	1940 M 157	731	1939 M 742
14	1940 C 111	165	" L 67	354	" B 30	533	" P 373	732	1940 O 375
15	" L 54	166	1939 B 501	356	" C 134	535	" C 141	735	1939 M 450
27	" B 90	170	1940 A 134	360	" B 95	539	" P 476	741	1940 A 196
30	" M 15	176	" M 127	361	" P 499	540	" L 71	742	1939 L 564
31	1939 A 733	179	" O 269	364	" C 56	542	1939 C 763	744	1940 R 110
33	1940 M 155	185	" A 121	367	" N 215	547	1940 A 148	745	" M 5
35	" L 1	198	" P 92	369	" A 17	549	1941 O 16	747	" A 175
37	1939 R 381	203	" N 218	370	" R 78	551	1939 L 262	750	" N 102
39	1940 A 79	207	" P 502	373	" S 19	553	1940 O 244	752	" S 51
41	" B 54	209	" O 245	376	" M 102	554	" A 154	754	" R 104
45	" R 39	212	" R 8	380	" R 29	571	" O 264	758	" M 214
49	" P 145	215	" A 118	383	" A 72	573	" R 68	759	" C 171
51	1939 C 743	218	" L 51	385	" L 90	575	" O 287	762	" R 102
52	1940 P 142	220	" M 623	387	" P 513	576	" S 53	764	" N 125
55	" S 17	223	" R 62	389	" B 97	580	" P 515	767	" R 18
57	1939 B 374	226	" B 117	404	" N 95	583	" " 498	769	" Pesh 11
60	1940 N 1	227	" S 43	405	" R 81	584	1939 N 258	770	" PC 90
63	" P 49	233	" PC 63	407	" L 95	586	1940 P 541	773	" " 75
65	" A 114	241	1939 L 499	409	" B 121	591	1939 M 892	780	1939 M 957
67	1939 C 651	243	1940 M 140	414	" M 153	593	" C 587	785	1940 N 97
71	" B 396	247	" N 247	416	" C 150	594	1940 N 84	787	" PC 98
73	1940 A 65	249	1939 A 391	419	" B 82	597	" O 275	791	1939 N 183
77	" R 33	250	1940 B 60	424	1939 L 495	602	1939 M 798	794	1940 P 623
78	" S 28	252	1939 C 753	426	1939 M 876	603	1940 O 261	796	" FC 20
79	" P 5	253	1940 N 47	427	1940 N 74	605	" C 153	801	" C 202
80	1939 C 557	254	" R 27	428	1939 S 343	609	" R 95	803	" B 148
82	1940 M 224	256	" P 486	434	1940 O 263	610	" N 119	805	" A 184
83	" O 310	262	" S 37	436	" FC 7	612	" FC 10	806	1939 C 715
85	" B 5	266	" P 494	440	" PC 70	621	" O 303	808	1940 O 323
90	" O 200	269	" R 73	445	" " 60	622	" FC 19	813	" A 185
92	" M 183	270	1939 A 389	449	" " 55	624	" O 305	816	1939 M 867
93	" L 38	272	1940 L 82	453	" FC 25	627	" S 61	825	1940 P 588
94	" O 179	274	" A 75	454	" O 248	632	" M 293	831	1939 C 399
95	" C 112	276	1939 C 752	456	" L 87	636	" S 33	835	1940 O 342
96	1939 B 496	277	1940 A 69	459	" B 127	640	" R 72	839	1939 L 346
100	1940 R 60	280	" M 196	460	" R 83	642	" A 195	843	1940 O 390
103	" M 111	285	" A 147	461	" S 56	643	" M 297	844	" R 53
105	" R 34	286	" C 39	463	" R 77	644	1939 O 688	846	" P 595
108	" PC 45	294	" A 78	464	" B 126	646	1940 PC 82	848	1939 L 273
118	" M 268	295	" N 13	465	" L 19	650	1939 L 225	849	1940 O 257
119	" N 162	299	" A 143	467	1939 M 817	658	1940 PC 86	852	" M 59
120	" M 257	300	" P 474	468	" A 736	663	" B 136	855	" A 174
121	" O 23	301	" C 113	471	1940 B 76	670	" FC 26	856	" O 251
122	" M 271	304	" L 39	477	1939 C 617	676	" L 113	860	" Pesh 12
123	" L 93	305	1939 A 643	477	1940 P 512	682	" B 154	861	1939 M 928
125	" C 163	308	1940 R 70	484	" A 29	686	1939 L 199	862	1940 P 603
126	" M 265	310	" C 30	485	" P 62	690	1940 A 201	865	1939 L 414
127	" S 42	313	" A 151	492	" B 93	691	" P 24	867	1940 B 131
128	" P 625	317	" O 266	494	" A 68	699	" C 192	872	1939 C 733
129	" C 182	321	" M 187	496	" B 87	701	" P 549	875	1940 R 91
132	" P 546	330	" C 157	498	" A 41	703	" N 123	880	" C 166
135	" " 446	332	" A 141	501	" B 118	705	1939 L 129	881	" " 169
138	" C 167	334	" M 19	504	" L 96	711	" R 378	883	" S 63
139	" P 492	336	" A 145	507	" B 51	714	1940 S 58	885	" O 194
142	1939 A 719	338	1939 M 688	508	" P 185	717	" B 153	886	1939 C 642
144	1940 M 370	339	1940 P 65	511	" B 112	718	" C 189	889	1940 O 314
147	" A 88	345	" A 22	513	" P 581	721	" P 179	893	1939 S 318
149	" R 50	347	" S 13	518	" N 227	722	1939 C 559	895	1940 C 161
152	" A 116	349	" P 471	521					

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1	1940 PC 93	32	1940 M 292	48	1939 M 858	69	1940 N 88	80	1940 N 264
18	1939 M 877	37	" C 187	50	1940 PC 101	72	" R 109	81	" M 385
17	" C 692	39	" P 627	54	" B 150	74	" A 197	107	" S 49
23	1940 N 8	41	1939 M 847	57	" P 163	75	" L 98	110	" O 337
29	" A 182	42	" C 523	64	" L 112	77	" N 226	113	" L 163
31	" Pesh 18	45	1940 P 668	66	" C 179	78	" Pesh 10		

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114	1940 A 190	269	1940 P 565	409	1940 A 203	583	1940 M 149	759	1940 R 134
116	1939 C 645	272	" L 17	411	" P 609	585	" N 401	761	" C 33
119	1940 Pesh 16	273	" N 104	413	" N 283	586	" A 272	767	" A 260
120	" R 97	277	" P 599	414	" A 217	603	" M 470	768	" R 145
123	" E 155	280	" C 210	416	1939 M 933	606	" N 245	770	" Pesh 17
126	" A 188	281	" A 202	417	1940 P 620	608	" L 201	772	" P 324
127	" O 348	282	" S 67	419	" Pesh 9	609	" S 111	775	" O 312
134	" " 313	283	1939 M 745	420	1939 L 486	610	" A 308	777	1939 C 719
135	" A 200	288	1940 C 250	422	1940 R 84	611	" P 596	778	1940 S 85
136	" M 379	290	" Pesh 4	429	" P 605	614	" R 123	780	" O 371
141	" A 207	292	" N 99	432	" N 284	616	" L 194	784	" A 256
143	" C 220	296	" Pesh 6	433	" B 190	617	" M 295	787	" C 296
145	" M 207	299	" L 171	435	" S 109	618	" B 164	795	" R 148
146	" N 230	300	" B 158	440	" L 210	623	" O 273	797	" A 242
149	" A 189	302	" C 264	447	" M 474	626	" M 299	798	" L 184
150	" M 221	303	" R 112	451	" O 289	633	" A 245	800	" R 176
151	" C 265	304	" O 212	461	" L 26	634	" R 117	801	1939 M 783
154	" P 275	306	" S 65	465	" C 217	635	" S 83	805	1940 B 172
162	1939 S 281	308	" Pesh 2	467	" P 612	637	1939 C 720	813	" L 236
169	1940 C 207	310	" A 199	468	" C 164	638	1940 N 240	815	1939 M 525
171	" M 160	311	1939 M 840	472	" M 206	639	" L 65	819	1940 C 281
172	1939 L 368	313	1940 Pesh 1	473	" C 269	640	" M 231	822	1939 M 934
173	1940 N 142	314	" A 193	477	" L 24	642	" L 197	825	1940 N 160
175	" O 346	316	" B 129	479	" C 241	643	" S 68	826	1939 M 595
177	" M 366	318	" M 40	483	" " 257	649	" A 291	830	1940 B 204
181	" N 70	320	" N 262	486	" A 205	661	" C 275	831	1939 M 884
183	1939 M 848	321	" M 433	488	" P 557	663	" B 161	833	1940 L 166
184	1940 O 308	323	" A 270	490	" C 251	666	" O 318	838	" P 180
187	1939 M 740	326	" L 157	493	" L 73	672	" P 251	843	1939 M 686
189	" L 572	327	" M 230	495	" P 561	674	" C 236	846	1940 O 382
195	1940 M 144	328	" A 237	498	" L 129	679	" L 204	849	" P 194
196	1939 C 754	330	" P 559	523	" C 273	680	" M 9	852	1939 M 584
200	" M 967	332	" M 294	524	" L 208	681	" C 274	854	1940 P 631
202	" S 301	333	" A 227	526	" C 290	682	" L 183	856	" L 192
204	1940 M 88	335	" L 78	527	" A 289	683	" R 120	857	1939 M 670
207	" L 161	337	" P 204	529	1939 L 380	686	" C 286	858	1940 R 140
208	" M 228	371	" N 263	531	1940 B 188	691	1939 M 547	859	" P 573
211	" A 231	372	" L 100	533	" L 16	695	1940 N 369	862	" O 804
213	" C 198	376	" A 233	534	1939 M 802	696	1939 M 781	863	" L 203
217	" B 143	379	" M 69	536	1940 N 238	699	1940 A 246	864	" C 211
223	" S 77	380	" N 267	537	" O 232	700	" M 217	865	" " 292
226	" O 351	381	" M 509	539	" R 118	705	" C 305	869	" A 304
228	1939 R 410	382	" C 210	541	" N 257	706	" B 169	870	" S 112
231	1940 PC 105	383	" L 159	542	" A 259	710	1939 M 818	871	" Pesh 19
237	" " 111	386	" A 171	543	" N 161	716	" S 296	873	" B 200
240	" L 50	388	" C 224	545	" B 181	717	1940 L 217	877	" L 119
241	" P 264	389	" A 218	553	" S 105	725	" P 303	878	1939 M 543
247	" O 235	395	" M 416	555	" Pesh 14	727	1939 M 860	881	" " 971
249	" P 160	396	" A 225	557	" M 427	729	1940 P 328	885	1940 N 410
250	" M 356	398	" C 213	562	" A 263	743	" N 92	889	1939 M 682
260	" P 198	400	" A 235	570	" L 199	744	" B 195	891	1940 L 178
263	" M 17	402	" C 215	571	1939 M 564	745	" P 346	892	1939 M 697
264	" L 69	405	1939 N 242	577	1940 L 202	751	1939 M 824	893	1940 O 367
267	" C 205	408	1941 O 14	578	" R 129	757	1940 Pesh 18	895	1939 M 789

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1	1940 PC 116	52	1940 O 385	89	1940 A 251	151	1940 L 185	181	1940 R 157
9	1939 S 349	54	1939 M 684	90	" C 284	152	" PC 114	184	1939 S 363
17	" M 393	56	" C 377	92	" A 261	153	" L 279	185	1940 M 281
22	1940 C 285	58	1940 N 110	93	" O 378	154	" PC 124	189	" A 370
23	" R 146	60	" A 214	96	1939 M 920	158	1939 M 590	190	1939 M 757
24	" A 250	64	" R 100	98	" " 531	161	" N 267	198	1940 L 177
25	1939 M 472	66	1939 M 751	105	1940 P 242	163	1940 A 248	200	1939 M 678
26	1940 N 178	72	1940 S 90	106	" B 193	166	" R 133	203	1940 C 329
29	" S 107	74	" N 134	109	" P 579	167	1939 M 907	204	1939 M 724
30	" R 125	79	" B 196	111	" N 113	169	1940 R 149	209	1940 B 205
31	1939 M 671	83	" O 369	114	" P 692	170	1939 M 645	214	" N 159
38	1940 O 184	85	" L 228	118	1939 N 282	177	" R 151	224	1940 O 353
48	" L 193	87	" O 397	123	" M 614	178	" N 42	226	" S 113

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228	1939 M 711	357	1940 O 354	488	1940 O 401	666	1940 O 416	774	1940 N 265
232	1940 P 629	364	1939 M 538	490	1939 M 963	667	" C 244	775	" M 174
234	" A 243	369	1940 O 328	494	1940 O 400	672	" L 281	777	" R 114
236	" O 360	370	" L 280	495	1939 M 862	674	" R 139	779	" M 284
238	" C 354	371	" Pesh 33	500	1940 P 467	676	" L 278	780	" C 383
240	" P 670	372	" A 320	505	1939 M 922	678	" B 252	782	" L 126
241	1939 M 937	376	" 831	509	1940 PC 184	679	" L 46	785	" S 1
244	1940 P 352	382	" N 249	512	" N 210	683	" 59	795	" M 62
245	1939 M 929	384	" R 152	513	" P 385	685	" M 90	800	" S 136
248	1940 O 364	386	1939 M 433	534	" Pesh 35	686	" A 338	801	" M 139
249	" C 254	388	1940 O 394	539	" P 361	687	" Pesh 26	806	" S 144
253	" M 483	390	1939 M 436	540	" C 194	688	" C 399	807	" N 270
254	" L 164	391	1940 O 324	543	" P 247	689	" N 239	810	" Pesh 29
256	" P 192	402	" B 254	545	" B 255	690	" L 195	811	" M 227
258	" O 396	403	" A 316	546	" L 237	691	" O 398	812	" L 123
259	1939 M 911	404	" P 19	550	" N 191	692	" M 697	813	" N 203
262	1940 P 610	406	1939 M 811	553	" L 10	694	" A 323	816	" M 240
264	" L 106	408	1940 O 391	556	" C 174	695	" M 213	817	" R 126
265	" O 335	411	1939 M 841	559	" A 322	696	" O 421	819	" A 340
268	" A 241	416	1940 P 430	561	" B 225	700	" C 378	822	" M 215
269	" P 675	418	" L 225	570	" R 144	702	" O 424	823	" A 315
271	" O 381	419	" P 249	571	" A 309	703	" S 134	824	" M 178
273	1939 N 287	421	" R 156	573	" M 375	704	" M 53	826	" L 289
280	" M 648	423	" P 379	576	" C 356	705	" R 113	827	" M 747
283	1940 B 210	425	" C 110	579	" N 360	706	" B 239	829	" 185
289	1939 M 776	426	" P 417	581	" C 260	709	" L 315	831	" A 343
292	1940 O 365	429	1939 M 853	586	" S 97	712	" A 349	832	" C 314
294	1939 M 699	432	1940 N 195	590	" L 275	714	" C 346	835	" A 324
297	1940 O 387	433	" PC 145	591	" N 186	715	" R 170	836	" B 242
301	1939 M 894	435	1939 M 949	600	" A 311	717	" C 47	841	" A 371
303	" 909	435	1940 PC 132	603	" Pesh 24	722	" M 161	844	" B 234
305	" 944	444	" R 153	606	" L 283	725	" L 104	848	" A 326
309	" 803	446	" L 154	614	" PC 137	727	" M 67	851	" L 172
314	1940 Pesh 34	449	" S 114	622	" R 159	729	" L 125	855	1941 P 147
316	1939 M 722	452	" R 141	623	" A 317	731	" N 276	864	1940 M 167
318	1940 R 175	455	" P 252	627	" R 171	732	" M 54	866	" A 337
319	" P 253	457	" O 362	628	" L 233	734	" C 350	867	" C 372
320	1939 M 293	458	" A 212	630	" M 465	735	" R 172	869	" P 414
321	1940 PC 128	461	" P 437	636	" L 109	737	" P 701	872	" PC 151
325	1939 M 446	463	" L 290	639	" N 202	738	" Pesh 27	873	" O 439
329	1940 P 304	464	" A 394	641	" P 410	739	" P 406	875	" A 344
335	1939 M 438	465	" L 276	642	" C 363	742	" C 369	876	" P 3
338	1940 R 162	466	" O 197	646	" P 197	745	" P 37	878	" C 367
343	" L 274	467	" A 386	647	" A 395	749	" M 81	879	" P 193
344	" O 405	468	" C 322	648	" O 419	751	" P 177	880	" A 339
348	1939 M 441	471	" A 252	650	" P 362	753	" N 143	881	" S 143
352	1940 P 191	476	1939 M 881	652	" O 432	754	" P 1	883	" M 222
353	" S 124	479	1940 N 259	653	" R 168	757	" A 353	887	" P 310
354	" C 330	480	" C 321	655	" O 413	769	" C 371	890	" M 77
355	" P 422	481	" O 340	656	" B 216	770	" L 120	894	" PC 147
356	" C 345	484	1939 M 897	665	" Pesh 25	773	" C 336	895	" L 179
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1	1940 PC 158	67	1940 M 179	109	1940 A 405	148	1940 B 257	186	1940 C 324
8	" A 373	71	1941 O 20	112	" L 272	150	" C 391	190	" M 210
13	" PC 173	73	1940 B 247	113	" R 177	152	" P 444	194	" L 4
17	" A 347	76	" O 435	114	" O 446	153	" N 275	196	" R 189
19	" M 82	78	" L 256	116	" L 319	154	" M 49	197	1941 O 30
21	" B 250	83	1941 P 11	117	1941 P 4	157	" C 405	200	1940 C 445
24	" M 145	85	" O 41	119	1940 S 133	158	" Pesh 36	202	" A 403
30	" Pesh 39	87	1940 PC 167	121	" O 433	159	" S 127	203	" Pesh 30
31	" R 161	93	" O 412	123	" M 329	161	" M 71	205	" B 266
33	1941 P 9	94	" S 145	132	1941 O 25	163	" A 431	206	" M 372
35	1940 Pesh 31	95	" B 272	135	1940 PC 160	164	" M 269	209	1941 O 10
36	1941 P 18	97	" C 441	141	" A 422	167	" C 351	211	1940 L 304
38	1940 N 268	98	1941 P 161	142	" R 222	170	" B 273	214	" A 368
42	" M 91	101	1940 M 106	143	" O 409	172	" M 47	215	1941 O 62
46	" P 449	106	" C 390	144	" N 335	178	" L 292	218	1940 PC 183
64	" S 172	108	" O 441	146	" L 97	184	" PC 181	222	" S 100
65	" O 228								

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224	1940 B 275	384	1940 A 399	517	1940 P 355	634	1940 A 383	751	1940 R 234
225	" A 426	387	1941 P 138	522	" A 445	635	" L 230	753	" M 493
226	" R 223	388	1940 M 612	525	" L 291	639	" N 235	754	1941 P 44
228	" C 358	390	1941 O 52	526	" M 816	640	" M 945	755	1940 N 225
233	" PC 176	394	1940 B 277	527	" R 178	641	" N 156	756	1941 P 142
238	" A 396	396	" M 744	529	" B 276	643	" PC 211	758	1940 C 472
240	" O 440	398	" A 393	531	" L 261	647	" M 822	759	" A 346
241	" A 305	399	" L 186	532	" S 175	648	" L 205	760	" P 594
245	" N 137	405	" C 228	533	" C 227	651	" N 177	761	" L 389
248	" P 243	409	" S 103	534	" P 552	653	" B 281	764	1941 N 16
249	" B 269	412	" B 279	537	" C 225	656	" A 310	765	1940 L 388
252	" A 412	413	" R 184	540	1941 P 32	657	" M 412	766	" N 175
253	" S 129	415	" M 699	543	1940 A 427	661	" S 154	769	" L 364
258	" A 415	417	" R 219	545	1941 P 109	665	" P 187	775	1941 O 146
259	1941 O 3	418	" P 322	551	1940 S 87	668	" L 457	779	1940 B 361
263	1940 C 438	420	" B 263	554	" O 443	671	1941 P 103	780	" R 250
266	1941 O 7	421	" A 389	559	" S 188	673	1940 L 247	782	1941 O 12
270	1940 B 265	425	" P 382	561	" L 354	675	" N 207	785	1940 A 449
271	" S 138	427	" Pesh 21	562	" S 161	677	" PC 202	787	" P 21
273	" N 287	430	" N 274	569	1941 P 6	678	" C 487	790	" S 177
278	" R 193	431	" P 259	572	1940 L 310	679	" A 194	792	" P 583
280	" B 287	434	" L 250	573	" M 898	680	" R 236	794	" B 363
281	" Pesh 38	435	1941 O 22	574	" N 367	682	" L 318	796	" P 585
283	" N 221	439	1940 N 145	576	" L 265	683	" R 228	797	1941 O 65
286	" R 195	444	" O 425	577	1941 P 35	685	" O 430	799	1940 C 497
293	" S 141	446	" C 460	578	1940 A 385	688	" L 339	801	" L 431
295	" C 337	447	" S 192	580	" C 377	689	" " 309	803	" M 439
303	" S 117	448	" C 454	581	" P 438	690	" R 220	805	1941 O 98
310	" C 395	449	" P 420	587	" L 80	692	" L 252	807	1940 N 196
313	" M 298	451	" L 325	589	" C 376	694	" M 423	814	1941 O 60
314	" A 365	455	" N 233	591	" N 236	696	" L 408	816	1940 R 186
317	" M 685	457	" P 289	593	" L 182	697	" N 301	817	1941 P 50
318	" R 201	463	" L 285	594	" N 285	699	" L 350	818	1940 N 214
319	" N 209	466	" " 336	596	" C 375	703	" S 187	819	" L 243
320	" R 190	467	" N 357	597	" L 245	704	1941 P 99	822	" O 347
321	" L 320	470	" B 259	598	1941 P 48	711	1940 M 436	825	" M 527
327	" " 124	472	" PC 187	599	1940 L 269	713	" R 238	828	" O 428
328	" S 125	477	" L 299	602	" B 291	715	" M 534	830	" R 230
331	" A 402	483	" C 447	604	" A 441	718	" B 283	834	1941 O 27
332	" L 314	485	" B 267	606	" B 289	719	" N 261	837	1940 B 284
334	1941 O 56	486	" A 351	609	" R 136	720	" M 587	838	" N 375
337	1940 A 407	488	" R 187	612	" O 415	721	1941 O 1	840	1941 P 116
342	" PC 192	490	" M 586	613	" N 211	723	1940 C 317	843	1940 PC 199
348	1941 O 18	491	" N 228	616	" O 437	727	" N 258	846	" L 329
351	1940 A 329	493	" L 409	618	" S 158	729	" M 521	849	" N 340
353	1941 P 29	494	" C 380	620	" O 411	731	" S 185	858	" M 493
356	1940 A 209	497	" O 417	622	" C 393	733	" P 555	865	" R 225
358	" M 677	499	" S 168	624	" M 938	734	" M 723	868	" M 513
359	" B 285	503	" L 344	625	" L 266	735	" S 81	875	" S 92
360	" M 745	504	" A 387	628	" M 682	737	" M 453	879	1941 P 38
362	1941 P 151	506	" L 348	629	" L 227	739	" N 336	880	1940 S 190
369	" " 45	507	" C 331	630	" M 681	740	" M 444	881	" " 150
373	1940 S 74	512	" A 443	631	" C 400	746	" S 167	885	" N 393
377	" P 245	513	" L 241	632	" " 477	748	" M 505	887	1941 O 33
379	" L 75	515	" M 306	633	" L 273	749	" N 302	896	1940 M 760
382	" P 548								

THE ALL INDIA REPORTER 1940

Lahore High Court

A. I. R. 1940 Lahore 1

TEK CHAND AND DALIP SINGH JJ.

Sain Dass Chawla — Plaintiff —
Appellant.

v.

Baba Ujagar Singh and another —
Defendants — Respondents.

First Appeal No. 357 of 1938, Decided on 13th June 1939, from decree of Sub-Judge, First Class, Rawalpindi, D/- 11th July 1938.

(a) *Res judicata* — Suit by decree-holder against father and son for declaration that son had saleable interest in A, B and C properties— Suit dismissed as against son in respect of all properties and against father in respect of B and C — Suit as regards A allowed to be proceeded against father only — Decision not appealed against — Decision held not liable to attack on appeal from decree relating to other matters which had been left undecided.

A decree-holder instituted a suit under O. 21, R. 63, Civil P. C., against father and son for a declaration that the son had a saleable interest in A, B and C properties and that all the three properties were liable to attachment. The suit was dismissed as against the son in respect of all the properties and against the father in respect of B and C properties. It was held however that suit as regards A could proceed against the father only. No appeal was filed against this decision :

Held that the decision was clearly a final adjudication between the parties relating to these matters and was therefore a "decree" as defined in Sec. 2, cl. (2), Civil P. C. An appeal from this decree lay under Sec. 96 of the Code but no such appeal was filed within the period of limitation prescribed by law and therefore the decree had become final and was not liable to attack on appeal from the decree relating to other matters which had been left undecided. [P 3 C 1]

Held further that as the suit was a composite suit, relating to different subject-matters in which different reliefs were claimed against the two defendants, it was therefore competent to the Court to decide the dispute relating to the various properties separately : 16 P R 1913, *Disting.* [P 3 C 1]

(b) *Practice*—Futile declaration of right will not be granted.

A Court will not grant a declaration of right which would be stamped with something in the nature of futility : A I R 1916 P C 117, *Rel. on.* [P 3 C 2]

Mela Ram and Nand Lal Saluja —
for Appellant.

D. R. Sawhney and Gurbachan Singh,
and Shamair Chand — for Respondents 2 and 1 respectively.

Tek Chand J.—The appellant, Sain Das Chawla, obtained a money decree against Tikka Sant Singh, son of Baba Ujagar Singh Bedi, from the Court of the Senior Subordinate Judge, Rawalpindi, on 20th November 1933. In execution of the decree, he attached a bungalow known as "Cosynook" at Murree, and one-fourth share in sarai Baba Khem Singh and in the building known as Damdama Sahib at Rawalpindi. Baba Ujagar Singh objected to the attachment, alleging that the attached properties belonged to him exclusively and that the judgment-debtor had no interest in them. The judgment-debtor also filed objections saying that he had only a right of residence in "Cosynook" and that this right was exempt from attachment and sale under Sec. 60 (1) (n), Civil P. C. He also averred that he had no interest in the other two properties which could be attached and sold. In the course of the inquiry into the objections, the decree-holder made a statement on 2nd November 1935, that "for the time being" he did not wish to proceed against the judgment-debtor's alleged share in the Damdama Sahib and sarai Baba Khem Singh and that execution should proceed against "Cosynook" only. On this statement, the executing Court released these two properties and restricted the inquiry to "Cosynook." Subsequently, relying on a decree passed by the Senior Subordinate Judge,

Lahore, on 27th February 1928, in terms of the award of Nawab Mohammad Hyat Khan Noon, dated 9th November 1927, it held that "Cosynook" was owned by Baba Ujagar Singh and that Tikka Sant Singh had only a right of residence in it and that he had no power to dispose of this right. It accordingly allowed the objections and released "Cosynook" from attachment. From this decision the decree-holder preferred an appeal to this Court.

The appeal was decided by Agha Haider J., sitting in Single Bench on 26th May 1936 : A I R 1936 Lah 830.¹ The learned Judge affirmed the finding of the executing Court that "Cosynook" could not be attached and sold in execution of the decree, but he held that it was liable to be dealt with by way of "equitable execution" and he ordered that a receiver be appointed to collect the rent and after deducting the expenses, pay it to the decree-holder till the decretal amount was discharged. From this order the judgment-debtor preferred an appeal under the Letters Patent, but the appeal was dismissed on 14th January 1937: Letters Patent Appeal No. 103 of 1936.² In the meantime, on 13th October 1936, the decree-holder had instituted a suit under O. 21, R. 63, Civil P. C., against Baba Ujagar Singh and Tikka Sant Singh for a declaration that the latter had a saleable interest in one-half of "Cosynook" and one-fourth of sarai Baba Khem Singh and Damdama Sahib respectively, and that all the three properties were liable to attachment and sale in execution of the decree to the extent stated. The suit was resisted by both the defendants on various pleas. The learned Subordinate Judge at first framed the following three preliminary issues :

1. Whether the plaintiff is entitled to maintain this suit in respect of Damdama Sahib and sarai Baba Khem Singh ?

2. How does the statement of the plaintiff, dated 2nd November 1935, releasing these properties from attachment, affect the present suit ?

3. What is the effect of the decision of the High Court, dated 26th May 1936, on this suit.

These issues were decided by the learned Subordinate Judge on 21st December 1937. He held that the plaintiff decree-holder having withdrawn the attachment against Damdama Sahib and the sarai was not entitled to maintain a suit for declaration against either defendant under O. 21, R. 63,

Civil P. C., or under S. 42, Specific Relief Act, in respect of these two properties. He further held that in view of the decision in the execution proceedings that the judgment-debtor's interest in "Cosynook" was not liable to attachment and sale in execution of the decree, which had been affirmed by the High Court on appeal, the plaintiff's suit against the judgment-debtor Tikka Sant Singh was barred by S. 47, Civil P. C. He accordingly dismissed the suit against Tikka Sant Singh in respect of all the three properties and against Baba Ujagar Singh in respect of sarai Baba Khem Singh and Damdama Sahib. He held however that the suit as regards "Cosynook" could proceed against Baba Ujagar Singh only. In accordance with this judgment a decree sheet was prepared on 21st December 1937 dismissing the plaintiff's suit against Tikka Sant Singh in respect of all the three properties and against Baba Ujagar Singh in respect of the sarai and Damdama Sahib. No appeal against this decision was preferred by the decree-holder.

The suit proceeded against Baba Ujagar Singh in respect of "Cosynook." Issues were framed on the merits and after evidence for the parties had been recorded, the learned Judge, on 11th July 1938, dismissed the suit against Baba Ujagar Singh qua this property also, leaving the parties to bear their own costs. From this decree, dated 11th July 1938, the plaintiff has appealed, impleading both Baba Ujagar Singh and Tikka Sant Singh as respondents. In this appeal the appellant has challenged not only the decision of the lower Court in favour of Baba Ujagar Singh in respect of "Cosynook," as given in the judgment of 11th July 1938, but also the decree of the lower Court, dated 21st September 1937, dismissing the suit relating to "Cosynook" against Tikka Sant Singh, and the suit in respect of the sarai and Damdama Sahib against both defendants.

A preliminary objection is raised on behalf of the respondents that the plaintiff not having appealed against the decree passed by the lower Court on 21st December 1937 is not entitled to agitate in this appeal matters which had been finally decided between the parties by that decree. After hearing counsel for the appellant I am of the opinion, that this contention is well founded and must succeed. The learned counsel for the appellant contends that the decision of the lower Court dated 21st December 1937 did not amount to a "decree" but was

1. Sain Das v. Tikka Sant Singh, (1936) 23 A I R Lah 830=165 I C 519.

2. Tika Sant Singh v. Saindas Chawala, Reported in (1937) 24 A I R Lah 433 = 175 I C 447 = I L R (1937) Lah 486=39 P L R 839.

merely an interlocutory order passed in the course of the suit and that the order was not appealable. This contention is without any force whatever. As has been stated above, the Court had, by its judgment of that date, dismissed the suit against Tikka Sant Singh with regard to all the properties which were the subject-matter of the suit and against Baba Ujagar Singh with regard to the sarai and the Damdama. This was clearly a final adjudication between the parties relating to these matters and was therefore a "decree" as defined in Sec. 2, cl. (2), Civil P. C. An appeal from this decree lay under S. 96 of the Code but no such appeal was filed within the period of limitation prescribed by law and therefore the decree has become final and is not liable to attack now on appeal from the decree relating to other matters, which had been left undecided. Mr. Mela Ram in support of his contention referred us to a decision of the Chief Court reported in 16 P R 1913.³ That case however is clearly distinguishable, as there an issue relating to *res judicata* had been decided in favour of the plaintiff, it being held that the suit could proceed and that the former decision relied upon did not bar the suit. That order was clearly of an interlocutory nature: there was no final determination of the rights of the parties in regard to the subject-matter of the suit or any part thereof and therefore it did not amount to a "decree".

It was further argued that the Subordinate Judge should not have decided the suit piecemeal. But the suit, in this case, was a composite suit, relating to different subject-matters in which different reliefs were claimed against the two defendants. It was therefore competent to the Court to decide the dispute relating to the various properties separately. It is conceded that the plaintiff could have brought three separate declaratory suits relating to each property and each suit could have been dealt with separately. It therefore makes no difference that the plaintiff has joined the three claims in one suit. Further, the Court, in this case, did, as a matter of fact, give a final adjudication relating to some of the subject-matters in dispute on the 21st December and passed a formal decree on that date. If the plaintiff considered the judgment or the decree to be illegal or wrong on the merits, his remedy was by way of appeal or review, but he not having availed himself of either

of these remedies, the decision has become final and unassailable and cannot be challenged now in regard to the matters finally determined by it. The present appeal against Tikka Sant Singh is therefore clearly incompetent and so also against Baba Ujagar Singh with regard to the sarai and Damdama Sahib.

The only remaining point is the claim against Baba Ujagar Singh in respect of "Cosynook." Though the plaintiff's appeal against Baba Ujagar Singh relating to this matter is competent, but in view of the decision as regards the rights of Tikka Sant Singh in this property it is futile to give any adjudication on the merits in regard to this property. Admittedly, any declaration given by us would in the circumstances be entirely barren, and as observed by their Lordships of the Privy Council in 39 Mad 634⁴ (at p. 639) a Court will not grant a declaration of right which 'would be stamped with something in the nature of futility.' As stated already, it has been decided in the course of the execution proceedings—and that decision (whether right or wrong on the merits) is final in the present suit as between the plaintiff and Tikka Sant Singh—that the latter had no saleable interest in this property which could be attached and sold in execution of the plaintiff's decree against him, and the only relief by way of "equitable execution" which could be given to the plaintiff has been granted to him. This being so, it is wholly useless to decide, for the purposes of the execution of the decree of the plaintiff against Tikka Sant Singh, as to what the rights of Baba Ujagar Singh in this house are. The appeal fails and I would dismiss it with costs. Baba Ujagar Singh has filed a cross-objection against that part of the decree of the lower Court which left the parties to bear their own costs of that suit. After hearing his counsel I can find no substance in this objection. In the circumstances of the case, the lower Court had exercised a sound judicial discretion in leaving the parties to bear their own costs. I would therefore dismiss the cross-objection with costs.

Dalip Singh J.—I agree.

D.S./R.K.

Appeal dismissed.

4. Janaki Ammal v. Narayanaswami Aiyar, (1916) 3 A I R P O 117=87 I O 161=48 I A 207=39 Mad 634 (P C).

3. Gehna v. Khuda Bakhsh, (1918) 16 P R 1913 =15 I O 568=191 P L R 1912.

A. I. R. 1940 Lahore 4

ADDISON AND RAM LALL JJ.

Firm Sukhram Pholley—Decree-holders
— Appellants.

v.

Kanwal Singh and others—Objectors—
Respondents.

Letters Patent Appeal No. 50 of 1939,
Decided on 5th May 1919, from judgment
of Skemp J., in S. A. No. 1189 of 1938, D/-
17th January 1939.

(a) Custom (Punjab)—Ancestral land coming to reversioners cannot be farmed in execution of decree against original proprietor after his death though it had been attached in his lifetime.

The attachment of the ancestral property in the lifetime of original proprietor does not confer any title and does not amount to a charge on the property, nor does it affect the rights of the reversioners. As in Rohtak District, under customary law, ancestral land, which has come to the reversioners from a judgment-debtor, is not liable even for the just debts of the judgment-debtor, it follows that such land cannot be farmed under custom in execution of a decree against the judgment-debtor after his death, though it had been attached in his lifetime: 5 Cal 148 (P C) and AIR 1937 Lah 157, Disting.; AIR 1930 Lah 849; AIR 1923 Lah 261; 25 Cal 179 (P C); AIR 1914 P C 129; AIR 1932 Lah 179 and AIR 1915 Lah 281, Rel. on.

[P 5 C 2]

(b) Punjab Debtors' Protection Act (2 of 1936), S. 9—There must be express charge on ancestral land before it can be sold — Attachment is not sufficient as it is not charge.

Under S. 9 there has to be an express charge by mortgage on ancestral land before it can be sold or otherwise disposed of in execution of a decree against a predecessor-in-interest. Attachment in the lifetime of the predecessor-in-interest is not sufficient, as attachment does not amount to a charge.

[P 6 C 1]

(c) Punjab Debtors' Protection Act (2 of 1936), S. 9—Act coming into force before record is sent to Collector to arrange lease of judgment-debtor's land—Land cannot be alienated even if attachment was before Act.

Where a record is sent to the Collector to arrange for the lease of judgment-debtor's land after the Punjab Debtors' Protection Act has come into force, the land cannot be sold or otherwise transferred even if the attachment of the land had been effected before the Act came into force: AIR 1937 Lah 560 and AIR 1939 Lah 168, Rel. on.

[P 6 C 1]

Fakir Chand Mital — for Appellants.

Bishan Narain — for Respondents.

Addison J.—The firm, Sukh Ram Pholley obtained a simple money decree in 1930 against Giani, a Jat of Tehsil Jhajjar, District Rohtak, for Rs. 3460. Applications for execution were made in 1933 and 1935 and the present application for execution was made on 8th February 1936. At that time Giani was alive and 8 bighas 16 bis-

was of agricultural land belonging to him were attached on 12th March 1936. The papers were then sent to the office of the Collector to arrange a farm of the land. These proceedings had not been completed when Giani died on 17th or 18th April 1937. His nephews and grandnephews were brought on the record and they objected that the land could not be alienated after Giani's death as they were governed by custom and the land was ancestral. It was found by the two Courts below that the land was ancestral. They also concurred in holding that the land was exempt from attachment and sale under custom after Giani's death and that S. 9, Punjab Debtors' Protection Act, also operated as a bar. There was a second appeal to this Court which was dismissed by a learned Judge against whose decision this appeal under the Letters Patent has been preferred. In the Full Bench decision, 4 P R 1913¹ it was held that where a male proprietor, governed by customary rules, had contracted a just debt and died leaving ancestral landed property, such property was not liable in the hands of the next holder in respect of such debt, unless the debt had been expressly charged on the property. As a consequence, it was further held that a person who had obtained a simple money decree for such a debt against the debtor himself or his representatives had no right to execute it against ancestral land, once in the debtor's possession, which had passed into the hands of the next holder under customary law. In this Full Bench case the land had neither been attached nor sold in the lifetime of the judgment-debtor. In the course of this judgment it was said obiter that it might perhaps be conceded that attachment of the landed ancestral property during the lifetime of the debtor was permissible but it was added that the learned Judges were not at present concerned with that aspect of the question. In the case before us the land had been attached in the lifetime of the judgment-debtor and reliance is placed upon this obiter dictum by the appellants. Reliance was also placed on a remark by their Lordships of the Privy Council in 5 Cal 148² at page 174, which is as follows:

They think that, at the time of Adit Sahai's death, the execution proceedings under which the

1. Jagdip Singh v. Narain Singh, (1913) 4 P R 1913=15 I C 866=173 P L R 1912=160 P W R 1912 (F B).

2. Suraj Bansi Koer v. Sheo Proshad Singh, (1880) 5 Cal 148=6 I A 88=4 Sar 1 (P C).

mouza had been attached and ordered to be sold had gone so far as to constitute, in favour of the judgment creditor, a valid charge upon the land, to the extent of Adit Sahai's undivided share and interest therein, which could not be defeated by his death before the actual sale.

In this case before the Privy Council however a decree had been obtained against Adit Sahai alone for a certain sum to be realized by the sale of the mortgaged property. This case is therefore distinguishable on the ground that Adit Sahai had charged the joint Hindu family property, belonging to himself and his sons, and it might perhaps be said that, for this reason alone, his share at least was liable for the debt. Further, in the case of coparceners under Hindu law, it has been held that the undivided interest of a coparcener, if it is attached in his lifetime, may be sold after his death whether the order for sale is made in his lifetime or after his death. This principle might also explain the remark relied upon in the judgment of their Lordships of the Privy Council. AIR 1937 Lah 157³ was relied upon by the appellants but it is not very helpful. There the land had been attached and sold before the death of the judgment-debtor and it was held that his legal representatives could not, in these circumstances, challenge the sale.

A case, which is on all fours with the present case, is A I R 1930 Lah 849,⁴ decided by a Division Bench, where it was held that the attachment of ancestral land in the lifetime of the original proprietor, for debts due from him, did not create any charge on the property and could not preclude the accrual of the reversionary rights. In this case the learned Judges relied upon 3 Lah 414⁵ where it was held that an attachment created no charge on the attached property and conferred no title on the attaching creditor, but merely prevented a private alienation of the property. This proposition follows from 25 Cal 179⁶ where it was held that an attachment, which had preceded the institution of the first purchaser's suit, afforded no support to the second purchaser's claim, as attachment under the Civil Procedure Code merely prevented alienation and did not give title;

and from 42 Cal 72⁷ where it was held that an attachment prevented and avoided any private alienation but did not invalidate an alienation by operation of law such as was effected by a vesting order under the Insolvency Act. It was again held in 13 Lah 524⁸ that a mere attachment infringed the rights of only the judgment-debtor and had the effect of placing the property attached in *custodia legis*. It did not amount to an infringement of the rights of the reversioners.

Finally, it was held by a Division Bench of the Punjab Chief Court in 29 I C 572⁹ that an attachment of property did not affect any title therein, but merely prohibited its transfer. It follows from these authorities that the attachment of the landed property in the lifetime of Giani did not confer any title and did not amount to a charge on the property, nor did it affect the rights of the reversioners. As in Rohtak District, under customary law, ancestral land, which has come to the reversioners from a judgment-debtor, is not liable even for the just debts of the judgment-debtor, it follows that the land in the present case could not be farmed under custom in execution of the decree against the judgment-debtor after his death, though it had been attached in his lifetime.

The same result follows from S. 9, Punjab Debtors' Protection Act, 1936. The attachment was made in the present case on 12th March 1936 and the Punjab Debtors' Protection Act came into force on 6th June 1936, after the attachment but before Giani's death. S. 9 practically enacts the decision arrived at in the Full Bench case, 4 P R 1913,¹ and lays down that, when custom is the rule of decision in regard to succession to immovable property, then, notwithstanding any custom to the contrary, ancestral immovable property in the hands of a subsequent holder shall not be liable in execution of a decree or order of a Court relating to a debt incurred by any of his predecessors-in-interest, provided that, when the debt has been expressly charged by mortgage on ancestral immovable property by a predecessor-in-interest, the Court shall determine the liability of such

3. Sukh Dial v. Nazir Ahmad, (1937) 24 A I R Lah 157=169 I C 416=17 Lah 799=38 P L R 613.

4. Ganpatrai v. Santa Singh, (1930) 17 A I R Lah 849=127 I C 358=31 P L R 970.

5. Ram Bhaj Datta v. Ram Das, (1928) 10 A I R Lah 261=69 I C 720=3 Lah 414.

6. Moti Lal v. Karabuldin, (1898) 25 Cal 179=24 I A 170=1 C W N 639=7 Sar 222 (P O).

7. Raghunath Das v. Sundar Das, (1914) 1 A I R P C 129=24 I C 304=41 I A 251=42 Cal 72 (P O).

8. Natha v. Ganesh Singh, (1932) 19 A I R Lah 179=136 I C 265=13 Lah 524=33 P L R 46.

9. Bhambul Devi v. Narain Singh, (1915) 2 A I R Lah 281=29 I C 572=39 P R 1915=8 P L R 1916.

land as if this Section had not been passed. There is a further proviso, but it does not help the appellants in any way and need not be set out. Under this Section therefore there has to be an express charge by mortgage on ancestral land before it can be sold or otherwise disposed of in execution of a decree against a predecessor-in-interest. This makes it quite clear that attachment in the lifetime of the predecessor-in-interest is not sufficient, as attachment does not amount to a charge.

In A I R 1937 Lah 560,¹⁰ when dealing with a similar provision in S. 10 as regards standing crops and trees, a learned Judge held that where certain standing trees belonging to the judgment-debtor were attached in execution of a money decree before the Punjab Debtors' Protection Act came into force and the trees were ordered to be sold after the Act had come into force, the sale could not take place as it was contrary to Sec. 10, although the attachment was prior to the Act, as such attachment did not create a charge or lien upon the attached property and also conferred no title upon the attaching creditor. Another authority is A I R 1939 Lah 168,¹¹ where another learned Judge held that where the Punjab Debtors' Protection Act came into force several weeks before the papers were sent to the Collector to arrange for the lease or farm of the judgment-debtor's land, the liability of the land to attachment and sale was taken away by the new enactment. This is an authority dealing directly with S. 9 of the Act. It seems quite clear that S. 9 does prohibit the sale or other form of transfer of ancestral property in circumstances like the present, if it has not been effected prior to 6th June 1936. For the reasons given we dismiss this appeal but make no order as to costs before us.

D.S./R.K. *Appeal dismissed.*

10. *Telu v. Firm Jethu Mal-Hari Pershad*, (1937) 24 A I R Lah 560=170 IC 388=39 P L R 243.

11. *Nand Mal-Durga Das v. Nazir Ahmad*, (1939) 26 A I R Lah 168.

A. I. R. 1940 Lahore 6

BHIDE J.

Kirpa Ram — Petitioner.

v.

Official Receiver, Sargodha — Respondent.

Civil Revn. No. 1057 of 1938, Decided on 16th December 1938, from order of Addl. Dist. Judge, Lyallpur at Sargodha, D/- 19th February 1938.

(a) **Provincial Insolvency Act (1920), Ss. 4, 54, 75—No second appeal lies against decision under S. 54—It can be treated as revision.**

No second appeal lies from the decision of an Insolvency Court under S. 54 but the appeal can be treated as revision under S. 75. [P 6 C 2]

(b) **Insolvency—Fraudulent transfer—Threat of legal proceedings to person in hopelessly insolvent condition is no genuine pressure.**

A threat of legal proceedings to a person in a hopelessly insolvent condition is no genuine pressure at all, so as to make a transfer, which otherwise appears fraudulent, a bona fide transfer: A I R 1937 Lah 53, 19 Ch D 580 and 45 L T 80, *Rel. on.* [P 6 C 2]

Mehr Chand Mahajan — for Petitioner.

Achhru Ram — for Respondent.

Order.—A preliminary objection is raised that a second appeal is incompetent. This appears to be correct as the decision of the Courts below was under S. 54 and not under S. 4, Provincial Insolvency Act. But the appeal can be treated as a petition for revision under S. 75, Provincial Insolvency Act, and I shall do so as requested by the learned counsel for the appellant. It has been found in this case that the transfer was made by Ladha Ram and others when they were in hopelessly insolvent circumstances. They had already declared their inability to pay more than four annas in the rupee to their creditors. It has been found that they were threatened with a notice of legal proceedings by the transferee, but the Courts below have held, following the view taken in A I R 1937 Lah 53,¹ that the so-called threat of legal proceedings to a person in a hopelessly insolvent condition is no genuine pressure at all. The decision of the Courts below is perhaps not expressed in as clear a language as it might have been, but this seems to be really the meaning of the finding arrived at. The decision in A I R 1937 Lah 53¹ indicates that this was out of a series of transactions which were held to be fraudulent. The view taken in A I R 1937 Lah 53¹ seems to be in accord with English authorities: *cf.* (1882) 19 Ch D 580² and 45 L T 80. I see no adequate ground for interference in revision. I dismiss the petition, but in view of all the circumstances leave the parties to bear their costs.

R.M./R.K.

Petition dismissed.

1. *Narsingh Das v. Official Receiver, Sargodha*, (1937) 24 A I R Lah 53=169 I C 845=39 P L R 181.

2. *Ex parte Hall, In re Cooper*, (1882) 19 Ch D 580=51 L J Ch 556=46 L T 549.

A. I. R. 1940 Lahore 7

DIN MUHAMMAD J.

*Syed Musharaf Hussain and another—
Judgment-debtors — Appellants.*

v.

*Agha Munawar Ali Khan, Decree-holder
and another, Defendant—Respondents.*

Execution First Appeal No. 168 of 1939,
Decided on 23rd May 1939, from order of
Sub-Judge, First Class, Lahore, D/- 6th
April 1939.

**(a) Words and Phrases — Word “upto” may
include last day or not.**

The word “upto” may include the last day or
may not, and if it is in consonance with justice
to interpret it in one of the ways permissible, there
can be no complaint on the other side. (In the
particular case last day was excluded.) [P 8 C 1]

**(b) Execution — Executing Court — Decree
binding—Extraneous matter included in decree
without objection by defendant — Executing
Court cannot refuse to execute that part of
decree.**

If once extraneous matters are allowed to be in-
cluded in a decree without any objection on the
part of the defendant, the executing Court cannot
refuse to execute that part of the decree on the
ground that it was extraneous to the subject-
matter of the suit. The defendant has a right to
appeal against the decree thus drawn up and have
that portion excluded. But if he does not take
any such action in the matter, he cannot be
allowed to avoid that part of the decree merely on
the ground of its being inoperative: *AIR 1934 Lah*
623; AIR 1933 All 649; AIR 1915 Mad 210; AIR
1937 Pat 232 and A I R 1932 Bom 47, Approved ;
A I R 1919 Lah 400 and A I R 1925 Cal 286, Not
approved; AIR 1919 P C 79, Disting. [P 8 C 1, 2]

**(c) Res judicata — Constructive— Principles
of constructive res judicata apply in execution
proceedings.**

Principles of constructive res judicata apply in
execution proceedings. If a man with eyes open
undertakes not to raise any objection of any kind
to a certain position on the score of which he has
secured a substantial advantage, he should not be
allowed to reprobate it in the course of the same
proceedings and to re-agitate the matter: *6 All 269*
(P C); AIR 1921 P C 23; AIR 1933 Lah 594 and
A I R 1935 Lah 949, Rel. on. [P 8 C 2]

K. L. Gauba — *for Appellants.*

Achhru Ram and S. A. Mahmud —
for Respondents.

Judgment. — This appeal has arisen in
the following circumstances. A suit was
instituted by one Agha Munawar Ali Khan
against Sayed Musharaf Hussain, S. A.
Majid and Chaudhri Jamal Din, for a per-
manent injunction restraining the defen-
dants from interfering with the plaintiff's
ownership and possession of a building
known as Naulakha Talkies, recovery of
Rs. 4500 due on account of rent from 4th
July 1938 upto 4th December 1938 and

some other minor reliefs with which we are
not at present concerned. On 6th December
1938 the parties entered into a compro-
mise on the basis of which the statements
of the parties' counsel were recorded. The
plaintiff's counsel stated that the defen-
dants had agreed to pay rent from 5th July
upto 24th October, both days inclusive, the
sum to be deposited within one month from
that date and the defendants to be liable to
be ejected in case of default, adding that
the rent from 25th October to 7th Decem-
ber 1938 had been remitted. He further
stated that the defendants had agreed to
pay rent for four months next following
within three months from that date and
that in case of default the same penalty of
ejectment had been provided for. Counsel
for the defendants endorsed this statement
with the result that the order of the Court
and the decree followed on those lines.
Further the suit was converted into a suit
for ejectment, pure and simple, and the
deficiency in court-fee was made up.

It is common ground that rent upto 24th
October was duly paid. There was however
a default in the payment of the future rent
provided for in the agreement. As stated
above, it was contemplated to be paid
before 6th March. The plaintiff however
in the course of execution proceedings con-
doned the delay and extended the time
“upto 6th April.” On that day counsel for
the plaintiff appeared in Court and report-
ed that no amount had been paid till then.
A Court official recorded this report and
referred the matter to the Subordinate
Judge. He thereupon issued a warrant of
ejectment and had it executed through the
bailiff. The possession of the building was
restored to the plaintiff in due course of
law. It is against the order of 6th April
that this appeal has been presented on
behalf of Musharaf Hussain and Abdul
Majid.

Counsel for the appellants has contended
that inasmuch as time has been granted
upto 6th April, no action could be taken on
the 6th. He has referred me to para. 886
of Vol. 27 Halsbury's Laws of England in
support of his contention that 6th April
should have been excluded from calcula-
tion. But in my view it is not relevant in
the present discussion. It would appear that
wherever the Subordinate Judge has used
the word ‘upto’ he has always taken care to
add ‘(both days inclusive),’ thus emphasiz-
ing that the date mentioned after the word
‘upto’ is to be excluded. Where this has

not been done it clearly follows that it was not the intention of the Court to exclude that day. Even otherwise, I am not prepared to entertain this objection as it is highly technical and is grounded on dishonesty. Further, it is admitted that no payment has been made so far, and if the present order is set aside as premature, the same result will follow and the same objection will be raised by the judgment-debtors as are being contested before me and the time of the Courts will be wasted unnecessarily. I accordingly overrule this objection. The word 'upto' may include the last day or may not, and if it is in consonance with justice to interpret it in one of the ways permissible, there can be no complaint on the other side.

The crux of the whole matter is whether the executing Court could execute that part of the decree which was not included in the subject-matter of the suit. Counsel for the appellants has relied on 47 Cal 485¹ at pp. 495-496, 31 P R 1919² and A I R 1925 Cal 286.³ The Privy Council judgment¹ is not exactly in point, while the other two judgments do lend support to the contention raised by the appellants. There is, however, a long array of authorities against this position : see A I R 1934 Lah 623,⁴ A I R 1933 All 649,⁵ 38 Mad 959,⁶ A I R 1937 Pat 232⁷ and A I R 1932 Bom 47.⁸ In all these cases it is laid down that if once extraneous matters are allowed to be included in a decree without any objection on the part of the defendant, the executing Court cannot refuse to execute that part of the decree on the ground that it was extraneous to the subject-matter of the suit. The defendant has a right to appeal against the decree thus drawn up and have that portion excluded. But if he does not take any such action in the matter, he cannot

be allowed to avoid that part of the decree merely on the ground of its being inoperative. With all respect I am inclined to follow this view of the law in preference to 31 P R 1919² and A I R 1925 Cal 286,³ inasmuch as this is more in consonance with justice and lends no countenance to fraud. It will appear strange if the law helps a dishonest man first to inveigle his adversary into a certain position, take benefit out of it and then to repudiate it on the ground of certain technicalities. Even if this view be erroneous, I would like to err in good company. I accordingly hold that the order of the Subordinate Judge ejecting the defendants was not open to any legal objection.

Counsel for the respondent has further rightly urged that this objection could not be raised, inasmuch as the defendants had consciously and deliberately waived all sorts of objections open to them when they secured an extension of time. It is no doubt so and their statement admits of no doubt. The present proceedings are a continuation of the previous proceedings and as remarked by their Lordships of the Privy Council in 11 I A 37⁹ at pp. 41 and 43 the orders made in that connexion will be binding on everyone concerned. 33 C L J 218,¹⁰ 14 Lah 409¹¹ and A I R 1935 Lah 949¹² all lay down that principles of constructive res judicata apply in execution proceedings. If a man with eyes open undertakes not to raise any objection of any kind to a certain position on the score of which he has secured a substantial advantage, he should not be allowed to reprobate it in the course of the same proceedings and to re-agitate the matter. On all these grounds, I repel the contentions raised by the appellants' counsel and dismiss this appeal with costs. The injunction issued on 17th May 1939 is hereby discharged.

D.S./R.K.

Appeal dismissed.

1. Hemanta Kumari Devi v. Midnapur Zemindari Co. Ltd., (1919) 6 A I R P C 79=53 I C 534=46 I A 240=47 Cal 485 (P C).

2. Kartar Singh v. Indar Singh, (1919) 6 A I R Lah 400=51 I C 273=31 P R 1919.

3. Arjun Kapali v. Asvani Kumar, (1925) 12 AIR Cal 286=78 I C 317.

4. Lal Singh v. Mohan Singh, (1934) 21 A I R Lah 623=154 I C 185=37 P L R 178.

5. Sahu Shyam Lal v. M. Shyam Lal, (1933) 20 A I R All 649=146 I C 145=55 All 775=1933 A L J 728 (F B).

6. Sabapathi Pillay v. Venmahalinga Pillai, (1915) 2 A I R Mad 210=23 I C 581=38 Mad 959=26 ML J 331.

7. Mohamad Yahia v. Mt. Bibi Soghra, (1937) 24 A I R Pat 232=169 I C 741.

8. Shambhu Singh v. Mani Lal, (1932) 19 A I R Bom 47=135 I C 479=33 Bom L R 1457.

9. Ram Kirpal v. Rup Kuari, (1856) 6 All 269=11 I A 37=1856 A W N 286 (P C).

10. Raja of Ramnad v. Velusami Tevar, (1921) 8 A I R P C 23 = 59 I C 880 = 48 I A 45 = 33 C L J 218 (P C).

11. Ved Kaur v. Balkrishen Das, (1933) 20 A I R Lah 594 = 141 I C 577 = 14 Lah 409 = 34 P L R 528.

12. Umrao Singh v. Muhammad Abdullah, (1935) 22 AIR Lah 949=162 I C 208=38 P L R 517.

A. I. R. 1940 Lahore 9

RAM LALL J.

Mt. Hassan Bi — Appellant.

v.

Nek Alam — Respondent.

First Appeal No. 226 of 1938, Decided on 4th July 1939.

(a) Guardians and Wards Act (1890), S. 7—In appointing guardian Court should consider welfare of minor—Question of guardianship cannot be settled by compromise entered into between rival claimants.

In appointing a guardian what the Court has to consider is the welfare of the minor on evidence produced before it and not to pass judgment in accordance with the terms of a compromise entered into between the contesting applicants for guardianship. It is the duty of the Court to consider whether or not the compromise is in the interests of the minor: *A I R 1928 Rang 137*; *30 All 137* and *A I R 1924 Mad 484, Ref.* [P 9 C 2]

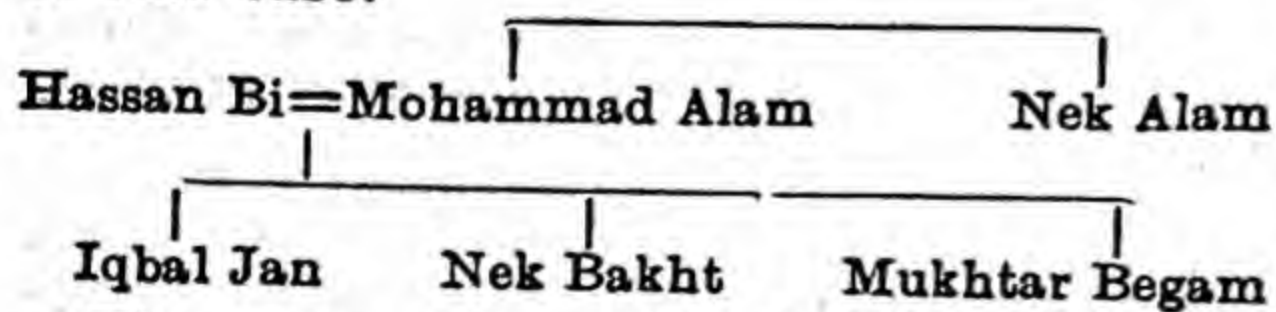
(b) Guardians and Wards Act (1890), S. 7—Before appointing person as guardian of minor's property enquiry, however summary, must be made whether minor had any property and if so what it was.

Before appointing a guardian of the property of a minor, an enquiry, however summary, on the question whether the minor had any property and if so what, must be made and a person should not be appointed guardian of the property without specifying what it is. It is true that an enquiry for the purposes of Guardians and Wards Act is not meant to be a lengthy and elaborate enquiry, but there must be some basis for finding that there is some property at all. If the deceased father of the minors was governed by the customary law, then his widow takes a widow's estate and during her lifetime the minors have no right in this property except for maintenance. No guardian of the minors can in such circumstances take possession of such property in the lifetime of the widow. If, on the other hand, the deceased father was governed by the Mahomedan law then the widow is entitled to her share and the balance would be the property of the minors of which a guardian could be appointed. [P 10 C 1]

Shamair Chand — for Appellant.

Sayad Mohsin Shah — for Respondent.

Judgment.— The following pedigree-table will help in understanding the facts of this case.



The paternal uncle of the three minor daughters of Mohammad Alam applied to be appointed guardian of their person and property and the application was opposed by their mother. In opposing this application the mother, Mt. Hassan Bi, filed a written statement on 26th August 1938 in which she stated: "*Muzhira har tarah se apni*

jaidad wa babalighan ka achhi tarah se intizam kar sakti hai aur karti rahi hai" (I can and have been making adequate arrangements for the management of my property and of the minors.) The implication of this statement appears to be that the property in the possession of Hassan Bi belongs to herself and that the minors have no property at all. The statement of one of the minors, Mt. Iqbal Jan, was recorded on 14th October 1938 to the effect that she preferred to stay with Hassan Bi and not with her paternal uncle. No further evidence was recorded and the parties entered into a compromise and the statements of Hassan Bi and Nek Alam were recorded. In accordance with the terms of this compromise, the Court appointed Nek Alam guardian of the property of the minors and Hassan Bi as the guardian of the person of the minors, ordering that Nek Alam, as guardian of the property, should pay Rs. 30 per mensem to the guardian of the person of the minors for their maintenance and further that he should file a security bond for Rs. 1000 with two sureties. An appeal from the order of the Guardian Court has been preferred by Mt. Hassan Bi through Mr. Shamair Chand and is resisted by Sayad Mohsin Shah.

The main ground of attack is that the real point at issue in the case was not brought out or considered by the Court below and that the decision by way of compromise was illegal and ultra vires. It seems to me that there is considerable force in this objection. What the Court had to consider was the welfare of the minors on evidence produced before it and not to pass judgment in accordance with the terms of a compromise. It was the duty of the Court to consider whether or not the compromise was in the interests of the minors and there is nothing in the judgment of the Court below to indicate that this aspect, which is after all the overriding consideration in such cases, was considered by the Court at all. It is clear law that the minor is entitled to the judgment of the Court on this crucial matter. In making an order in the terms of a compromise the Court has virtually handed over its functions of judgment to the contesting parties. In 6 Rang 563¹ it has been held that the selection of a guardian by arbitrators is illegal and that it is for the Court, and not the arbitrators, to be satisfied that it is for the welfare of a minor

1. *Ma Ngwe Nyun v. Ma Thwe*, (1928) 15 A I R Rang 187=112 I C 451=6 Rang 563.

that a guardian should be appointed and if to be appointed who that person should be. The State is the guardian of all its minor subjects and the question of guardianship is not one of the private civil rights of any private person which he is by law allowed to submit to arbitration. See in this connexion 30 All 137² and 47 Mad 459.³ If such a matter could not be settled by arbitrators appointed by the contesting applicants for guardianship, it could no more be settled by an agreement by such persons. This appears to me to be a fatal objection to the procedure adopted by the learned Guardian Judge and therefore to the order under appeal.

Further, it appears to me that there is nothing on the record, other than an inference from the statement of Hassan Bi made at the time of the compromise, to show that the minors have any property at all of which a guardian should be appointed. The property in this case belonged to the deceased father of the minors. If this person was governed by the customary law then Hassan Bi takes a widow's estate and during her lifetime the minors have no right in this property except for maintenance. No guardian of the minors can in such circumstances take possession of such property in the lifetime of Hassan Bi. If, on the other hand, the deceased father Mohammad Alam was governed by the Mahomedan law then the widow is entitled to her share and the balance would be the property of the minors of which a guardian could be appointed. No enquiry, however summary, on the question whether the minors had any property and if so what, was made and Nek Alam has been appointed guardian of the property without specifying what it is. In 36 C W N 769⁴ it was held by a Division Bench that in an application for the guardianship of a minor governed by the Mitakshara law it must be shown that the minor has some separate property as without that there is no foundation for the application. It is true that an enquiry for the purposes of the Guardians and Wards Act is not meant to be a lengthy and elaborate enquiry, but there must be some basis for finding that there is some property at all. As I

have said, in this case either the minors have no property or only a share in the property of Mohammad Alam and at least in a summary way it should have been determined what that property was. If on such summary enquiry the Guardian Court had found that the parties were governed by custom then obviously there was no occasion for the appointment of a guardian of the property. If, on the other hand, they were governed by the personal law then the guardian could only be appointed with respect to the share of the minors in the property of Mohammad Alam. From the order it appears that by compromise Nek Alam has been appointed guardian of the property of the minors assuming it to be the whole of the property left by Mohammad Alam. It appears to me, for the reasons stated above, that the Court has declined to exercise its proper functions and omitted to consider these crucial points in the case. I accordingly set aside the order passed by the learned Guardian Judge, Rawalpindi, and direct him to take such evidence as the parties wish to adduce and decide the application for guardianship in the light of the observations made above. The appeal is accordingly accepted but in view of the circumstances I make no order as to the costs of this Court. The other costs will be costs in the case. Parties will appear before the Guardian Judge, Rawalpindi, on 31st July 1939.

D.S./R.K.

*Appeal allowed.***A. I. R. 1940 Lahore 10**

TEK CHAND AND DALIP SINGH JJ.

*Mt. Jogindar Kaur — Plaintiff —**Appellant.*

v.

Arjan Singh and others—Defendants —
Respondents.

Second Appeal No. 1691 of 1938, Decided on 12th June 1939, from decree of Dist. Judge, Karnal, D/- 22nd August 1938.

(a) Custom (Punjab) — Riwaj-i-am — Questions and answers refer to ancestral property only.

In the absence of a clear statement to the contrary, "questions" and "answers" in the riwaj-i-am should be taken to refer to ancestral property only. Hence the question and answer 40 of the riwaj-i-am of Ambala District governs succession to ancestral property only: *Case law referred.*

[P 11 C 2 ; P 12 C 2]

(b) Custom (Punjab) — Succession—Absence of plea that property was not ancestral does not lead to inference that there is admission that custom does not recognize distinction between succession to ancestral and non-ancestral property.

2. Mahadeo Prasad v. Bindeshari Prasad, (1908) 30 All 137=5 A L J 101=1908 A W N 51.

3. Samid Chetty v. Adaikalam Chetty, (1924) 11 A I R Mad 484=84 I C 613 = 47 Mad 459=46 M L J 179.

4. Banamali Patra v. Arjun Sen, (1932) 19 A I R Cal 730=140 I C 198 = 36 C W N 769 = 55 C L J 358.

It may be that in a particular case the property is obviously ancestral and it might be futile for the objector to plead that it was not so. The absence of such a plea therefore cannot, by itself, lead to the inference that there is an admission in every such case, that custom does not recognize any distinction in matters of succession to ancestral and non-ancestral property. [P 13 C 1]

(c) Custom (Punjab) — Succession — Jats of Tahsil Thanesar, Karnal District — Collaterals in fourth degree are not preferential heirs as against daughter to non-ancestral property of sonless Jat.

Among Jats of Tahsil Thanesar, Karnal District, collaterals in the fourth degree do not exclude daughters from succession to non-ancestral property. [P 13 C 1]

Hans Raj Sachdeva — *for Appellant.*

Kartar Singh — *for Respondents.*

Tek Chand J.—Sawan Singh, a Sikh Jat of Mauza Nagla, Tahsil Thanesar, Karnal District, died sonless on 17th April 1925, leaving a minor daughter Mt. Jogindar Kaur, plaintiff-appellant, who was 7½ years of age at the time. On his death his estate, which consisted of 266 bighas 8 biswas, was mutated in the name of the defendants who claimed to be his collaterals in the fourth degree. On 16th April 1937, Mt. Jogindar Kaur, soon after she had attained majority, instituted this suit against the defendants for possession of the land left by her father. She denied that the defendants were related to Sawan Singh or that the land was ancestral, and alleged that she was the rightful heir of Sawan Singh and was entitled to succeed to the property on his death. The defendants resisted the suit pleading that they were collaterals of Sawan Singh in the fourth degree, that the land was ancestral qua them and that, in any case, according to the custom prevailing in the tribe, collaterals excluded daughters in succession to property of a sonless male proprietor, whether ancestral or non-ancestral. The trial Judge held that the defendants' alleged relationship with Sawan Singh had not been proved. He further held, that even if they were his collaterals, the land was not proved to have been owned by the alleged common ancestor and that, in any case, collaterals did not exclude daughters in succession to non-ancestral property. He accordingly granted Mt. Jogindar Kaur a decree for possession of the land in dispute.

On appeal the learned District Judge, disagreeing with the finding of the trial Court as to the relationship of the defendants with Sawan Singh, held that they had been proved to be his collaterals in the

fourth degree. He however affirmed the finding of the trial Court that the land had not been proved to be ancestral qua them. On the question of custom, he found that daughters were excluded by collaterals in succession to non-ancestral as well as ancestral immovable property. On these findings he accepted the defendants' appeal and dismissed the suit. He however granted a certificate under S. 41 (1) (3), Punjab Courts Act, to the plaintiff for a second appeal to this Court on the question of custom involved. Before us, both parties have accepted the findings of fact that the defendants are the collaterals of Sawan Singh in the fourth degree and that the land is not ancestral qua them. The only question for decision therefore is whether according to the custom prevailing in the tribe collaterals are preferential heirs, as against the daughter, to the non-ancestral property of a sonless Jat. In support of their claim the defendants rely upon the "answer" to "question 40" of the Riway-i-am of Ambala District (which then included the Thanesar Tehsil) prepared at the settlement of 1888. The question and answer are in the following terms:

Q. — Under what circumstances can daughters inherit?

A.—There is no such custom, nor have daughters any right of succession; only with the consent of the collaterals some property may be gifted to them.

Underneath this "answer", there is a "note made in the presence of the Settlement Officer" to the effect that the Jat tribes said that on failure of collaterals the property went to the proprietors of the patti rather than the daughter.

It will be seen that the "question" did not specifically mention non-ancestral property, nor is there any indication in the "answer" that the tribesmen on whose replies it was formulated, intended it to refer to property of every description, ancestral as well as non-ancestral. It has been laid down in a long series of decisions of the Punjab Chief Court and this Court that in the absence of a clear statement to the contrary "questions" and "answers" in the riway-i-am should be taken to refer to ancestral property only: see 2 P R 1909,¹ 1 Lah 284,² 7 Lah 124³ at p. 129, 13 Lah

1. Nidhu v. Ram Singh, (1909) 2 P R 1909=1 I C 457=25 P W R 1909.

2. Ghulam Muhammad v. Gauhar Bibi, (1920) 7 A I R Lah 9=54 I C 419=1 Lah 284=10 P L R 1920.

3. Sham Das v. Moolo Bai, (1926) 13 A I R Lah 210=95 I C 387=7 Lah 124.

404,⁴ 15 Lah 791,⁵ 17 Lah 346,⁶ 18 Lah 350,⁷ 162 I C 382⁸ and 38 P L R 395.⁹ This proposition was accepted as correct by the learned District Judge and has not been disputed before us by counsel for the respondent. The learned Judge however in holding that the "question" and "answer 40" in the *riwaj-i-am* of the Ambala District must be taken to refer to non-ancestral property also, relied upon a Division Bench decision of this Court reported in A I R 1933 Lah 553.¹⁰ The parties to that case were Jats of Ludhiana District, and the learned District Judge has assumed that the entries in the *riwaj-i-ams* of Ambala and Ludhiana Districts were identical in this matter. This assumption however is not correct and vitiates the whole basis of the learned Judge's decision. As pointed out in the judgment in A I R 1933 Lah 553¹⁰ Mr. Gordon Walker, the compiler of the Ludhiana District *riwaj-i-am* of 1882, observed in para. 79 (at page 40) that no distinction between self-acquired and ancestral property was, as a rule, recognized and the rules of succession, restriction on alienation, etc., were stated to apply to both alike.

Again, the "Answer" to Question 34 of the Ludhiana District *riwaj-i-am* of 1911 clearly showed that the spokesmen of the tribe did make a distinction between self-acquired and ancestral property where such distinction was recognized. Thirdly, in the case cited reference was made to two former decisions of the Chief Court, relating to Ludhiana District, reported in 29 P R 1911 = 9 I C 608¹¹ and 25 P R 1912,¹² in which after full inquiry a large number of instances of exclusion of daughters by collaterals in succession to Garewal Jats of the Ludhiana district had been proved. Admit-

tedly, the *riwaj-i-ams* of Ambala district, prepared at the settlements of 1885 and 1910-11, contain nothing corresponding to para. 79 of the Gordon Walker's Customary Law of the Ludhiana District. Nor does the "answer" to "Question 40" (which corresponds to Question 43 of the Dunnett's Customary Law of the Ludhiana District) indicate that the distinction between self-acquired and ancestral property was present in the minds of the spokesmen of the tribes. Nor again has any judicial instance of the exclusion of daughters by collaterals in Thanesar tehsil or Ambala district generally been proved. On the other hand, there is at least one Ambala case decided by a Division Bench of this Court, A I R 1931 Lah 113,¹³ where the *riwaj-i-am* in question has been held not to refer to succession to non-ancestral property. Moreover, the answer to Question 40 in the *riwaj-i-am* of this district contains clear indications that the "answer" was intended to apply to ancestral property only. The statement that "only with the consent of collaterals some property may be gifted to daughters" shows that the reference is to ancestral property only; for it is conceded that a male Jat proprietor in this district, as in all other districts, has unrestricted power to gift his self-acquired property to anyone he likes. The "note" below the answer that "on failure of collaterals the property went to the proprietors of the patti rather than to the daughter" also indicates that the answer was confined to ancestral property. It is not suggested that a daughter does not succeed to self-acquired property of the father even in the absence of all agnatic relations, and that such property is divided by all the miscellaneous owners in the patti to her exclusion.

In the absence of any indication to the contrary, therefore, there is no reason why the general rule as to the interpretation of such entries in the *riwaj-i-ams* should not be held to apply in this case and following it it must be held that the Question and Answer 40 of the *riwaj-i-am* of Ambala district govern succession to ancestral property only. The learned District Judge has relied upon a mutation (Ex. D-7) as an instance of the exclusion of daughters from succession to non-ancestral property among Jats of this district. A perusal of that document however shows that this is not an

4. Rahmat Ali Knan v. Sadiq-ul-nissa, (1932) 19 A I R Lah 353=138 I C 280=13 Lah 404 = 33 P L R 117.

5. Mohammad Alam v. Hafizan, (1934) 21 A I R Lah 351=150 I C 46=15 Lah 791=35 P L R 378.

6. Sundar Devi v. Tegh Singh, (1935) 22 A I R Lah 830=160 I C 980=17 Lah 346=38 P L R 657.

7. Khillu Ram v. Mt. Dhani Bai, (1937) I L R (1937) 18 Lah 350=39 P L R 1016.

8. Kishni v. Munshi, (1936) 23 A I R Lah 157 = 162 I C 382.

9. Ganga Ram v. Naranjan Das, (1935) 22 A I R Lah 518=165 I C 754 = 38 P L R 395 = 17 Lah 61.

10. Jatan v. Jiwan Singh, (1933) 20 A I R Lah 553 = 144 I C 454=14 Lah 630=34 P L R 753.

11. Ishar Kuer v. Raja Singh, (1911) 29 P R 1911 9 I C 608=94 P L R 1911.

12. Partap Singh v. Panjabu, (1912) 25 P R 1912 = 13 I C 177=41 P L R 1912.

13. Kehar Singh v. Mt. Batchni, (1931) 18 A I R Lah 113=131 I C 236=12 Lah 310=32 P L R 36.

instance in point at all. The property referred to was of one Kishna and the rival claimants were his collaterals and one Mt. Nano, who is described as the daughter of one Rama. It does not appear from the mutation proceedings as to who this Rama was and how Mt. Nano was related to Kishna. Clearly therefore this is not an instance of exclusion of the daughter of a sonless male proprietor by his collaterals. Further, the mutation proceedings do not show that the property was non-ancestral of Kishna and the collaterals. The learned District Judge has observed that the absence of any contention by Mt. Nano that the property was not ancestral indicates that no distinction was made in the tribe in regard to succession to self-acquired and ancestral property. This is a line of argument which we are wholly unable to accept. It may be, that in a particular case the property is obviously ancestral and it might be futile for the objector to plead that it was not so. The absence of such a plea therefore cannot by itself lead to the inference that there is an admission in every such case, that custom does not recognize any distinction in matters of succession to ancestral and non-ancestral property.

Lastly, the learned counsel for the respondents relied upon the oral evidence produced by them in this case. This evidence has not been referred to by either Court below, and was apparently not relied upon then. We have however examined it and do not find it of any value whatsoever. Only one witness, Indar Singh (D. W. 6), gave an instance of succession to the property of Jowala Singh, whose daughter was excluded by his collaterals, but he admitted in cross-examination that the property of Jowala Singh was ancestral qua the collaterals. The instance therefore is not in point. After giving the case careful consideration, I have no doubt that the decision of the learned District Judge in this case is not correct. The entry in the *riwaj-i-am* does not support the right of the collaterals of the fourth degree to exclude daughters from succession to non-ancestral property. There is no other evidence in support of the alleged custom. I would accordingly accept the appeal, set aside the judgment and decree of the learned District Judge and restore that of the Court of first instance with costs throughout.

Dalip Singh J.—I agree.

D.S./R.K. *Appeal allowed.*

A. I. R. 1940 Lahore 13

BHIDE J.

*Firm Kishan Chand Jaishi Ram —
Defendant — Petitioner.*

v.

*Firm Haji Mohammad Saddiq & Sons
— Plaintiff — Respondent.*

Civil Revn. No. 136 of 1939, Decided on 8th May 1939, from decree of Addl. Judge, Small Cause Court, Delhi, D/- 9th January 1939.

Provincial Small Cause Courts Act (1887), S. 25—Omission to decide point of local jurisdiction is material irregularity.

A Judge acts with material irregularity in the exercise of his jurisdiction if he does not decide the point of local jurisdiction which was raised by the defendant in his pleas. [P 13 C 2]

Qabul Chand — for Petitioner.

Order. — This is a petition for revision arising out of a suit for recovery of Rupees 85-10-6. The suit has been decreed by the Additional Judge, Small Cause Court, Delhi, and the defendant has presented this petition for revision. This petition was heard *ex parte* as the respondent failed to appear in spite of service. The only point pressed by the learned counsel for the petitioner is that the learned Judge, Small Cause Court, has acted with material irregularity in the exercise of his jurisdiction in not deciding the point of local jurisdiction which was raised by the defendant in his pleas. The defendant's contention was that the Small Cause Court at Delhi had no jurisdiction to try the suit as the contract for the goods in question was made at Kiratpur in the Bijnoor District; the goods were delivered there and the price was also paid at the same place. The learned Additional Judge, Small Cause Court, who decided the suit, has not referred to this plea at all and it does not appear from the record that the plea was abandoned at any stage. In the circumstances I must accept this petition for revision and setting aside the decree of the learned Judge I remand the case to him for re-decision after considering the question of jurisdiction. The stamp on petition for revision will be refunded. Other costs will follow final decision.

Parties are directed to appear before the Additional Judge, Small Cause Court, Delhi on 23rd May 1939.

D.S./R.K.

Case remanded.

A. I. R. 1940 Lahore 14

RAM LALL J.

*Messrs. Karam Singh-Mohan Singh,
through Sardar Mohan Singh, Pro-
prietor of firm — Defendant —*
Petitioner.

v.

*Nihal Singh, Sole Proprietor of business
styled as Nihal Harbhajan Singh,
Plaintiff and others, Defendants —*
Respondents.

Civil Revn. No. 197 of 1939, Decided on
11th July 1939, from decree of Addl. Judge,
Small Cause Court, Amritsar, D/- 20th
January 1939.

**Negotiable Instruments Act (1881), Sec. 22—
Instruments written in oriental languages will
be governed by local usage—Admission in plaint
that hundi fell due on certain date in accor-
dance with local usage — Operation of S. 22 is
excluded—Three days of grace cannot be added.**

The provision in Section 22 giving three days
of grace affects only instruments which are not
written in an oriental language. The instruments
written in oriental languages will be governed by
any local usage which may be proved in the case.
Where it is admitted in the plaint that the hundi
in question fell due on a certain date in accordance
with the local usage or custom, the operation of
S. 22 is excluded, and therefore the three days of
grace which are allowed in the case of instru-
ments not expressed in an oriental language cannot
be added in such case for computing limitation for
a suit on that negotiable instrument: *A I R 1915
Lah 297, Doubted; A I R 1932 Lah 582, Rel. on.*
[P 14 C 2]

Harnam Singh — *for Petitioner.*

Bhagat Singh — *for Respondents.*

Order. — The sole question involved in
this case is whether the suit brought on
the basis of a hundi was within time. The
hundi in question was executed for Rs. 600
on 18th April 1935 equivalent to Chetar
Shudi 15, 1992. The hundi was to fall due
after 240 days and a suit was brought on
13th December 1938. It is stated in para. 1
of the plaint that the due date for payment
of the hundi was Maghar Shudi 15, 1992,
equivalent to 10th December 1935 "accor-
ding to the custom of the Amritsar mar-
ket," and it was claimed that after adding
three days of grace the hundi was payable
on 13th December 1935. The suit was
brought exactly three years afterwards on
13th December 1938. The learned Addi-
tional Judge, Small Cause Court, Amritsar,
held that three days of grace should be
added to the date on which the hundi fell
due and therefore the suit brought on 13th
December 1938 was within time. This deci-
sion, he based on the authority in *A I R*

1915 Lah 297,¹ where Rattigan J., held that
every bill of exchange (hundi) made pay-
able a certain number of days after date of
its execution is at maturity on the third
day after the day on which it is expressed
to be payable under S. 22 (2), Negotiable
Instruments Act, and that day should also
be excluded.

Against this order a revision petition has
been presented through Sardar Harnam
Singh who has urged that the instrument
in this case had been written in an oriental
language and therefore the Negotiable In-
struments Act did not affect any local
usage relating thereto. There is considera-
ble force in this contention. The relevant
part of Sec. 1, Negotiable Instruments Act,
is as follows: Nothing contained in this
Act shall affect "any local usage relating to
any instrument in an oriental language." Under S. 22 every promissory note or bill
of exchange is at maturity the third day
after the day on which it is expressed to be
payable. This provision giving these three
days of grace obviously affects only instru-
ments which are not written in an oriental
language. The instruments written in orien-
tal languages will be governed by any local
usage which may be proved in the case. In
the present case it is admitted in the plaint
that the hundi in question fell due on
Maghar Shudi 15, 1992, equivalent to 10th
December 1935 in accordance with the
local usage or custom. By this statement
in the plaint the operation of S. 22, Negoti-
able Instruments Act, is obviously excluded.

The learned counsel for the respondent
contended as a last resort that the hundi
was to be at maturity 240 days after the
day on which it was written and that the
240th day fell on 14th December 1935
which would bring the suit under limita-
tion. In my opinion, this contention is not
well founded because in that very paragraph
of the plaint it is stated that according to
the local usage of the market the hundi
was at maturity on 10th December and not
240 days after it was written as I am of
the opinion that the local usage pleaded
governs the case and that therefore the
three days of grace which are allowed in
the case of instruments not expressed in an
oriental language cannot be added in this
case, the starting point of limitation was
10th December 1935. So far as *A I R 1915
Lah 297*¹ is concerned, it is not clear from
the report that the instrument in that case

1. *Nanak Singh v. Keshao Das*, (1915) 2 *A I R*
Lah 297=27 *I C 608*=34 *P L R 1915*.

was written in an oriental language except that it is described as a hundi. If the instrument in that case was written in an oriental language, then I am unable, with all respect, to agree with the decision; if, on the other hand, the instrument in that case was not written in an oriental language, then the decision is unquestionable.

Reference in this connexion may be made to a decision by a Division Bench reported in A I R 1932 Lah 582,² where it was held that the Negotiable Instruments Act did not apply to hundis and therefore in the case of hundis it was permissible to the plaintiff to set up and prove a usage for the payment of interest beyond six per cent. In the present case the plaintiff is bound by his own admission in the plaint that according to the local usage in the market the date of maturity was 10th December and that the case is governed by local usage and custom, and if so, the operation of S. 22 is excluded and the suit is out of time. In these circumstances I would accept this revision petition but in view of all the circumstances the parties will bear their own costs throughout.

D.S./R.K.

Petition accepted.

2. Har Narain Sahib Ram v. Bihari Lal Charanji Lal, (1932) 19 A I R Lah 582=142 I O 729 =13 Lah 800=34 P L R 92.

A. I. R. 1940 Lahore 15

BLACKER J.

Sher Mohammad — Convict — Petitioner
v.
Emperor.

Criminal Revn. No. 861 of 1939, Decided on 3rd August 1939, from order of Sess. Judge, Lahore, D/- 12th April 1939.

(a) Criminal P. C. (1898), S. 195 (1) (a) — Complaint by officer subordinate to officer concerned — Court has no jurisdiction to take cognizance.

The complaint contemplated by S. 195 (1) (a) must be filed by the officer concerned or by some officer to whom such officer is subordinate and if filed by some officer who is himself subordinate to such officer concerned the Court has no jurisdiction to take cognizance of it. [P 15 C 2]

(b) Penal Code (1860), S. 182 — Mere withholding of information is not punishable.

Section 182 makes punishable the positive act of giving false information and there is nothing in the Section showing that it intends to punish the withholding of information as distinct from actual giving of information. [P 15 C 2]

Dr. Shuja-ud-Din — *for Petitioner.*

Order.—The petitioner Sher Mohammad has been convicted under S. 182, I. P. C.

His appeal was dismissed by the learned Sessions Judge, Lahore, and although he has served his sentence, he has put in this petition for revision of his conviction in order to clear his record. As to the facts of the case there can be no doubt. On 28th June 1938 the petitioner presented himself for recruitment as a police constable before Mr. Scroggie, Assistant Inspector-General of Government Railway Police. Following his usual habit, Mr. Scroggie asked any of the selected candidates present who had put in Government service in the police or in any other Government Department previously to come forward. The petitioner did not step forward. It was subsequently shown that the petitioner had actually been discharged previously from the District Police. Counsel for the petitioner raised a preliminary objection as to jurisdiction on the ground that within the meaning of S. 195 (1) (a), Criminal P. C., the complaint should have been filed by Mr. Scroggie himself or by some officer to whom Mr. Scroggie was subordinate and not by an officer who was himself subordinate to Mr. Scroggie. I do not propose to spend much time on this objection though it appears to me to be sound as I think that the petition has to be accepted on the merits on other grounds.

The first of these grounds is that the facts shown to have been established do not in my opinion constitute an offence under S. 182, I. P. C. That Section makes punishable the positive act of giving false information. In this case the petitioner did not give any information to anybody though he may have withheld it. I am unable to read anything in the Section as showing that it intends to punish the withholding of information as distinct from the actual giving of information. I may notice in passing that where such is the intention of the Code, the Code does not hesitate to say so, as for example in S. 415 where there is an Explanation expressly laying down that for the purposes of that Section a dishonest concealment of facts is a deception. There is no such Explanation to S. 182.

The second ground why I consider that S. 182 is not applicable to the facts of the case is that it is not sufficient for the purposes of this Section to give false information but it is also necessary that the offender should intend or know that he will thereby cause the public servant to do or omit to do anything which the said public servant ought not to do or omit to do. It has not been established in this case that Mr. Scroggie

ought not to have enlisted Sher Mohammad if Sher Mohammad had disclosed that he had been discharged from the police. Mr. Scroggie was cross-examined on this point and his position is clear. He says :

If a man is discharged as being unlikely to be an efficient police officer I would not have enlisted him even if he had been a good athlete. Another officer in my position might have taken him but it is not for me to say.

This clearly means that it would have been Mr. Scroggie's own discretion whether to take him or not and that does not mean that the taking of him was a thing which Mr. Scroggie ought not to have done. For these two reasons I am of opinion that the omission of the petitioner to come forward when called upon does not amount to an offence under S. 182, I. P. C. I accordingly accept the petition and acquit him.

D.B./R.K.

Petition accepted.

A. I. R. 1940 Lahore 16

SKEMP J.

Guru Jaswant Singh, under management of Court of Wards — Appellant.

v.

Diwan Somer Nath — Respondent.

Execution First Appeal No. 54 of 1939, Decided on 5th June 1939, from order of Senior Sub-Judge, Lahore, D/- 2nd December 1938.

Punjab Court of Wards Act (2 of 1903), Sec. 31 (2) — Memorandum signed by Deputy Commissioner informing claimant that his claim is admitted to certain amount, amounts to certificate.

If the Deputy Commissioner informs the claimant that his claim has been admitted for a certain amount it implies of necessity that the Deputy Commissioner has been notified of the claim as required by S. 26 of the Act. Hence a memorandum signed by Deputy Commissioner informing the claimant that his claim has been admitted for a certain amount, amounts to a certificate under S. 31 (2) : *A I R 1937 Lah 736, Rel. on; 6 P R 1910 and A I R 1927 Lah 638, Disting.*

[P 17 C 1]

J. N. Aggarwal — *for Appellant.*

M. C. Mahajan and Shib Dayal —
for Respondent.

Judgment.—This is a first appeal arising from execution proceedings. On 25th April 1929 Mangat Rai and others obtained a mortgage decree for over Rs. 49,000, bearing interest at 1 per cent. per mensem against Guru Jaswant Singh. After the decree-holder had realized about Rs. 25,000, he transferred the decree to Dewan Somer Nath, the present respondent. On 1st June 1934, the estate of Guru Jaswant Singh

was taken over by the Court of Wards. The Deputy Commissioner then published a notification under S. 26 of the Act calling upon persons having claims against the property to notify them; and he entered into a compromise with Dewan Somer Nath. The terms of this compromise are stated as follows in a memo., No. 9036 dated 3rd September 1935, signed by the Deputy Commissioner in person :

By virtue of a compromise your claim of Rupees 56,747-8-0 against the Guruharsahai Court of Wards estate has been admitted to the extent of Rs. 36,500 with interest at the rate of 6 per cent. per annum to be charged from 1st July 1935. The estate land in village Jandwala, Tahsil Chunian, District Lahore, will remain under collateral mortgage with you for the aforesaid amount Rs. 36,500 and interest at 6 per cent.

Dewan Somer Nath on 15th August 1938 applied for execution of his decree. The Deputy Commissioner's successor took an objection that without the certificate provided by S. 31, Court of Wards Act, the execution could not proceed. Relying on a ruling of Jai Lal J. reported in A I R 1937 Lah 736,¹ the learned Senior Subordinate Judge rejected the objection. The Deputy Commissioner has come here in appeal through Mr. Jagan Nath Aggarwal. The only point is whether the memorandum quoted above amounts to a certificate under S. 31 (2), Court of Wards Act. S. 31 (2), Court of Wards Act, provides :

On the publication of a notice under S. 26 all suits and all proceedings in execution of any decree against a ward or as affecting any property under the superintendence of the Court of Wards then pending in any Civil Court shall be stayed until the plaintiff or the decree-holder files a certificate that the claim has been notified in accordance with Section 26.

In A I R 1937 Lah 736¹ the Deputy Commissioner had written to the Senior Subordinate Judge notifying that he had admitted the claim of the appellant for a certain figure, but the Senior Subordinate Judge held that a formal certificate was required to continue the execution proceedings. Jai Lal J. said :

The law does not provide for any form of a certificate and the mere intimation by the Deputy Commissioner given to the Court in which the execution proceedings are pending, is a sufficient compliance with the provisions of S. 31, sub-s. (2).

Mr. Mehr Chand Mahajan, who appears for the respondent, has drawn my attention to the fact that this case went up in Letters Patent Appeal No. 4 of 1937, and the Letters Patent Bench, Coldstream and

1. Davindar Singh v. Court of Wards of the Estate of Lachhmi Devi, (1937) 24 A I R Lah 736=169 I C 961=39 P L R 923.

Monroe JJ., on 8th July 1937, held that the certificate required by S. 31, Court of Wards Act, was furnished by the Deputy Commissioner under his own signature direct to the Court. Mr. Jagan Nath Aggarwal relied on 6 P R 1910.² That case can be distinguished on the ground that there was no settlement between the claimant and the Deputy Commissioner and that the Deputy Commissioner had refused to give a certificate. He also relied on 8 Lah 351.³ In that case the Deputy Commissioner was never approached after the property came under the Court of Wards. There was no settlement and no certificate. This case can also be distinguished. In my opinion, the learned Judge of the Court below was right in following A I R 1937 Lah 736.¹ The principle may be stated as follows that if the Deputy Commissioner informs the claimant that his claim has been admitted for a certain amount it implies of necessity that the Deputy Commissioner has been notified of the claim as required by S. 26 of the Act. I reject this appeal with costs.

D.S./R.K.

Appeal dismissed.

2. Kanda Ram v. Muhammad Nawaz Khan, (1910) 6 P R 1910 = 4 I C 949 = 160 P L R 1910.

3. Court of Wards v. Devi Das, (1927) 14 A I R Lah 638 = 106 I C 141 = 8 Lah 351 = 28 P L R 692.

A. I. R. 1940 Lahore 17

BHIDE J.

*Mohammad Din and other —**Defendants — Appellants.*

v.

*Amir Khan, Plaintiff and another,
Defendant — Respondents.*

Second Appeal No. 825 of 1938, Decided on 9th December 1938, from decree of Dist. Judge, Attock at Campbellpore, D/- 19th March 1938.

(a) Punjab Pre-emption Act (1 of 1913), S. 15 (b) — Sale of muqarridari rights in joint lands—S. 15 (b) does not apply.

Section 15 (b) has no application to the case where the sale is not of a share in the joint land or property but is simply a sale of the muqarridari rights in such land. [P 17 C 2]

(b) Punjab Pre-emption Act (1 of 1913), S. 15 (b)—Sale of muqarridari rights in land—Right of pre-emption cannot be claimed.

Right of pre-emption is a statutory right and cannot be claimed unless a distinct right is given by statute. [P 18 C 1]

Right of pre-emption cannot be claimed in respect of the sale of muqarridari rights in property 1940 L/8 & 4

as no specific provision is made in the Punjab Pre-emption Act in respect of the sale of such rights. [P 17 C 2 ; P 18 C 1]

M. C. Mahajan and Yashpal Gandhi —
for Appellants.

Ghulam Mohy-ud-Din —
for Respondent (Plaintiff).

Judgment. — This is a second appeal arising out of a suit for pre-emption in respect of a sale of muqarridari rights in 8 kanals 8½ marlas of land situate in the Attock District. The plaintiff based his right of pre-emption in the plaint on his ownership in the patti in which the land in question was situated. It has however been found that the land is a portion of the shamilat and is not situate in any patti and this finding has not been disputed before me. The trial Court dismissed the suit but on appeal the learned District Judge has decreed the suit, holding that the plaintiff was entitled to pre-empt the sale under S. 15 (c) firstly of the Punjab Pre-emption Act. He was apparently of opinion that muqarridari rights are inferior proprietary rights and the sale of such rights is subject to pre-emption under the aforesaid clause. The learned counsel for the respondent has not attempted to support the decision of the learned District Judge on the ground on which it proceeds. He has himself cited A I R 1923 Lah 295,¹ in which it was held that "a muqarridar of the Attock District is a tenant and not an inferior proprietor." The learned counsel for the respondent has taken the position that a muqarridar is a sort of an occupancy tenant though not in the strict sense of the word as used in the Punjab Tenancy Act and in his opinion the plaintiff's case comes under Sec. 15 (b) fourthly. S. 15 (b) however relates to a sale "of a share out of joint land or property." In the present instance the sale was not a sale of the joint land but simply a sale of muqarridari rights in such land. I am therefore unable to see that cl. (b) of S. 15 has any applicability to this case. A muqarridar has been defined separately in the Punjab Tenancy Act and is admittedly different from an occupancy tenant. Even if the plaintiff were an occupancy tenant I do not see that his case would have come under Sec. 15 (b). The truth of the matter appears to be that there is no specific provision in the Pre-emption Act for pre-emption in respect of a sale of muqarridari rights. The case may be merely one of

1. Kanshi Ram v. Shah Nawaz, (1923) 10 A I R Lah 295 = 71 I C 811.

omission; but the right of pre-emption is a statutory right and unless there is a distinct right given by the statute with respect to a sale of muqarridari rights, the plaintiff cannot succeed. In my opinion, no such right has been given by the Punjab Pre-emption Act in respect of sales of muqarridari rights and the plaintiff's suit must therefore fail. I accordingly accept the appeal and dismiss the plaintiff's suit, but in the peculiar circumstances of the case leave the parties to bear their costs throughout.

Note. — An oral request has been made by the learned counsel for the respondent for a certificate to file a Letters Patent appeal. The point of law is not covered by any authority. I therefore certify the case to be a fit one for Letters Patent appeal.

N.S./R.K.

Appeal accepted.

A. I. R. 1940 Lahore 18

BHIDE J.

Jagat Singh and others — Plaintiffs —
Appellants.

v.

District Board, Amritsar, through its
Secretary — Defendant — Respondent.

Second Appeal No. 25 of 1939, Decided on 5th May 1939, from decree of Senior Sub-Judge, Amritsar, D/- 1st December 1938.

(a) Easements Act (1882), S. 52 — On facts permission given to local body to occupy land to use it for purposes of school, held amounted to licence.

Certain property was given by a person to a local body for the purposes of a school. The body was allowed to hold possession of the land so long as it was being used for the purpose of the school. There was however no transfer of ownership nor was there any evidence showing transfer of ownership, and there was also no relationship of landlord and tenant between the parties :

Held that the permission granted to the local body to hold the land and use it for the purposes of the school was in the nature of a licence.

[P 19 C 1]

(b) Easements Act (1882), S. 60 — Sinking well and erecting compound wall are works of permanent character.

Sinking a well and erecting compound wall can be considered to be works of a permanent character within the meaning of S. 60 : *AIR 1918 Nag 180, Rel. on.*

[P 19 C 1]

(c) Easements Act (1882), S. 60—Land given by grantor to licensee for certain purpose coupled with undertaking not to claim it so long as it was required for that purpose — Licensee erecting works of permanent nature — Grantor cannot recover land even on payment of compensation.

Where a person who has given his land to the licensee for certain purpose has given him an undertaking that he would not claim the land so long as it was required for that purpose and on acting on that promise the licensee has erected works of permanent nature, the grantor of license is not entitled to recover land even on payment of compensation because S. 60 does not recognize any such exception.

[P 19 C 1]

Barkat Ali — *for Appellants.*Din Dayal Khanna — *for Respondent.*

L. Kishen Chand, (Secretary, Dist. Board),
in person.

Judgment. — The plaintiffs sued in this case for possession of about 3 kanals of land on the ground that it had been only temporarily given to the defendant (District Board, Amritsar) for purposes of an agricultural farm, with an option to the plaintiffs to recover possession when required. The defendant having refused to deliver possession when demanded by the plaintiffs they instituted the present suit. The defendant on the other hand claimed that the land had been gifted to the District Board for the purposes of a school and that the District Board was entitled to hold possession so long as the school was in existence and the land was required for the purposes of the school. The Courts below have found the issues in favour of the defendant and dismissed the plaintiffs' suit. From this decision the plaintiffs have preferred a second appeal. The finding of the Courts below that the land in question was given to the District Board for the purposes of the school and that the plaintiffs were not entitled to reclaim possession of the land so long as the land was required for the purposes of the school is based on the evidence of respectable witnesses and being a finding of fact is not open to challenge in second appeal. The learned counsel however contended that one of the witnesses on whom the Courts below have relied has distinctly stated that there was no question of any transfer of ownership [*vide* statement of Bawa Barkat Singh (D.W. 5)] and that the defendant had been merely allowed to keep the land for the purposes of the school. He argued that if the ownership still remains with the plaintiffs they were entitled to recover possession as there was no gift in the legal sense of the term and the alleged agreement not to recover the land so long as the school was in existence could not bind the plaintiffs as there was no consideration for it.

It is significant that no deed of gift was executed and even a mutation with regard

to it was not effected in the Revenue records wherein the plaintiffs have all along been shown as owners and it is also admitted that they have also been paying the land revenue. The District Board has not been able to produce any evidence even from its own records as regards the exact nature of this transaction. If there was any intention to transfer the ownership of the land it is difficult to believe that there would be no record of the transaction in the District Board Office. The District Board merely relied on certain entries in the khasra Girdwari where the land was stated to be given by way of dharamarth, but these entries were challenged by the plaintiffs when they came to know of them and they got them corrected. Moreover, even in these entries, the District Board was shown as tenant-at-will and dharamarth was only stated as a reason for not charging rent. In my opinion, the learned Senior Subordinate Judge has overlooked the statement of Bawa Barkat Singh to the effect that there was no question of transfer of ownership (*Milkiyat ka sawal na tha*), has misconstrued the khasra Girdwari entries and has not taken into consideration the effect of the absence of any documentary evidence showing transfer of ownership. In the circumstances his finding that there was a permanent gift cannot be sustained.

It has been already held by the Revenue Courts that there was no relation of landlord and tenant between the parties and this seems to be correct as no rent was intended to be paid. On the facts proved, the permission granted by the plaintiffs to the District Board to occupy the land and to use it for the purposes of the school seems to be in the nature of a 'license' as defined in S. 52, Easements Act. Such a license is ordinarily revocable, but not so if the licensee acting upon the license has executed a work of a permanent character and incurred expenses in the execution (Sec. 60, Easements Act). In the present case, it is not disputed that the District Board has sunk a well and erected compound walls. I do not see why these should not be considered to be works of a permanent character within the meaning of S. 60 : *cf.* 48 I C 723.¹ The learned counsel for the appellants urged that the plaintiffs should be allowed to recover the land on payment of compensation, but S. 60 does not recognize any such exception. I see no reason why the principle of that Section,

should not be applied in this case. There is, besides, definite evidence of respectable witnesses in this case that the plaintiffs gave an undertaking that they would not claim the land, so long as it was required for the school. I see no reason to disbelieve this evidence. I do not think the District Board would have cared to sink a well, etc. if the plaintiffs had given the land on the condition (as they now allege) that they were at liberty to take it back any time they liked. In the circumstances, the District Board having acted upon the promise made by the plaintiffs the principle of estoppel as laid down in S. 115, Evidence Act, will fully apply. I accordingly hold that the plaintiffs are the owners and the defendant District Board is in the position of a licensee but is not liable to be ejected on account of the undertaking given by the plaintiffs that they would not claim the land so long as it was required for the school and also on account of the works of a permanent character executed by the District Board, on account of that promise. I therefore dismiss this appeal, but in view of all the circumstances leave the parties to bear their costs.

N.S./R.K.

*Appeal dismissed.***A. I. R. 1940 Lahore 19**

BHIDE J.

Labh Singh and another—Plaintiffs—Appellants.

v.

Sardar Gurbakhsh Singh and another—Defendants—Respondents.

Second Appeal No. 930 of 1938, Decided on 8th May 1939, from decree of District Judge, Ludhiana, D/- 8th April 1938.

(a) Custom (Punjab) — Onus lies on party alleging custom—Kalals of village Dewatwal in Ludhiana District are not governed by custom in matters of alienation of ancestral property.

The burden of proof always lies on the party alleging a custom and the burden is all the more heavy if the tribe to which that party belongs does not usually depend on agriculture but follows a variety of occupations : *A I R 1938 Lah 299 (F B), Rel. on.* [P 21 C 1]

Kalals of village Dewatwal in Ludhiana District are not primarily an agricultural tribe and are not governed by custom in the matters of alienation of ancestral property, and they have not by their association with the agricultural tribes in the village since 1841 adopted their customs. The mere fact that the Kalals own a patti in the village Dewatwal would not be sufficient to raise any presumption in favour of custom. Besides, customs are apt to vary with the local history of a tribe and the mere fact that the Kalals in some other

1. *Madhusudan Das v. Bissuji*, (1918) 5 AIR Nag 180=48 I C 723.

places have adopted agricultural custom would be no evidence to show that Kalals of Dewatwal follow custom. [P 20 C 1, 2]

(b) Custom — It must be in existence for the time preceding man's memory.

A custom to be legal must be proved to have been in existence for a time preceding the memory of man : *A I R 1937 Lah 451 (F B), Rel. on.* [P 21 C 2]

(c) Custom—Question is one of fact.

Custom is not a matter of inference but of fact. [P 20 C 2]

Mehr Chand Mahajan — *for Appellants.*

Achhru Ram — *for Respondents.*

Judgment. — The plaintiffs sued in this case for a declaration that a mortgage of 18 bighas, 18 biswas, and 2 biswansis of ancestral land for Rs. 4500 made by their brother, defendant 1, in favour of defendant 2 should not affect their reversionary rights. The suit was resisted by defendant 2 on the pleas that the parties (who are Kalals of the village Dewatwal in the Ludhiana District) were governed by Hindu law and not by agricultural custom and secondly that the alienation was effected for valid necessity and consideration. The trial Court found the issues in favour of the plaintiffs and decreed the suit, but on appeal the learned District Judge reversed the findings of the trial Court on both the points and dismissed the suit. From this decision the present appeal has been preferred. The finding of the learned District Judge on the question of necessity and consideration is one of fact but the finding is challenged on the grounds that the learned District Judge has overlooked some of the material evidence with respect to the question of necessity and consideration and that in any case if the parties are agriculturists, the sum of Rs. 300 for the purpose of starting a shop could not be considered to be a valid necessity. I therefore consider it desirable to decide the appeal on both the points. I shall first take the question of custom. As stated above, the parties are Kalals of the village Dewatwal in the Ludhiana District. As pointed out in 87 P R 1907¹ a case relating to Kalals of the Ludhiana District, the Kalals are not primarily an agricultural tribe. Although some of them hold lands in the Ludhiana District, they follow other occupations also. At one time there was a proposal to include them amongst agricultural tribes in the Ludhiana District but this proposal was apparently not accepted. The customary law of the Ludhiana District admittedly

does not contain any record of the customs of this tribe and the presumption is that they were not recognized as a tribe governed by custom at the time when the Customary law was prepared.

The trial Court in deciding the issue as to custom in favour of the plaintiffs relied mainly on the fact that the Kalals in village Ahluwalia have a patti of their own, have a share in the shamilat and furnish a lambardar. It has also relied on the fact that in some social matters, such as karewa, custom was followed. It has been, however, pointed out in several recent decisions of this Court that custom is not a matter of inference but of fact. In the circumstances, it seems very doubtful whether the mere fact that the Kalals own a patti in the village Dewatwal would be sufficient to raise any presumption in favour of custom in the present case: *cf. AIR 1935 Lah 967²* at p. 969. The presumption in favour of restraint on alienations of ancestral land in village communities was based on the history of such communities and also on the *riwaj-i-ams* prepared from time to time with respect to such communities in the Central Punjab: *vide* 107 PR 1887.³ In the present instance, as stated above, no *riwaj-i-am* was prepared at all with respect to the Kalals in the Ludhiana District. It is true that they own one-third of the village. But their acquisition dates from the year 1841 only. Kalals not being primarily an agricultural tribe the question therefore is whether they have by their association with the agricultural tribes in the village since 1841 adopted their customs. This would be purely a question of fact and can only be decided on evidence. (After examining oral evidence his Lordship concluded.) Taking the oral evidence as a whole I do not think that it establishes that Kalals of Dewatwal are governed by custom in the matters of alienation of ancestral property.

Coming to the documentary evidence, the plaintiffs relied on two instances from other villages namely Shabbpur and Kalal Majra. The learned District Judge has pointed out that these villages were founded by Kalals and were compact village communities. Besides, customs are apt to vary with the local history of a tribe and the mere fact that the Kalals in some other places have adopted agricultural custom would be no

1. Attar Singh v. Sant Singh, (1907) 87 P R 1907.

2. Ishar Das v. Bhagwan Das, (1935) 22 AIR Lah 967=158 IC 451=17 Lah 612=38 PLR 1045.

3. Gujar v. Sham Das, (1887) 107 P R 1887.

evidence to support the plaintiffs' claim in the present case. In one case from this village, *Balwant Singh v. Harnam Singh*, decided in the year 1916, it was held that Kalals were not governed by custom. In a recent case decided in the year 1936, *Bishen Singh v. Atma Ram*, a contrary view was taken and it was held that Kalals were governed by custom. The decision of the trial Court was affirmed by the District Judge. The case of *Balwant Singh v. Harnam Singh* was apparently not brought to the notice of the Court which decided the case of *Bishen Singh v. Atma Ram*. The decision in *Bishen Singh v. Atma Ram* appears to be founded mainly on the following considerations: (1) that the Kalals have a patti of their own; (2) that their main occupation is agriculture; (3) that they settled in the village at its foundation; (4) that they have cultivated land ever since their settlement; (5) that they hold a large area of land in the village in question; (6) that they hold share in shamilat; (7) that they have their own lambardar; and (8) that custom generally prevails in the locality. Ahluwalias of Dewatwal follow custom in social matters also.

Most of the above points are relevant only for ascertaining whether the Kalals of Dewatwal form a homogeneous agricultural village community and, if they do, whether it should be presumed that they are governed by custom in the matter of alienation of ancestral property. In the present instance however we know that Kalals are not primarily an agricultural tribe and although they are owners of one patti in Dewatwal they acquired land in this village only in 1841. So the real question which requires decision in this case is, as pointed out above, whether they have adopted agricultural custom in the matter of alienation of ancestral property owing to their association with members of agricultural tribes during the last 100 years or so. The burden of proof always lies on the party alleging a custom and in this case the burden was all the more heavy as Kalals do not usually depend on agriculture but follow a variety of occupations: cf. A I R 1938 Lah 299.⁴ There was no riwaj-i-am available to the plaintiff in this case which could shift the onus to the opposite side. The plaintiffs could therefore only establish the growth of the custom relied upon by them, by a long series of instances, since they acquired land

in Dewatwal in 1841. It has been held in A I R 1937 Lah 451⁵ that a custom to be legal must be proved to have been in existence for a time preceding the memory of man, following the dictum of Blackstone that "if any one shows the beginning of it, it is no good custom." If this rule is strictly applied, no valid custom could possibly be held to have come into existence since 1841. But even if a less strict view of custom is taken, as no such instances of the alleged custom from this village have been proved during this period, I feel no hesitation in holding on the evidence before me that the plaintiffs have failed to discharge the heavy onus of proving custom which lay on them.

On the above finding it is unnecessary to go into the question of necessity and consideration; but I may mention that I agree generally with the finding of the learned District Judge on that point also. The sum of Rs. 1700 was due to the plaintiffs themselves on a prior mortgage and this item was not disputed. As regards the balance of Rs. 2800, Rs. 2500 were alleged to have been borrowed for the marriage of the alienor, there is evidence on the record to show that the alienor had asked Bishen Singh to arrange his betrothal and that he had actually done so. Bishen Singh has not been shown to be not disinterested and there is no good reason for disbelieving his testimony. As regards the balance of Rs. 300 borrowed for starting a shop, the alienor's land had been mortgaged in favour of the plaintiff and in the circumstances he may have found it necessary to resort to other occupations to maintain himself. The item is a comparatively small one and not unreasonable for the object in view. I therefore dismiss the appeal with costs.

D.S./R.K.

Appeal dismissed.

5. Bahadur v. Nihal Kaur, (1937) 24 A I R Lah 451=169 I C 909=I L R (1937) Lah 594 = 39 P L R 349 (F B).

A. I. R. 1940 Lahore 21

TEK CHAND AND DALIP SINGH JJ.

Lala Sain Das — Defendant —

Appellant,

v.

Baba Ujagar Singh — Plaintiff —

Respondent.

First Appeal No. 41 of 1939, Decided on 13th June 1939, from decree of Sub-Judge, First Class, Rawalpindi, D/- 11th July 1938.

4. *Kishen Singh v. Mt. Santi*, (1938) 25 A I R Lah 299=175 I C 87 (F B).

(a) Hindu Law — Coparcenary properties — Son's interest—Attachment.

A son's interest in coparcenary properties is liable to attachment in execution of a personal decree against him, even though in the Punjab the son cannot claim partition in the father's lifetime : *A I R 1932 Lah 211, Rel. on.* [P 23 C 1]

(b) Tort—Damages—Wrongful attachment—Attachment bona fide and on sufficient grounds—Even nominal damages cannot be awarded—Principle of injuria sine damnum does not apply.

In case of *injuria sine damnum* nominal damages are usually awarded and this principle is applicable to cases of trespass on immovable property when there has been unjustifiable intrusion on property in possession of another. But this rule cannot be extended to every case of attachment of property irrespective of the circumstances.

[P 24 C 1]

Thus, where an attachment of some properties made bona fide and on sufficient grounds was withdrawn at the creditor's own request at a very early stage of the proceedings, without any interference with the possession of the person aggrieved by the attachment :

Held that the principle of *injuria sine damnum* did not apply to such a case and even nominal damages could not be awarded to the person aggrieved by the wrongful attachment : *AIR 1938 Lah 334, Disting.; (1704) 1 Smith's Leading Cases 251, Discussed and not applied.* [P 24 C 1]

(c) Tort—Slander of title—Bona fide attachment withdrawn at early stage—Special damage must be proved.

An attachment of properties made bona fide and on sufficient grounds, and withdrawn at an early stage of the proceedings without interference with the possession of the person injured by the attachment is at best only a slander of title and special damage must be proved before damages are awarded to the person aggrieved by the attachment.

[P 24 C 1]

Mela Ram and Nand Lal Saluja —

for Appellant.

Shamair Chand — *for Respondent.*

Tek Chand J. — This appeal arises out of a suit for recovery of Rupees 1000 as damages for wrongful attachment of properties, instituted by Baba Ujagar Singh Bedi, plaintiff-respondent, against Sain Das Chawla, defendant-appellant. The lower Court had granted the plaintiff a decree for Re. 1 only as "nominal damages" and has ordered the parties to bear their own costs. From this decision the defendant has appealed, urging that on the findings of the Court below no damages should have been allowed at all and the suit should have been dismissed in its entirety. The plaintiff has filed cross-objections praying that Rs. 500 should be allowed as damages. The facts, which are no longer in dispute, may be briefly stated. The defendant Sain Das Chawla obtained a money decree against Tikka Sant Singh, who is the only

son of the plaintiff Baba Ujagar Singh Bedi, from the Court of the Senior Subordinate Judge, Rawalpindi, on 20th November 1933. In execution of this decree, he attached a bungalow, known as 'Cosynook' at Murree and one-fourth share in two properties at Rawalpindi, called Sarai Baba Khem Singh and Damdama Sahib. Baba Ujagar Singh objected that the three attached properties belonged to him exclusively, and that his son, the judgment-debtor, had no interest in them. He admitted that the properties were ancestral, but alleged that by a decree passed in 1928 on the award of an arbitrator duly appointed by him and his son to settle their disputes, he had been declared to be the exclusive owner of these properties and his son had only a right of residence in 'Cosynook'. Tikka Sant Singh also objected alleging that he had no interest in the sarai and Damdama Sahib and that his right of residence in 'Cosynook' was exempt from attachment and sale in execution of a money decree, under S. 60 (1) (n), Civil P. C. In the course of the enquiry in these objections, the decree-holder made a statement that "for the time being" he did not wish to proceed against the sarai and Damdama Sahib and that these properties be released. The enquiry however proceeded as regards 'Cosynook' but, ultimately, the executing Court released this property also. On appeal by the decree-holder, the High Court held that, though the right of residence of the judgment-debtor in 'Cosynook' could not be attached and sold 'equitable execution' by way of appointment of a receiver could be ordered. A receiver was accordingly appointed to collect the rent, and, after defraying the expenses, pay it to the decree-holder until the decretal amount was discharged. This judgment is reported in *A I R 1936 Lah 830*,¹ and it was affirmed on appeal under the Letters Patent on 14th January 1937, *L P A No. 103 of 1936*.²

After the release of the properties, the plaintiff Baba Ujagar Singh instituted the present suit claiming Rs. 1000 as damages for wrongful attachment of the properties. He alleged that the defendant, knowing full well that the properties in question belonged to the plaintiff exclusively and that the judgment-debtor had no interest in them, had them attached maliciously and that this

1. *Saindas Chawla v. Tika Sant Singh*, (1936) 23 A I R Lah 830=165 I C 519.

2. *Tika Sant Singh v. Saindas Chawla*, reported in (1937) 24 A I R Lah 433=175 I C 447= I L R (1937) Lah 486=39 P L R 839.

caused the plaintiff much mental worry and pain and adversely affected his reputation and that he was put to considerable expense in the objection proceedings for which he was entitled to be indemnified. The defendant denied the plaintiff's claim. The trial Court held that the plaintiff had failed to show that the attachment had been made without "reasonable and probable cause," nor had 'malice' on the part of the defendant been proved. It further held that the plaintiff was not entitled to be reimbursed for the expenses incurred by him in successfully objecting to the attachment, nor could he, in the circumstances, claim any damages for personal worry or loss of reputation. Following a Single Bench decision of this Court, 1938 P L R 158,³ the Court held however that the plaintiff was entitled to nominal damages, which it assessed at one rupee, and it has passed a decree for this amount.

Before us, counsel for the plaintiff-respondent has attacked the findings of facts arrived at by the lower Court, but, after hearing him and examining the record, I see no force in his contention. The judgment-debtor, Tikka Sant Singh is the only son of the plaintiff, Baba Ujagar Singh. Admittedly, the family is governed by Hindu law. All the three attached properties had been acquired or built by the father of Baba Ujagar Singh, and Tikka Sant Singh had acquired an interest in them on his birth. Normally, a son's interest in coparcenary properties is liable to attachment in execution of a personal decree against him, even though in the Punjab the son cannot claim partition in the father's lifetime: AIR 1932 Lah 211.⁴ In this case however owing to dispute between Baba Ujagar Singh and his son Tikka Sant Singh, their rights in various family properties had been defined by an arbitrator and his award had been made a rule of Court in 1928. But there is nothing on the record to indicate that the defendant, Sain Das Chawla, was aware of the award or the decree at the time of the attachment. Secondly, the award is couched in very involved language; it would by no means be clear to a layman, without expert legal advice, as to what exactly the rights of the father and the son in the various properties were.

3. Mahomed Din v. Sant Ram, (1938) 25 A I R Lah 334=180 I C 938=(1938) 40 P L R 158.

4. Nihal Chand v. Mohan Lal, (1932) 19 A I R Lah 211 = 135 I C 197 = 13 Lah 455 = 39 P L R 779.

It cannot therefore be said that the defendant acted on insufficient grounds in attaching the three properties. Indeed, the attachment proceedings appear to have been taken bona fide in the honest belief that the judgment-debtor had an interest in ancestral joint family properties. Therefore even if the onus lay on the defendant — a matter on which the rulings are by no means uniform but which it is not necessary to decide for the purposes of this case — it must be held that he has successfully discharged it. On this finding, the plaintiff is not entitled to recover any damages at all. The lower Court, while rightly disallowing his claim for reimbursement for the expenses incurred by him in the objection proceedings and for compensation for alleged mental worry and loss of reputation, has granted him nominal damages, following 1938 P L R 158.³ That decision proceeded on the principle of the well-known case in (1704) 1 Sm L C 251.⁵ The actual decision in that case, that the malicious refusal of a returning officer to accept the vote of a duly qualified elector was a tort on which an action lay without proof of special damage, has been the subject of much criticism, it having been doubted whether franchise could rightly be regarded as a species of property and its infringement a form of trespass: see Clerk and Lindsell's Law of Torts, pp. 8 and 115 and the cases cited therein. The following observations of Holt C. J. in that case however have become almost classical and have been quoted and followed in numerous cases:

Every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it costs him nothing, no, not so much as a little diachylon, yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground though it does him no damage; for it is an invasion of his property and the other has no right to come there.

These are illustrations of *injuria sine damnum*, in which the mere invasion of his right gives the plaintiff a right of action. The principle is that a man has an absolute right to his property, to the immunity of his person, and to his liberty, and an infringement of this right is actionable per se, it being not an essential part of the cause

5. Ashby v. White, (1704) 1 Sm L C 251.

of action to prove actual damage, (Underhill's Law of Torts, Edn. 13, p. 6). In such cases therefore nominal damages are usually awarded. This principle has been held applicable to cases of trespass on immovable property when there has been unjustifiable intrusion on property in possession of another. Such trespass is actionable per se. But the rule cannot be extended to every case of attachment of property, irrespective of the circumstances.

In the case before us, the facts were peculiar. The attachment of the sarai and the Damdama was withdrawn at the defendant's own request at a very early stage of the proceedings, without any interference whatever with the plaintiff's possession. As regards the "Cosynook," the plaintiff admittedly was not in possession; the right of residence in it had been given by the award and the decree to the judgment-debtor, and though this right of residence was subsequently held not to be liable to attachment and sale in execution of the decree against the judgment-debtor, it was ordered by the High Court that it could be proceeded against by way of "equitable execution." The attachment of "Cosynook" therefore was not a trespass on property in possession of the plaintiff and consequently the principle in (1704) 1 Sm L C 251⁵ cannot apply to it. With regard to the other properties also, the attachment order was at best "a slander of title" for which action could only lie on proof of special damage: see Clerk and Lindsell's Law of Torts, Edn. 9, p. 659. It is therefore clear that this is not a case to which the principle of *injuria sine damnum* applies and hence the plaintiff is not entitled to recover even nominal damages from the defendant. In this view their case is clearly distinguishable on facts from 1938 P L R 158³ relied upon by the lower Court. It may however be stated that the remarks in the last para of the judgment in that case must be taken to be limited to its peculiar facts and not as laying down any rule of universal application. For the reasons given above, I would accept this appeal and setting aside the decree of the Court below dismiss the plaintiff's suit with costs in both Courts. The cross-objections necessarily fail and are dismissed with costs.

N.K./R.K.

Appeal allowed.

A. I. R. 1940 Lahore 24

DALIP SINGH J.

Mohammad Mustafa Khan—Plaintiff
—Appellant.

v.

Mohammad Yar Khan and others —
Defendants — Respondents.

First Appeal No 16 of 1939, Decided on 22nd March 1939, from order of Sub-Judge, First Class, Ferozepore, D/- 30th November 1938.

(a) Arbitration—Award—Award made without intervention of Court, which is partly invalid, can be made rule of Court if invalid portion is separable from valid portion.

An award made without the intervention of the Court, which is partly invalid, can be made a rule of the Court if the invalid portion is separable from the valid portion. If it is so separable, then there is no objection to making the award a rule of the Court. If it is not so separable, then as the Court has no power to remit the award to arbitrators appointed without its intervention or to correct the award itself, the award cannot be made a rule of the Court: 29 Cal 854 (P C), *Rel. on.* [P 25 C 2]

Where by the terms of the reference the arbitrators are empowered to decide what is the property belonging to the parties jointly, the mere fact that they have wrongly decided that certain property is not joint and in addition have gone further and held it to belong to a third party does not make the award invalid, for the portion which assigns title in the property to a third party can easily be separated from the rest of the award, which divides the property after finding what is the joint property of the parties. [P 25 C 2]

(b) Arbitration—Award—Validity of — Joint property partitioned by arbitration without intervention of Court — Mere fact that no specific directions have been given about ventilators and drains existing on property does not render award invalid on ground of being indefinite—It is open to parties to find out for themselves legal inference to be derived from award with respect to these particular easements.

Where joint property belonging to certain persons has been partitioned by an award made without the intervention of the Court, the mere fact that no specific directions having been given by the arbitrators about the ventilators and drains existing in the properties partitioned does not render the award invalid on the ground of difficulty in execution of the award or indefiniteness in the award. It is open to the parties to find out for themselves what would be the legal inference to be derived from the award with respect to these particular easements in the properties. The ordinary rules of law relating to easements in a joint property divided between two owners will apply unless there is something in the award which takes any particular easement out of the general law and assigns a particular right in any party to that easement. [P 25 C 2 ; P 26 C 1]

Shamair Chand — *for Appellant.*Barkat Ali — *for Respondent**(Mohammad Yar Khan).*

Judgment. — In this case, the parties, who are two brothers, disputed about the

partition of certain joint properties. There was also a dispute as to what properties were joint or self-acquired by either party and this dispute as to the extent of the joint property and the mode of partition was referred to two arbitrators who finally gave an award accompanied by a map, according to which they disposed of the property which they held to be joint between the parties in a certain manner. One of the brothers, the plaintiff in the present case, then applied to file this award. Objection was taken by the defendant that the award was invalid for various reasons and the trial Court having framed issues on the objections taken by the defendant, came to the conclusion that the award could not be filed firstly on account of the misconduct of the arbitrators in assigning certain property to one Jhuman Khan or his sons, Jhuman Khan being the real brother-in-law of the parties, that is, married to their sister, neither the sister, nor Jhuman Khan nor his sons having been any party to the reference. The Court considered two authorities, A I R 1936 Lah 794¹ and 30 P L R 1914,² and came to the conclusion that an award without the intervention of the Court must either be rejected or must be filed and the Court could not separate any portion of the award if a portion of the award was found to be invalid.

The second objection upheld by the Court against the award was that the award had left undetermined the question of the drains and ventilators existing on the property in the respective portions into which it had divided that property. The result of this was that there would be difficulty in execution proceedings and the award was indefinite and therefore there was misconduct in law on the part of the arbitrators. For these reasons, the Court refused to file the award. There was also a third objection taken, which the Court held against the objector, that the plan attached to the award was not a correct plan. The Court held however that the colours on the plan enabled the portions assigned to each party to be demarcated at the site and therefore rejected this objection.

The plaintiff has come in appeal and various rulings have been cited before me as to the powers of the Court to file an award which is partly invalid, when such

award is made without the intervention of the Court. The matter is however concluded by the ruling of their Lordships of the Privy Council in 29 Cal 854,³ where their Lordships in the case of an award made without the intervention of the Court held that the award could be made a rule of the Court provided the invalid portion was separable from the valid portion. This Court therefore has only to see whether the invalid portion of the award, if any, is or is not separable from the rest of the award. If it is so separable, then there is no objection to making the award a rule of the Court. If it is not so separable, then as the Court has no power to remit the award to arbitrators appointed without its intervention or to correct the award itself, the award cannot be made a rule of the Court.

Turning now to the first objection, namely the award declaring certain property to belong to Jhuman Khan, it is possible that the arbitrators made a wrong decision on this point. The fact however remains that by the terms of the reference the arbitrators were entitled to decide what was the joint property of the parties and the mere fact that they have wrongly decided that certain property is not joint and in addition have gone further and held it to belong to a third party does not in my opinion make the award invalid, for the portion which assigns title in the property to a third party can easily be separated from the rest of the award which divides the property after finding what is the joint property of the parties. The matter might have been otherwise if there was no dispute between the parties as to the properties to be divided and it was only a question of partitioning the properties already ascertained to belong to the parties. But in the circumstances of this case I see no reason why the award may not be filed expunging the portion which says that the portion marked green in the plan belongs to Jhuman Khan or his descendants. I therefore do not consider that the award should have been rejected on the first objection as done by the trial Court.

As regards the second objection, the matter again appears to me to be perfectly clear. The property has been partitioned and if no specific directions have been given about the ventilators and drains existing on the properties partitioned, it is open to the

1. *Rattan Kaur v. Sobha Ram*, (1936) 23 A I R Lah 794=168 I O 218.

2. *Niadar Mal v. B. Borroah & Co.*, (1914) 1 A I R Lah 422=29 I O 359=30 P L R 1914.

3. *Buta v. Municipal Committee, Lahore*, (1902) 29 Cal 854=29 I A 168=7 O W N 82=87 P R 1902=8 Sar 327 (P O).

parties to find out for themselves what would be the legal inference to be derived from the award with respect to these particular easements in the properties. In other words, the ordinary rules of law pertaining to easements in a joint property divided between two owners will apply unless there is something in the award which takes any particular easement out of the general law and assigns a particular right in any party to that easement. I see no difficulty in execution nor any indefiniteness in the award by reason of this failure to determine what is to happen to existing ventilators and drains. I therefore do not consider that the second ground for rejecting the award is made out. On behalf of the respondent the learned counsel has contended that the third objection should have been held in his favour. But after looking at the plan and seeing what the mistakes are in it according to the evidence of D. W. 1, I do not think there can be any real difficulty in demarcating the portions allotted to the parties on the spot from the map. I therefore agree with the trial Court in holding that this objection to the award is of no value. The result is that I accept the appeal and declare the award to be a rule of the Court. In the circumstances I leave the parties to bear their own costs throughout.

R.M./R.K.

Appeal allowed.

A. I. R. 1940 Lahore 26

TEK CHAND AND ABDUL RASHID JJ.

*Sodhi Narindar Singh —**Plaintiff — Appellant.*

v.

*Sodhi Kuldip Singh and another —**Defendants — Respondents.*

First Appeal No. 450 of 1938, Decided on 7th July 1939, from decree of Sub-Judge, First Class, Gujranwala, D/ 29th August 1938.

(a) Court-fees Act (1870), S. 7 (i) — Suit for declaration that plaintiff is sole owner of G. P. Notes not yet mature is not suit for money — S. 7 (i) does not apply.

A suit to obtain declaration that the plaintiff is the sole and exclusive owner of G. P. Notes which are not mature for payment is not a suit for recovery of money. As such Sec. 7 (i) does not apply to such a suit. [P 26 C 2]

(b) Practice—Adjournment—Period depends on circumstances of individual case — If long period is required costs should be given to other party.

In determining the period of adjournment the Court should consider the circumstances of an

individual case and where they are such as to demand a longer period, a longer adjournment on payment of costs to the other party should be granted. [P 27 C 1]

M. C. Mahajan and D. R. Sawhney —

for Appellant.

Dina Nath Bhasin and Nand Lal Bhalla

— for Respondent 1.

Tek Chand J. — Counsel for respondent 1 raises a preliminary objection that the court-fee paid by the plaintiff-appellant on the plaint as well as the memorandum of appeal is insufficient. They urge that, though the claim is described in the plaint as one for a declaration, the G. P. Notes in question are the exclusive property of the plaintiff and that defendant 1 has no connexion or concern with them, in reality the suit is one for recovery of Rs. 15,000 and as such is governed by S. 7 (i), Court-fees Act according to which, the ad valorem court-fee is payable on that amount. After examining the plaint and hearing counsel we have no doubt that this objection is devoid of all force. Admittedly, the Notes in question are in possession of the plaintiff and it is common ground that they will not mature for payment by the Public Debt Office (defendant 2) for some years. The sole point in dispute between the parties is one of title and the suit is clearly one to obtain a declaration that the plaintiff is the sole and exclusive owner of the Notes. It is difficult to see how a suit of this kind can be called one for recovery of money falling within Sec. 7 (i), Court-fees Act. We hold that the plaint and the memorandum of appeal are properly stamped with a court-fee of Rs. 10 each and we overrule the objection.

On examining the record we find that there has been no proper trial in the lower Court and the learned Subordinate Judge has acted hastily in dismissing the suit. The issues were framed on 11th May 1938 and the case was fixed for evidence of the parties on 23rd August 1938. On that date, it transpired that no witnesses had been summoned by the plaintiff. His counsel stated that the principal witness in the case was the plaintiff himself that he was posted in Burma as Inspector General of Civil Hospitals and could not get leave to be present at Gujranwala on the date fixed, that interrogatories had therefore to be sent to him, but for a proper preparation of these interrogatories certain copies from the record of a decided case were necessary, that copies had been applied for but had not been

supplied. He therefore asked for an adjournment. This prayer however was refused and the case adjourned only for four days for plaintiff's evidence. The plaintiff could not possibly be present in person at Gujranwala on that date, and yet the suit was dismissed. We think that in the peculiar circumstances of the case the learned Judge should have granted a longer adjournment on payment of costs to the respondent, and that his order dismissing the suit forthwith cannot be maintained. The suit must be sent back for re-hearing and decision in accordance with law.

We observe that the issues framed in this case are not sufficiently comprehensive. With the concurrence of both counsel the issues are re-framed as follows: (1) Do the Government Promissory Notes in dispute belong to the plaintiff? (2) Was Mt. Ram Kaur the absolute owner of these notes? (3) If so, did she gift them to Sodhi Indar Singh, father of the defendant? (4) Relief.

We accordingly accept this appeal, set aside the judgment and decree of the lower Court and remand the case for retrial on the issues framed above. The plaintiff-appellant shall pay Rs. 50 as costs to defendant-respondent 1. This amount shall be paid in the lower Court before 8th August 1939. Both counsel have been directed to cause their respective clients to appear before the Senior Subordinate Judge, Gujranwala, on 8th August 1939, when the Judge will fix (1) a date on which the parties shall file the list of witnesses together with the process-fees and diet money, (2) a date for filing the documents which are in their possession or power and on which they rely, and (3) a date for evidence.

N.K./R.K.

Case remanded.

A. I. R. 1940 Lahore 27

DIN MOHAMMAD J.

Sir Ganga Ram Trust Society, Lahore
— Decree-holder — Appellant.

v.

Mehta Sundar Lal and another —
Judgment-debtors — Respondents.

Execution First Appeals Nos. 204 and 338 of 1938, Decided on 13th June 1939, from order of Senior Sub-Judge, Jhang, D/- 2nd May 1938.

(a) Punjab Debtors' Protection Act (2 of 1936), S. 9 — Person governed by custom can avail himself of protection under S. 9 whether he is agriculturist or not — Interpretation of

statutes—Words should be interpreted in their plain grammatical sense.

A Court of law is not justified in going behind the plain wording of the Act and to speculate as to what the legislators intended to enact. A cardinal rule of the interpretation of statutes is that their words should be interpreted in their plain grammatical sense. The opening part of S. 9 does not make it a condition precedent that the person, who seeks its benefit should necessarily be an agriculturist. Any person who can satisfy the Court that he is governed by custom in the matter of succession can avail himself of this protection, be he an agriculturist or not. [P 28 C 2]

(b) Punjab Debtors' Protection Act (2 of 1936), S. 9 — Loan cannot be considered as synonymous with 'debt'—Discussion on ground of judgment-debtor's or decree-holder's profession is out of place.

The word "loan" has not been used in S. 9 and cannot in any circumstances be considered as synonymous with the word "debt" as used therein. The expression "loan" was defined as it had been used in the definition of "money-lender" and the word "money-lender" appears only in Sec. 12 and not in Sec. 9. Any discussion therefore on the ground of the profession of the original judgment-debtor or of the decree-holder is out of place in considering whether he is protected by S. 9. [P 28 C 2]

(c) Punjab Debtors' Protection Act (2 of 1936), S. 9 — Khatri of Jhang district follow custom—Ancestral property in hands of subsequent holder is protected.

Khatri of Jhang district are presumed to follow custom in matter of succession. Hence among them ancestral property in the hands of a subsequent holder is entitled to protection under S. 9. [P 29 C 2]

(d) Res Judicata—Failure of judgment-debtor to raise plea based on S. 9 of Punjab Debtors' Protection Act in application based on personal claim to attached property does not debar him from raising it subsequently.

The question whether an alternative plea ought to have been made a ground of attack depends on the facts of each case. If the alternative plea is inconsistent with the main plea and would thus create confusion it cannot be said that the alternative plea ought to have been raised in the previous suit or application: *A I R 1935 Lah 753 and 20 Cal 79 (P C), Rel. on.* [P 29 C 2]

Application under S. 9, Punjab Debtors' Protection Act, is inconsistent with the plea of the judgment-debtor that property attached is his personal property. Hence, failure of the judgment-debtor to raise the plea under S. 9 in an application based on personal claim, does not debar him from raising the plea subsequently. [P 29 C 2]

(e) Res Judicata — Execution Proceedings — Different objection can be raised at different stage.

In the course of the same execution proceedings a different objection can be raised at a different stage thereof: *A I R 1937 All 446, Rel. on.* [P 30 C 1]

(f) Res Judicata — Question never raised or decided is not res judicata.

A question never raised and never decided before cannot operate as res judicata: *A I R 1933 All 922; A I R 1933 Nag 287 and A I R 1935 Lah 942, Rel. on.* [P 30 C 1]

Vishnu Datta — *for Appellant.*

J. L. Kapur and Qabul Chand Mittal —
for Respondents.

Judgment.—This judgment will dispose of Execution First Appeals Nos. 204 and 338 of 1938. They have arisen in the following circumstances: A mortgage decree was obtained by the late Sir Ganga Ram against the late Mehta Bahadur Chand for a considerable amount of money. Both have died and the decree-holder is represented before me by a Trust Society and the judgment-debtor by his sons. The mortgaged property was sold in due course but only a part of the decretal amount was thus realized. Proceedings under O. 34, R. 6, Civil P. C., then followed and a decree was made against the estate of the deceased judgment-debtor in the hands of his sons. Various abortive attempts were made by Sundar Lal to get rid of the attachment of the property in suit made at the instance of the decree-holder prior to 1st October 1936. In all those applications he claimed some of the property to be his but he never diligently prosecuted any one of them with the result that they were dismissed without any clear adjudication on the merits of the case. In the meantime, Act 2 of 1936 was passed and on 1st October 1936 when his last application, based on his personal claims, was dismissed, he presented the petition now before me claiming that the entire property attached was protected under S. 9 of Act 2 of 1936. Objections on the part of the decree-holder were raised to this application mainly on the ground of *res judicata* and on the ground of the inapplicability of the Act to the judgment-debtor. The Senior Subordinate Judge in a judgment, which to say the least, is most unsatisfactory on other grounds, found both points against the decree-holder; hence this appeal.

I may say at once that the argument employed by the Senior Subordinate Judge in favour of the judgment-debtor in respect of the applicability of Act 2 of 1936, is altogether erroneous. Having held that he was not governed by custom, he could not grant him protection under the Act merely on the ground that he was an agriculturist. As I interpret S. 9, the question whether a person is an agriculturist or not, does not arise under the terms of the Section, and the discussion on that part of the case therefore is altogether irrelevant. The material portion of that Section reads as follows :

When custom is the rule of decision in regard to succession to immovable property, then notwithstanding any custom to the contrary ancestral immovable property in the hands of a subsequent holder shall not be liable in the execution of a decree or order of a Court relating to a debt incurred by any of his predecessors-in-interest.

It is obvious that the opening part of the Section does not make it a condition precedent that the person, who seeks its benefit, should necessarily be an agriculturist. Any person, who can satisfy the Court that he is governed by custom in the matter of succession, can avail himself of this protection, be he an agriculturist or not. It may be that the intention of the framers of the Act was to protect agriculturists alone but a Court of law is not justified in going behind the plain wording of the Act and to speculate as to what the legislators intended to enact. A cardinal rule of the interpretation of statutes is that their words should be interpreted in their plain grammatical sense. The Section always speaks for itself unless it can be reasonably contended that by implication it means something else. Counsel for the decree-holder referred to the definition of "loan" in order to support his contention that the present judgment-debtor was not contemplated by this Section; but in my view that too is altogether irrelevant. The word "loan" has not been used in the Section and cannot in any circumstances be considered as synonymous with the word "debt," as used therein. The expression "loan" was defined as it had been used in the definition of "money-lender" and the word "money-lender" appears only in S. 12 and not in S. 9. The fact that "loan" may not carry the same meaning as "debt"—or, in other words, the fact that these two terms may be different—becomes clear if we refer to the Relief of Indebtedness Act which defines these two terms separately. Any discussion therefore on the ground of the profession of the original judgment-debtor or of the decree-holder is out of place.

The principal question therefore to determine in connexion with the applicability of this Section is whether it has been established that the original judgment-debtor followed custom in the matter of succession. In relation to this aspect of the case, reliance is placed on three Manuals of Customary Law relating to the Jhang District, prepared in 1880, 1904-05 and 1924-25. It is significant that at the time of the preparation of the first *riwaj-i-am* one of the persons consulted was Mehta Devi

Dyal who was admittedly a paternal uncle of the original judgment-debtor; and that at the time of the preparation of the second manual in 1904-05 the person consulted on behalf of this family was Mehta Mut-saddi Mal, the father of the judgment-debtor. The documents placed on the record by the decree-holder himself relating to the year 1880 unmistakably show that Khatris had adopted the custom of Syeds in the matter of succession and that where they did not adopt that custom, they had clearly stated that they were governed by their personal law like the Brahmins. Similar replies were given in 1904-05 and 1924-25. This being so, it cannot be contended that the family of the judgment-debtor could not possibly be governed by custom. In 10 Lah 86¹ their Lordships of the Privy Council applied rules of Customary law to Aroras residing in the town of Peshawar. In 57 All 494² at p. 508, their Lordships of the Privy Council, referring to a previous judgment of their own reported in 49 Cal 120,³ observed that even non-agriculturists could be governed by custom. That several Hindu tribes of the Jhang District have been held by the Chief Court and this Court to be governed by Customary law, is apparent from authorities like 93 P R 1892⁴ relating to Khatris, 43 P R 1899⁵ relating to Trikha Brahmins and 9 Lah 110⁶ relating to Aroras. The onus therefore clearly shifted on to the other side to disprove that the family of the judgment-debtor was governed by Customary law in the matter of succession. The decree-holder has signally failed to prove that the family of the judgment-debtor is governed by Hindu law and the presumption therefore arising in favour of the judgment-debtor on the basis of the entries in the Manuals of Customary law in his favour stands un rebutted. Besides, he has led positive evidence to show that he is governed by Customary law and his witnesses have referred to certain instances too which support his contention. In these circumstances, it cannot but be held that

the rule of decision in the matter of succession in the case of this family is custom and not Hindu law. This being so, as I have already stated, the fact that the original judgment-debtor was a lawyer or had indulged in speculative business or had acquired other property from professional income, is immaterial. I hold therefore that the judgment-debtor can avail himself of the protection afforded by Act 2 of 1936. The property now in dispute being admittedly ancestral cannot therefore be attached in execution of any decree against the original judgment-debtor.

It was strenuously contended, however, that even if this protection was available to the judgment-debtor, he could not take advantage of it inasmuch as he had failed to raise this point in the petitions submitted by him prior to 1st October 1936. Here also I am not inclined to agree with the decree-holder. This plea would, in my view, have been inconsistent with the personal claims that he had been putting forward before and would have created confusion in the record. The question whether in such circumstances an alternative plea ought to be raised or not has been discussed at length in a case reported in A I R 1935 Lah 753,⁷ to which I was a party and I am not convinced that this case stands on a different footing. My attention has been drawn to various authorities of this Court and of the other Courts in India, in which it has been stated that alternative pleas ought to be raised on the first possible occasion; but with all respect I consider that each case depends on its own circumstances. As remarked by their Lordships of the Privy Council in 20 Cal 79,⁸

that it 'might' have been made a ground of attack is clear. That it 'ought' to have been, appears to their Lordships, to depend upon the particular facts of each case. Where matters are so dissimilar that their union might lead to confusion, the construction of the word 'ought' would become important.

As I look at the question, it does not lie in the mouth of a person who claims the property as his own to contend at the same time that it is not his and to waste his own time as well as the time of the Court in enunciating as to what would happen if the property was not his. The principle laid

7. Abdul Wahab v. Mustafa Khan, (1935) 22 A I R Lah 753=156 I O 543.

8. Kameswar Pershad v. Raj Kumari Rattan Koer, (1893) 20 Cal 79=19 I A 234=6 Bar 241 (P C).

1. Vaishnu Ditti v. Rameshri, (1928) 15 A I R P C 294=113 I O 1=55 I A 407=10 Lah 86 (P O).

2. Basant Singh v. Brij Raj Saran Singh, (1935) 22 A I R P C 132=156 I O 864=62 I A 180=57 All 494 (P C).

3. Ram Kishore v. Jai Narayan, (1922) 9 A I R P C 2=64 I O 782=48 I A 405=49 Cal 120=17 N L R 163 (P C).

4. Ganga Ram v. Asa Nand, (1892) 93 P R 1892.

5. Mohan Lal v. Devi Das, (1899) 43 P R 1899.

6. Jugal Das v. Jasodan Bai, (1928) 15 A I R Lah 212=108 I O 170=9 Lah 110.

down in 15 Lah 869,⁹ A I R 1937 Lah 772,¹⁰ A I R 1936 Lah 696,¹¹ 8 Cal 51,¹² A I R 1921 P C 23,¹³ A I R 1933 Lah 697,¹⁴ 15 Lah 208¹⁵ and 14 Lah 409,¹⁶ so far as it goes, is, if I may say so with all respect, correct but in my view it does not apply to the facts of the present case. Further, in the course of the same execution proceedings a different objection can be raised at a different stage thereof: see A I R 1937 All 446.¹⁷ It is also obvious that a question never raised and never decided before cannot operate as res judicata: see A I R 1933 All 922,¹⁸ A I R 1933 Nag 287¹⁹ and A I R 1935 Lah 942.²⁰

There is also another aspect of looking at the case. Prior to the passing of Act 2 of 1936, several judgments of this Court, A I R 1930 Lah 1058,²¹ among others, had ruled that a male proprietor of the Jhang District could not avail himself of the principle enunciated in 4 P R 1913.²² The judgment-debtor therefore was excusable if he did not claim the benefit of that decision in the previous stages of the execution proceedings. The passing of the Act however changed the position and on this ground too he would not be debarred from taking advantage of the Act when it came to his knowledge. I am therefore of the view that the judgment-debtor was competent to raise

this objection at the stage at which it was raised and that he was not barred by the principle of res judicata. I accordingly accept Appeal No. 338 of 1938 and dismiss Appeal No. 204 of 1938 though on different grounds. In the result the property now under attachment will be released. There will however be no order as to costs.

D.S./R.K.

*Order accordingly.***A. I. R. 1940 Lahore 30**

TEK CHAND AND DALIP SINGH JJ.

Joint Hindu Family Pilada Ram and others — Appellants.

v.

Joint Hindu Family Tulsi Das Asa Nand and others — Respondents.

Letters Patent Appeal No. 111 of 1938, Decided on 21st December 1938, from judgment of Ram Lal J., in F. A. No. 20 of 1938, D/- 2nd May 1938.

(a) Civil P. C. (1908), O. 21, Rr. 54, 24 and 65 — Attachment — Execution of—Nazir can delegate execution of process to his subordinates.

A warrant of attachment in printed form provided by rules and addressed to the bailiff was made over to the Naib Nazir and he endorsed it to a process-server who executed the attachment which was objected to by judgment-debtor on the ground that process-server had no authority to effect the attachment it being without the order of the Court :

Held that ministerial acts could always be delegated where they do not require the exercise of any discretion or judgment and as such the Nazir could always delegate the execution of process to the subordinates and that the terms of O. 21, R. 54 had been complied with and the attachment was legal : 6 All 385 ; 22 Cal 596 and (1851) 6 Ex 150, Rel. on. [P 31 C 2]

(b) Civil P. C. (1908), O. 21, R. 65, Rules under — Lahore High Court Rules — Vol. 1, Chap. 12-L, R. 20 — R. 20 does not refer to attachment.

Rule contained in Vol. 1, Chap. 12-L, R. 20 (v) refers only to conduct of sales and has no bearing on the question of attachment. [P 31 C 2]

M. L. Puri — *for Appellants.*Indar Dev — *for Respondents.*

Dalip Singh J.—On 23rd February 1937 a warrant of attachment of certain houses in Kallur Kot, Tehsil Bhakkar, was issued by the learned Senior Subordinate Judge, Mianwali, in execution of a decree for some eight thousand odd rupees. It was addressed to the "bailiff Bhakkar" as in the printed Form No. 100 in Rules and Orders Vol. VI, Part A-1, p. 57. The warrant was sent to the Subordinate Judge at Bhakkar and it is alleged in the trial Court's judgment that it was made over to the Naib Nazir who endorsed it to Gonda Ram, pro-

9. Prabhu Dayal v. Dewat Ram, (1935) 22 A I R Lah 200 = 155 I C 286 = 15 Lah 869 = 35 P L R 429.
10. Firm Nanak Chand Ramji Das v. Ibrahim, (1937) 24 A I R Lah 772 = 174 I C 965 = 40 P L R 38.
11. Punjab National Bank Ltd. v. Shamsheer Singh, (1936) 23 A I R Lah 696 = 166 I C 391 = 38 P L R 936.
12. Mungul Pershad Dichit v. Grija Kant Lahiri, (1882) 8 Cal 51 = 8 I A 123 = 11 C L R 118 = 4 Sar 248 (P C).
13. Raja of Ramnad v. Velusami Tevar, (1921) 8 A I R P C 23 = 59 I C 880 = 48 I A 45 (P C).
14. Madan Gopal v. Jaswant Rai, (1933) 20 A I R Lah 697 = 144 I C 488 = 34 P L R 489.
15. Kidar Nath v. Taj Muhammad Khan, (1933) 20 A I R Lah 3 = 144 I C 259 = 15 Lah 208 = 34 P L R 685.
16. Ved Kaur v. Balkishen Das, (1933) 20 A I R Lah 594 = 141 I C 577 = 14 Lah 409 = 34 P L R 528.
17. Aley Rasul v. Balkishan, (1937) 24 A I R All 446 = 169 I C 997 = 1937 A L J 482.
18. Radhe Shyam v. Shyam Lal, (1933) 20 A I R All 922 = 147 I C 743.
19. Gokulchand Ram Gopal v. Laxminarayan, (1933) 20 A I R Nag 287 = 150 I C 685.
20. Mohammad Din v. Hirda Ram, (1935) 22 A I R Lah 942 = 160 I C 749.
21. Daim Shah v. Wir Bhan, (1930) 17 A I R Lah 1058 = 128 I C 818 = 31 P L R 655.
22. Jagdip Singh v. Narain Singh, (1913) 4 P R 1913 = 15 I C 866 = 173 P L R 1912.

cess-server, on 1st April 1937. There is nothing on the record to show by whom the endorsement on the warrant in favour of Gonda Ram, process-server, was made. It seems to have been assumed throughout the case that it was the Naib Nazir who made this endorsement. Attachment in accordance with the warrant was effected by the process-server on 14th April 1937. His report and affidavit duly attached to the warrant are on the record. On 14th May 1937, one Ganda Ram objected that the property attached had been mortgaged to him on 16th April 1937. On 15th May 1937, one Ghanu Ram objected that a portion of property attached had been mortgaged to him on 15th April 1937. On 30th August 1937 the judgment-debtor objected that the attachment was illegal as the process-server had no authority to effect attachment in a decree of property of so high a value and therefore prayed that it be held ineffectual.

The lower Court upheld this objection on 22nd November 1937, the only issue framed being: "Is the attachment in question illegal?" The learned Judge appears to have held that under O. 21, R. 65, Civil P. C., a rule has been framed in Vol. I, Chap. 12-L, Rule 20 (v), wherein it is laid down in the High Court Rules and Orders that the conduct of sale of property worth more than Rs. 100 should not be entrusted to a process-server. It seems that the District Judge, Hissar, had asked the High Court about instructions regarding attachment agency and the High Court office had referred him to the above rule in the Rules and Orders and stated that the principles applied to attachment. The matter came in appeal before a Single Bench of this Court and it was held that the rules and orders had not the force of law but that the provisions of the Civil Procedure Code as contained in O. 21, R. 54 had not been complied with, and that, further, the order of the Court to attach property was directed to the bailiff, and the bailiff or Naib Nazir was not entitled to delegate this authority to the process-server without an order from the Court and that therefore the attachment was illegal. The appeal was therefore dismissed. The Letters Patent appeal was admitted and has been heard by us.

It may be stated at once that the learned counsel for the respondent was unable to show us in what way the terms of O. 21, R. 54 had not been complied with. All that that Rule requires is that the property should be attached by proclamation by beat

of drum or other customary mode and that the prohibitory order should be served on the judgment-debtor and a copy of the order should be pasted on or near the property attached and also at the court-house and, if the property is land, at the office of the Collector. It is also clear that the rule contained in Vol. 1, Chap. 12-L, R. 20 (v), does not refer to attachment but only to the conduct of sales and does not appear to me to have any bearing on the question before us. In Vol. 1, Chap. 12-H, R. 3, page 19 of the Rules and Orders, it is stated that the warrant should go to the Nazir who will depute a process-server to execute it. This rule and order appears to be at variance therefore with the printed form No. 100 in Vol. 6, Part A-1, p. 57, referred to above. The Civil Procedure Code merely lays down in O. 21, R. 24 (2), that the process should be delivered "to the proper officer to be executed." The proper officer, according to the rule in Vol. 1, Chap. 12-H, R. 3, p. 19, would be the Nazir, but, according to the printed form, would appear to be the bailiff.

It was contended by the learned counsel for the appellant that even a non-official could effect a valid attachment provided he complied with the provisions of O. 21, R. 54. This contention appears to me to be without any foundation. It is obvious that it would be strange indeed if property could be attached by outsiders, who had no authority to effect any attachment at all, without the person affected being able to question that authority. Therefore I see no force in this contention. But on the question of the power to delegate, I cannot agree with the learned Judge in the Single Bench because it seems to me laid down in various authorities that ministerial acts can always be delegated where such acts do not require the exercise of any discretion or judgment: *see* (1851) 6 Ex 150,¹ and in this country 6 All 385² and 22 Cal 596,³ where it was held that the Nazir could always delegate the execution of the process to his subordinates.

In this case however, the further question arises, namely that the Court following the printed form had directed the bailiff to execute the attachment and it seems to have been assumed that the Naib Nazir received the order and delegated it to a

1. *Walsh v. Southworth*, (1851) 6 Ex 150=2 L M & P 91=20 L J M O 165.

2. *Abdul Karim v. J. Bullen*, (1884) 6 All 385=1884 A W N 183.

3. *Dharam Chand Lal v. Queen-Empress*, (1895) 22 Cal 596.

process-server other than the bailiff. The reason for the assumption appears to be that the usual practice in the Courts throughout the province is that all warrants of attachment are handed over to the Civil Nazir who then deposes any one of his subordinate staff, whether Naib Nazir, or Madid Nazir, or execution bailiff, or process-server, as the case may be, to execute the warrant. The question therefore arises whether by the practice of the Court the word 'bailiff' in the printed form and order has been interpreted to mean the Nazir or the Naib Nazir, as the case may be. I would therefore frame two issues and remand them to the Court below for the parties to lead evidence, if they wish to do so, and decision: (1) Who made the endorsement on this particular warrant to the process-server Gonda Ram? (2) Whether it is the practice in the District of Mianwali and Tehsil Bhakkar that warrants of attachment always go to the Nazir or Naib Nazir, as the case may be, even if addressed, according to the printed form, to the bailiff; and whether the Nazir or Naib Nazir, as the case may be, then deposes one of his subordinates to execute the warrants? The report will be sent back within two months with the opinion of the learned trial Court on the same. Remand is under O. 41, R. 25, Civil P. C. Counsel have been directed to inform parties to appear before the Senior Subordinate Judge, Mianwali, on 16th January 1939 and obtain a date.

Tek Chand J.—I agree.

S.G./R.K.

Case remanded.

A. I. R. 1940 Lahore 32

SKEMP J.

Chanda Singh v. Emperor.

Criminal Revn. Petn. No. 406 of 1939,
Decided on 28th September 1939.

(a) Criminal P. C. (1898), S. 107—Principal and surety executing bond for keeping peace—Surety is liable only when principal bond not realizable.

Where the accused and his surety have executed bonds for keeping the peace, in the first place it is the principal bond which should be forfeited and it is only where that cannot be realized that the surety is liable to pay. The same principle applies to a fractional sum out of the bond: *A I R 1924 Lah 262, Foll.* [P 32 C 2]

(b) Criminal P. C. (1898), S. 345 (6)—Composition of offence operates as acquittal—Forfeiture of bond executed for keeping the peace held illegal in the absence of other evidence.

Composition of offence under S. 345 (6) has the effect of an acquittal of the accused and if there be no other evidence on record to show that the accused committed a breach of the peace, the order

forfeiting part of the bond not being supported by any evidence is illegal. [P 32 C 2]

Dwarka Das Mehra — *for Petitioner.*

Order.—One Chanda Singh executed a security bond for Rs. 1000 under S. 107, Criminal P. C., to keep the peace for one year; and one Mahna Singh executed a surety bond to the same effect on behalf of Chanda Singh. During the year Chanda Singh was convicted under S. 324, I. P. C., and fined Rs. 50. The case was one of two cross-cases and on the recommendation of the Sessions Judge, a Judge of this Court accepted applications for compromise with the effect that the accused were acquitted under S. 345, Criminal P. C. A Magistrate subsequently ordered that Rs. 100 out of Chanda Singh's bond and Rs. 100 out of Mahna Singh's surety bond should be forfeited; and these orders were upheld by the District Magistrate. Chanda Singh and Mahna Singh have come here in revision through Mr. Dwarka Das Mehra.

The second bond cannot be forfeited. *A I R 1924 Lah 262¹* is a direct authority on this point, with which I agree. In the first place it is the principal bond which was to be forfeited; only if that cannot be realized is the surety liable to pay. The same principle would apply to a fractional sum out of the bond. As to the order forfeiting Rs. 100 out of Chanda Singh's bond, counsel's argument is that by virtue of S. 345, sub-s. (6),

the composition of an offence under this Section shall have the effect of an acquittal of the accused with whom the offence has been compounded.

He argued that as there was an acquittal and there is no other evidence on the record to show that Chanda Singh committed a breach of the peace, the orders forfeiting part of the bond are not supported by any evidence. I am constrained to agree with this argument and the orders of the Courts below must be set aside. It is nevertheless open to the Magistrate, if he thinks it worthwhile at this stage, to take independent evidence proving that Chanda Singh was guilty of the breach of the peace. Counsel states that there was a fight between his brother and another man in which he went to the aid of his brother. I have not been into the facts and it is for the Magistrate to consider whether it is worth taking any further action now.

G.N./R.K.

Order set aside.

1. *Emperor v. Abdul Aziz*, (1924) 11 A I R Lah 262=81 I C 955=25 Cr L J 1131=4 Lah 462.

A. I. R. 1940 Lahore 33**SALE J.**

Tara Mani and others — Defendants —
Appellants.

v.

Mt. Kishen Devi, Plaintiff and others,
Defendants — Respondents.

Second Appeal No. 230 of 1939, Decided on 25th June 1939, from decree of Dist. Judge, Hoshiarpur, and Kangra, D/- 25th October 1938.

Custom (Punjab)—Succession—Sister—Brahmans of Palampur, Kangra District—Sister is heir in absence of collaterals.

Brahmans of Palampur tahsil in Kangra District are governed by custom and not by Hindulaw and under Customary law of Palampur sister is an heir in the absence of collaterals and has locus standi to sue as next reversioner: *A I R 1931 Lah 433* and *A I R 1936 Lah 660, Disting.* [P 33 C 1; P 34 C 1]

K. C. Bedi — for Appellants.

Brij Lal — for Respondents.

Judgment.—This is a second appeal in a case in which the plaintiff, as the sister of the last male owner, is suing for a declaration that the sale made by his widow is without consideration and necessity and not binding on her as the next reversioner. The facts in brief are that Naqbidhu, who was a Brahman of the Palampur Tehsil of the Kangra District, died either in August or September 1929, leaving a widow, Mt. Gulabi, as a life-tenant of his property. On 22nd December 1932, Mt. Gulabi sold the land in suit to defendants 3 to 6 by a registered sale deed for Rs. 3000. This alienation is impugned by Mt. Kishan Devi, sister of Naqbidhu, claiming to be his next reversionary heir. It is admitted in appeal before me that Mt. Kishan Devi is the sister of Naqbidhu and that the parties being Brahmans of the Palampur Tehsil are governed by custom and not by Hindu law. Two questions are agitated in this appeal: (i) whether a sister is an heir under the Customary law of the Palampur Tehsil and (ii) whether the lower Appellate Court is right in allowing only Rs. 2166 out of Rs. 3000 as the amount for which consideration and necessity is proved.

As regards the first point the decision turns on the answers to questions 54 and 59 of the *riwaj-i-am* of the Kangra District compiled by Mr. Middleton as Settlement Officer in connexion with the settlement of 1914-18. The trial Court considered that the case is governed by answer to question 54, which it held to be exhaustive, and therefore to override the answer to ques-

tion 59. The point about the answer to question 54 is that in this answer the names of various heirs who can succeed in the absence of male lineal descendants are cited, but a sister is not included in this list. Following therefore a Division Bench ruling of this Court, *A I R 1931 Lah 433*,¹ the trial Court held that a sister is not an heir and that therefore the plaintiff had no locus standi to sue in this case. The lower Appellate Court, in spite of a patent misreading of the answer to question 59, has held that by reason of an instance quoted in the answer to question 59 relating to Brahmans of Palampur Tehsil, a sister is recognized as an heir in the absence of collaterals and has found therefore that the plaintiff has a locus standi to sue. The misconception of the lower Appellate Court in regard to the answer to question 59, appears to be due to the fact that the learned District Judge, instead of consulting Mr. Middleton's volume in original, appears to have relied on an alleged certified copy of a vernacular translation (Ex. P-14). This alleged certified copy has only to be compared with the original to show that it is wrong. The so-called certified copy while correctly propounding question 59 recites the answer as follows:

In the presence of collaterals, sisters and sister's sons do not succeed but in case none of the above conditions exists, sister's son would succeed.

In other words it does not mention any recognition of sisters as heirs. Actually the correct answer to question 59 as given in Mr. Middleton's Customary Law of the Kangra District reads as follows:

Where there are no sons, widows, mother's collaterals, daughters, *ala maliks* or others having a preferential right to succeed, sisters are allowed to succeed. Such cases are not many, and there is no recognized custom on that account.

Then, in regard to Tehsil Palampur an instance is quoted of a sister succeeding in the case of a Brahman who died without collaterals. Mr. Bedi for the appellant says that he has been misled by depending on an apparently incorrect copy, but urges that in view of the statement in the correct answer to question 59, that "there is no recognized custom," the onus was on the plaintiff to prove the custom and he suggests that the case be remanded on this ground. No remand however is necessary. A specific issue was framed on this question, whether the plaintiff has a locus standi to sue, and this issue has been inter-

1. *Sohnu v. Bahgu*, (1931) 18 *A I R Lah* 433=135 *I C* 54.

preted by both Courts below as involving a decision of the question whether the plaintiff as a sister of the last male owner, is a recognized heir. Both parties therefore knew what evidence they had to bring.

In view of the answer to question 59 that sisters are recognized as heirs and the example given in regard to a Brahman of Tehsil Palampur, which exactly fits the present case, I am of opinion that there is no ground for upsetting the decision of the lower Appellate Court on this point. Mr. Bedi lays stress, as did the trial Court, on a Division Bench ruling cited in A I R 1931 Lah 433;¹ but this ruling is not in point: it relates to a case of Ghirths of the Kangra Tehsil, whereas in the present case we are dealing with Brahmans of Palampur Tehsil. Nor did it involve the specific question of a sister's succession. It is true that it was held in that particular case that the answer to question 54 is exhaustive of the heirs entitled to succeed under the Customary law of the Kangra District; but not only were the learned Judges dealing with a different caste in a different Tehsil, but the question of the right of a sister to succeed, which is specifically dealt with in the answer to question 59, was not before the Bench. Similarly, in A I R 1936 Lah 660² a decision by a single Judge based on A I R 1931 Lah 433¹ it is apparent that no reference was made to question 59; and the right of sisters to succeed as mentioned in the answer to that question. In the absence therefore of any binding decision of this Court to the contrary, I must hold that the learned District Judge is right in finding that the sister in this case is an heir of the last male owner, and has therefore a locus standi to sue. Turning now to the question of consideration, there are four items in the deed as recited in the judgment of the lower Appellate Court. There is no dispute as to the first item amounting to Rs. 1900. As regards the second item of Rs. 300, which has not been allowed either by the trial or the Appellate Court, counsel for the appellants concedes that the decision is based on a finding of fact and is therefore final. The item mainly disputed in the appeal before me was the fourth item of Rs. 700 which is recited as having been received in cash before the Sub-Registrar for expenses connected with the Chobarkh ceremony and for payment to creditors. The trial Court allowed this item in full,

whereas the District Judge has disallowed Rs. 400 on account of the Chobarkh ceremony, and allowed only Rs. 200 out of Rs. 300 claimed for payment to creditors.

Mr. Bedi has urged that the lower Appellate Court is in error in holding that Rs. 400 is not proved to have been paid on account of the Chobarkh ceremony. Admittedly there is no documentary evidence as to the details of this expenditure. The learned District Judge has considered the oral evidence produced, as wholly unsatisfactory. Counsel for the appellants urges that the amount is included in the item of cash payment before the Sub-Registrar and should be allowed on this ground. It is to be noted however that the document does not specifically say that Rs. 400 was paid, or would be payable, on account of the Chobarkh ceremony. At the time this document was executed, the Chobarkh ceremony had not taken place, and could not take place for at least another nine months, since the fourth anniversary of the death of Naqbidhu would not occur until August or September 1933, whereas this document was executed on 22nd December 1932. Further, it is in evidence that when this ceremony was performed in 1933, it was performed by Mt. Rumalo, the mother of Naqbidhu, and not by the alienor, Mt. Gulabi. Mt. Gulabi, the alienor, did not come into the witness-box to support this item; and in the circumstances there is no ground for upsetting the decision of the lower Appellate Court disallowing the item of Rs. 400 on this account for want of proof. As regards the payment to creditors the lower Appellate Court has allowed Rs. 200 out of Rs. 300 claimed. The District Judge disallowed the balance of Rs. 100 on the ground that there is no proof of payment of this item. Admittedly there is no such proof, and the decision of the District Judge is therefore correct on this point. As regards the item of Rs. 100 claimed for registration expenses, the District Judge has allowed Rs. 66 only as the pro rata cost of registration for a deed, in which Rs. 2100 only has been proved to be for necessity, out of a total of Rs. 3000 recited. I see no reason for interfering in the District Judge's discretion in regard to this item. In the result I find that there is no ground for disturbing the decision of the lower Appellate Court on any ground. The result is that the appeal fails and is dismissed with costs.

N.K./R.K.

Appeal dismissed.

2. Bundo v. Nihato, (1936) 23 A I R Lah 660 = 165 I C 78=38 P L R 851.

A. I. R. 1940 Lahore 35

BHIDE J.

Gopal Dass — Judgment-debtor —
Appellant.

v.

Municipal Committee, Hafizabad, Decree-holder and another — Judgment-debtor — Respondents.

Execution Second Appeal No. 268 of 1939, Decided on 3rd October 1939.

(a) Civil P. C. (1908), Ss. 48, 100 — Second appeal lies from finding on question whether application is 'fresh' within meaning of S. 48.

The question whether an application in question is a fresh application within the language of S. 48 is a mixed question of fact and law and a second appeal is competent. [P 35 C 2]

(b) Civil P. C. (1908), S. 48—Previous application for execution dismissed for default — Second application, though for same relief, held not to be for revival of prior application.

Where a previous application for execution has been dismissed for default on the part of the decree-holder, a subsequent application cannot be said to be for revival of the old application merely because the relief prayed for is the same : 21 All 155 and 6 P L R 1910, *Disting*; A I R 1934 All 481 and A I R 1927 All 16 (F B), *Expl.* [P 36 C 1]

Shambu Lal Puri — for Appellant.

Dewan Mehr Chand — for Respondent (Decree-holder).

Judgment. — This is an appeal arising out of execution proceedings. A decree was obtained by the respondent Municipal Committee in 1925 and applications for execution were made from time to time. The last but one application was made for the arrest of the judgment-debtors on 19th February 1936. The judgment-debtors raised certain objections which were dismissed and thereafter on 5th April 1937 warrants of arrest were issued. The decree-holder's agent took the warrants for executing them at Hafizabad, but failed to present them in the Sub-Judge's Court or take the assistance of any bailiff for their execution, with the result that the warrants were returned unserved. The Court held that the decree-holder had been negligent and dismissed the application on 27th April 1937. A fresh application was filed on the same date and warrants were re-issued; but an objection was then raised that the application for execution was barred under S. 48, Civil P. C. This objection was upheld by the executing Court and the application was dismissed. But on appeal the learned District Judge has held that the application dated 27th April 1937 was not really a fresh application but ancillary to and for the continuance of the previous

application and therefore was not barred under S. 48, Civil P. C. Against this decision the present appeal has been filed.

The learned counsel for the respondent has urged that the finding of the learned District Judge that the application dated 27th April 1937 was not a fresh application was a finding of fact and hence could not be challenged in second appeal. With all deference to the contrary view expressed in some of the rulings, I am of opinion that the question whether the application in question is a fresh application within the language of S. 48, Civil P. C., will at least be a mixed question of fact and law and a second appeal will be competent; secondly, the finding of the learned District Judge seems to be clearly opposed to the language of the order of dismissal as also to that of the application dated 27th April 1937. So far as the language of the application dated 27th April 1937 is concerned, there can be no doubt that it does not purport to be ancillary to or for the continuation of the previous application. The previous application had been dismissed—rightly or wrongly—for the default of the decree-holder in not getting the warrants served. If the decree-holder was dissatisfied with this order, it was open to him to appeal from it. He did not do so, but filed a fresh application for execution. The learned District Judge has held that the previous application being an old one was dismissed for statistical or administrative reasons. But this finding is opposed to the contents of the order of the learned Sub-Judge. The learned Sub-Judge, as stated above, held that the decree-holder had been negligent and dismissed the application for that reason. It is true that he also remarked that the application was an old one. But this remark may have been made only to support the learned Judge's view that the decree-holder had not been diligent. The learned Judge was himself the best person to say whether the previous application was dismissed merely for statistical or administrative reasons or otherwise and it is noteworthy that it was the same Judge who held that the application dated 27th April 1937 was a fresh application within the meaning of S. 48, Civil P. C., and was heard under that Section.

The learned District Judge has referred to 21 All 155,¹ 6 P L R 1910² and A I R

1. *Jitmal v. Jwala Prasad*, (1899) 21 All 155 = 1899 A W N 7.

2. *Mt. Prabh Devi v. Diwan Chand*, (1910) 6 P L R 1910 = 6 I C 490.

1934 All 481³ in support of his decision. The first two rulings are clearly distinguishable; for, in those cases, the previous applications had not been dismissed for any negligence on the part of the decree-holder. All that had happened was that warrants for the arrest of the judgment-debtor had been returned unserved. It was held that the mere fact that the warrants came back unserved was not sufficient evidence of the proceedings for execution being exhausted and thereby determined. In A I R 1934 All 481,³ no order had been passed by the Court with regard to one of the prayers in the previous application and hence the second application was held to be a continuation of the previous application. In 49 All 276⁴ which was cited on behalf of the respondent, it was only held that when the execution of a decree had been suspended through no act or default of the decree-holder, he had a right to ask the Court to revive and carry through the execution proceedings which had been suspended. No case has been cited before me in which a previous application had been dismissed for default on the part of the decree-holder as in this case and yet a subsequent application was held to be for revival of the old application, merely because the relief prayed for was the same. I am therefore of opinion that the learned District Judge was not justified in treating the application dated 27th April 1937 as one for continuation of the previous application in the circumstances of this case. I accordingly accept this appeal and restore the executing Court's order, dismissing that application as time-barred. In view of all the circumstances, I leave the parties to bear their costs throughout.

G.N./R.K.

Appeal accepted.

3. Shiva Shankar Das v. Yusuf Hasan, (1934) 21 A I R All 481=148 I C 1017 = 56 All 791 = 1934 A L J 202 (F B).

4. Chhattar Singh v. Kamal Singh, (1927) 14 A I R All 16=100 I C 692 = 49 All 276 = 25 A L J 201 (F B).

A. I. R. 1940 Lahore 36

DIN MOHAMMAD J.

Duni Chand — Petitioner

v.

Emperor.

Criminal Revn. No. 256 of 1939, Decided on 3rd April 1939; case reported by Addl. Sessions Judge, Amritsar, D/- 10th February 1939.

Punjab Excise Act (1 of 1914), S. 61 (1) (a)
—Unlawful possession of liquor—Several per-

sons cannot be tried of being collectively responsible for the possession of liquor under Sec. 61 (1) (a) unless each individual's possession of any liquor is proved.

Seven persons in a restaurant were found sitting round two tables lying side by side, on four chairs and a cot lying near the table. They had their hands or elbows on the table on which there were four tumblers containing small quantities of liquor and a bottle containing liquor of the same variety. The Magistrate convicted the accused along with his six companions on the ground of their being collectively responsible for the possession of liquor on the table :

Held that the Magistrate could not enforce collective responsibility without trying to find out whether the accused was in individual possession of any tumbler containing any liquor. [P 37 C 1]

Bhagat Ram Bakhshi — *for Petitioner.*Mohammad Monir, Asst. Advocate-General — *for the Crown.*

Facts.—Seven accused, Sohan Lal, Ram Chand, Duni Chand, Dhanpat Ram, Gian Chand, Jagan Nath and Hari Shah have been prosecuted for having been found in possession of liquor inside Royal Hotel, Amritsar, which is also used as a restaurant, the possession of liquor by anybody in a restaurant having been banned by Notification, No. 3718-Ex, dated 30th August 1937, which came into force on 1st April 1938. The premises of the Royal Hotel, Amritsar, were raided on the evening of 19th May 1938. After making other arrests in the hotel when the party reached room No. 4 and opened the door which was shut, they saw the seven accused sitting round two tables lying side by side, on four chairs and a cot lying near the table. The seven accused had their hands or elbows on the table, and there were some dishes containing rice, meat, curd, etc., lying on the tables. Four tumblers Exs. P-1 to P-4 containing small quantities of liquor in them were found lying on the table, as also some empty tumblers. A bottle Ex. P-5 containing eight ounces of liquor of the same variety was also found lying on the table. The liquor was taken into possession at the spot. Chaudhri Umar Din, Joginder Nath, Chaudhri Nawab Din and Chuni Lal, Head Constable, the four witnesses examined for the prosecution, were members of the raiding party, and witnessed the recovery of the liquor lying in front of seven accused.

Report.—Duni Chand and six others are alleged to have been present round a table in the Royal Hotel, Amritsar, on 19th May 1938, in the evening, when an excise raiding party went to the hotel and found that there were seven tumblers on the table

round which seven persons were sitting. Four of these tumblers contained liquor. But the other three were empty though they smelt of liquor. Duni Chand and the six companions were convicted on the ground that they were collectively responsible for the possession of the liquor on that table, which was on the premises of a restaurant within the Municipal limits of Amritsar. As such, Duni Chand and his companions were held to have contravened the provisions of Notification No. 3718 (Excise), dated 30th August 1937, which came into force on 1st April 1938. The trial Magistrate has enforced collective responsibility without trying to find out if Duni Chand (petitioner) was in individual possession of any tumbler containing any liquor. I therefore consider that his order convicting the petitioner is erroneous. The case is accordingly submitted to the Hon'ble Judges of the High Court with the recommendation that they be pleased to acquit the petitioner. The petitioner has already paid his fine of Rs. 15. It is recommended that an order of refund of this amount should be passed in his favour.

Order.—For reasons recorded by the Additional Sessions Judge, I accept this petition and acquit the petitioner. The fine, if paid, will be refunded.

G.N./R.K.

Petition accepted.

A. I. R. 1940 Lahore 37

BHIDE J.

Lala Jagan Nath Aggarwal and others
— Appellants.

v.

Special Official Receiver and others —
Respondents.

Exn. First Appeal No. 16 of 1939, Decided on 21st March 1939, from order of Senior Sub-Judge, Sheikhpura, D/- 27th October 1938.

Provincial Insolvency Act (1920), Ss. 51, 52 — Execution sale confirmed — Judgment-debtor being in meantime adjudged insolvent sale proceeds sent to High Court and not paid to decree-holder. — No proceedings having been taken under Ss. 51 and 52 decree-holder held entitled to sale proceeds.

During an execution sale the judgment-debtor was adjudged an insolvent and the sale was confirmed before stay order was received by executing Court but under orders of the Assistant Registrar the sale proceeds were sent to the High Court instead of being paid to the decree-holder:

Held that as no action was taken under S. 51 or S. 52, the decree-holder was entitled to get the sale proceeds after confirmation of the sale. [P 37 O 2]

Jagan Nath Aggarwal and Asa Ram Aggarwal — *for Appellants.*

B. Bhagat Ram — *for Respondent (Bela Singh.)*

Special Official Receiver in person.

Judgment. — This is an appeal arising out of execution proceedings relating to a decree in the Court of the Senior Subordinate Judge, Sheikhpura. A house belonging to the judgment-debtor was sold by auction and the sale was confirmed on 16th August 1938. In the meantime, the judgment-debtor had been adjudged insolvent by a Court at Ferozepore and the insolvency proceedings had been subsequently transferred to the High Court. On the motion of the Special Official Receiver an order was passed by a learned Judge of this Court that the confirmation of the sale of the house should be stayed, but this order did not reach the Senior Subordinate Judge till after the confirmation of the sale. It appears, however, that later on a letter was issued by the Assistant Registrar asking the Senior Subordinate Judge to send the proceeds of the sale to this Court. As a result the sale proceeds were not paid to the decree-holder and his application for execution was consigned to the record room. From this decision the present appeal has been preferred.

The learned counsel for the appellant has urged that the decree-holder was a secured creditor and it was open to him to realize his security in spite of the insolvency proceedings. It was further urged that in this case the sale having been confirmed on 16th August 1938, before the order of this Court staying confirmation of the sale had reached the Senior Subordinate Judge, the sale proceeds could not be ordered to be sent to this Court. The letter of the Assistant Registrar as regards the remittance of the sale proceeds to this Court was apparently not based on any order of a Judge of this Court. The Special Official Receiver was unable to give any reply to the contentions of the learned counsel for the appellant or to support the procedure adopted in requiring the Senior Subordinate Judge to remit the sale proceeds to this Court. As no action was taken under S. 51 or S. 52, Provincial Insolvency Act, in time, the decree-holder was entitled to get the sale proceeds after the confirmation of the sale. I accordingly accept the appeal and direct that the sale proceeds be made over to the decree-holder. In view of all the

circumstances I leave the parties to bear their costs.

D.B./R.K.

Appeal allowed.

*** A. I. R. 1940 Lahore 38**

SKEMP J.

Sri Ram, Proprietor of Messrs. Jugal Kishore & Sons, Delhi — Appellant.

v.

Emperor through Collector, Delhi, and another — Respondents.

First Appeal No. 177 of 1938, Decided on 9th December 1938, from order of Senior Sub-Judge, Delhi, D/- 14th June 1938.

*** (a) Succession Act (1925), S. 299 — Appealable order.**

If a Court passes an order calling upon an executor to furnish fresh security the order is subject to appeal. [P 38 C 2]

*** (b) Administration—Surety for administrator—Court can release surety of future liability if administrator is adjudged insolvent and commits waste.**

The surety is entitled to protection against the executor if it is shown that the latter is wasting the estate, and thereby rendering the former liable on his surety bond. The course to be adopted, on waste by the executor being established by the surety, is to call on the executor to furnish other security, and on his doing so, to discharge the original surety in respect of future waste. Should the executor fail to furnish other security the probate should be revoked and the surety discharged: 52 P R 1902; A I R 1932 All 262; A I R 1920 Cal 584 and 29 Cal 68, Rel. on: (1866) L R 1 P & D 76; 28 Mad 161 and 31 All 56, Not foll.

[P 39 C 1]

Hence, where the executor by being adjudged insolvent has demonstrated that he is unable to manage his own affairs it is reasonable for the surety to believe that he is not a fit person to manage an estate of somebody else and he is entitled to be discharged from his liability as regards future transactions. [P 38 C 1, 2; P 39 C 1]

Shamair Chand — *for Appellant.*

M. Sleem, Advocate General —

for the Crown.

Veshnu Datta —

for Respondent (Bhola Nath).

Judgment.—This is a first appeal against an order of the Senior Subordinate Judge, Delhi, directing one Sri Ram, who had obtained probate of a will, to lodge fresh security for the administration of the balance of the estate. This order was passed on an application by the surety Bhola Nath who had given security for the administration of the estate in the first instance. He sought to be released from his security bond on the grounds that Sri Ram had been adjudged insolvent and was not properly managing the estate. As a first step the Judge ordered

Sri Ram to lodge fresh security. A preliminary objection is taken that no appeal lies. This is based on S. 299, Succession Act, which says:

Every order made by a District Judge by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court. . . .

Admittedly there is no specific provision in the Act enabling the Court to take fresh security or cancel a security bond, and Mr. Vishnu Datta for the respondent Bhola Nath argues that there can therefore be no appeal. On the other hand, Mr. Shamair Chand urges that the Senior Subordinate Judge was seized of the case by virtue of the Act, that the order was passed in the ordinary course of the case under the Act and therefore S. 299 must be deemed to apply. I accept this argument. If a Court can pass an order calling upon an executor to furnish fresh security it is obviously right and proper that the order should be subject to appeal. Mr. Shamair Chand for the appellant takes the point that once a surety has given security that an executor shall administer the estate, he cannot be permitted to withdraw. He relies for this proposition on 28 Mad 161¹ which did so hold relying on (1866) 1 P & D 76.² 28 Mad 161¹ was followed in 31 All 56.³ On the other hand there are several cases in which a surety has been released from security: see 29 Cal 68⁴ where the applicant had become surety for his sister for the due administration of the mother's estate but alleged that the administratrix was wasting the estate. It was held by a Division Bench of the Calcutta High Court that the Court had jurisdiction to take a second bond with fresh sureties and that the surety could be released from his obligation by giving notice. In 47 Cal 115⁵ another Bench of the Calcutta High Court held that where the surety had become worthless the Court could call on the executors for fresh security. In 52 P R 1902⁶ a Division Bench of the Chief Court held that a surety of an executor is entitled to be discharged from his liability as regards the future

1. Subroya Chetty v. Ragammall, (1905) 28 Mad 161=14 M L J 482.

2. In re Stark, (1866) 1 P & D 76=35 L J P 42=13 L T 682=14 W R 349.

3. Kandhya Lal v. Manki, (1909) 31 All 56=1 IC 143=1908 A W N 288=6 A L J 19.

4. Raj Narain Mookerjee v. Full Kumari Debi, (1902) 29 Cal 68=6 C W N 7.

5. Surendra Nath Pramanik v. Amrit Lal, (1920) 7 A I R Cal 584=51 IC 936=47 Cal 115=29 C L J 496=23 C W N 763.

6. Shahabuddin v. Fazal Din, (1902) 52 P R 1902=89 P L R 1902.

transactions of the latter when the executor for whom he is surety wastes the estate, and as the effect of his discharge would be to revoke the probate, if fresh security is not furnished, an appeal lies against an order refusing such discharge.

The learned Judges said:

The surety is . . . entitled to protection against the executor if it be shown that the latter is wasting the estate, and thereby rendering the former liable on his surety bond. In our view of the law the course to be adopted, on waste by the executor being established by the surety, is to call on the executor to furnish other security, and, on his doing so, to discharge the original surety in respect of future waste. Should the executor fail to furnish other security the probate should be revoked and the surety discharged.

In a recent case, 54 All 293,⁷ it was held that:

Although a surety for the due administration by a grantee of letters of administration cannot claim as of right to be relieved of all future liability by merely expressing his intention to revoke, either by notice or by an application to the Court, . . . yet the Court to which the guarantee is given has power, when good cause is shown, to grant a release from all liability for future transactions.

In the course of their judgment the learned Judges said:

It may well be that at the time when the surety furnished security, the administrator was honest and was believed to be capable of administering the estate in a proper way, but he might subsequently become dishonest or might mismanage the estate, and so it would be astonishing if there were no provision of law which would give the surety remedy by way of objecting to the Court and asking to be relieved. He cannot merely sit idle and watch the administrator committing the waste and misappropriation, knowing fully well that the liability will be his own.

Mr. Shamair Chand suggested that as there is no authority of this High Court on the point it should be referred to a Division Bench, but I see no need for this course. There is a ruling of the Chief Court dealing with the point with which I am in respectful agreement. I also think the remarks in 54 All 293⁷ particularly apposite. The executor by being adjudged insolvent has demonstrated that he is unable to manage his own affairs and it is reasonable for the surety to believe that he is not a fit person to manage an estate of somebody else. I reject this appeal with costs to the respondents.

D.B./R.K.

Appeal rejected.

7. National Guarantee and Suretyship Association v. Prayag Deb, (1932) 19 A I R All 262 = 140 I C 127 = 54 All 293 = 1932 A L J 140.

A. I. R. 1940 Lahore 39

DIN MOHAMMAD J.

Ishar Das, Proprietor, Punjabee Bhaion Ki Dokan, Machhi Hatta, Lahore — Defendant — Appellant.

v.

(Firm) Bhaion Ki Dokan through Sardar Jawahar Singh and others — Plaintiffs — Respondents.

First Appeal No. 162 of 1939, Decided on 3rd October 1939, from order of Sub-Judge, First Class, Lahore, D/- 26th June 1939.

(a) Injunction—Temporary — Judge rejecting application for temporary injunction — Successor can go behind this order and grant application if necessary.

Where a Judge has declined to entertain an application for the grant of temporary injunction, the successor of that Judge can go behind that order in the new circumstances that have arisen and if the exigencies of the case require it.

[P 40 C 1]

(b) Trade name — Trade name of particular firm gaining reputation and publicity—Another person entering trade under same or similar name thereby causing confusion and irreparable harm—Court can restrain him from trading under such name by granting injunction.

Where the name of one particular individual or firm has gained universal reputation in connexion with a particular class of goods and a second person enters the trade under a name which is the same or similar and which is likely to cause confusion in the minds of the intending purchasers and the harm thus caused is prima facie such as no compensation would be enough to counter-balance it, Court can restrain that person from trading under a name which is similar by granting injunction.

[P 40 C 1]

Achhru Ram and Din Dayal Kapur
— *for Appellant.*

Dev Raj Sawhney and Kishori Lal
— *for Respondents.*

Judgment. — In a suit instituted by the firm 'Bhaion Ki Dokan' against Ishar Das and Devi Dayal, a temporary injunction has been issued by the Subordinate Judge "restraining the defendants from using the disputed trade name 'Punjabi Bhaion Ki Dokan' * * * "as well as from using the trade labels with the inscription of 'Punjabi Bhaion Ki Dokan' till the decision of the suit." The defendants have appealed. It is contended by the appellants' counsel that the application for injunction was belated inasmuch as the defendants' business had started in 1935, that since then the goods manufactured by them have been displayed in several exhibitions to the knowledge of the plaintiffs and that the balance of convenience was on the defendants' side and

not on the plaintiffs' side. It is further urged that these contentions had prevailed with Lala Sardari Lal, Subordinate Judge, who was first dealing with the case and who had consequently declined to comply with the plaintiffs' wishes. It is added that the injury to the defendants is irremediable and that the purpose of the plaintiffs can be served if the defendants keep regular accounts and undertake to pay their profits to the plaintiffs in case their suit is decreed. It is also emphasized that Sardar Prahlad Singh who succeeded Lala Sardari Lal, had gone out of his way in entertaining another application from the plaintiffs to the same effect and disturbing his predecessor's order.

The facts, as stated by the appellants' counsel, are correct, but I do not agree with him that in the new circumstances that had arisen, Mr. Prahlad Singh could not go behind the order of Lala Sardari Lal and make another order which the exigencies of the case required. I am also not disposed to agree with the appellants' counsel that no order should have been made inasmuch as the defendants' business had been in existence for some time before the grant of the temporary injunction. So far as the balance of convenience is concerned, I have no hesitation in remarking that the injury done to the plaintiffs' business is in a way irreparable. The two names 'Bhaion Ki Dokan' and 'Punjabi Bhaion Ki Dokan' are apparently so similar as likely to cause confusion in the mind of the intending purchasers and the harm thus caused is *prima facie* such as no compensation would be enough to counterbalance it. In trade it is the name that counts and if once a name gains publicity it forms the main asset of the concern. The principle governing such cases has been very succinctly enunciated in Lord Halsbury's *Laws of England*, Vol. 27, pp. 750-51, (Edn. 1913). The passages read as follows:

In some cases, however, the name of one particular individual or firm has such universal reputation in connexion with a particular class of goods that it becomes evident that if a second person enters the trade under a name which is the same or similar, confusion must arise unless special precautions are taken. In such cases the Court interferes either to insist on the second individual taking proper measures to prevent such confusion arising, or, in certain cases, to restrain him from trading under a name which is the same as or closely resembles that of the well known trader, or from using such trader's name as the trade name of his goods.

Where the plaintiff can show that the defendant's object is to produce confusion the Court intervenes much more readily, and often grants the plaintiff wider relief than he would otherwise

obtain. The evidence of such fraudulent intention may be derived from the manner of trading or from the circumstances under which the name was adopted.

I am in respectful agreement with these remarks and consequently find no justification in interfering with the discretion of the Court below which, to my mind, has not been injudiciously exercised. Counsel for the appellants has referred to several authorities in this connexion: 45 P R 1919,¹ A I R 1933 Lah 73,² A I R 1933 Lah 203,³ A I R 1933 Lah 448,⁴ A I R 1933 Lah 621,⁵ A I R 1933 Lah 1046,⁶ A I R 1933 Sind 26⁷ and A I R 1938 Cal 458⁸ but, in my view, none of them is in point, especially as every case is to be decided on its own facts. Moreover, the probability of deception cannot be denied in the present case and I have arrived at this conclusion by personal inspection of the goods manufactured which were shown to me at the time of hearing. I accordingly dismiss this appeal with costs.

D.S./R.K.

Appeal dismissed.

1. Varcados v. Mcleod, (1919) 6 A I R Lah 90 = 51 I C 434 = 45 P R 1919 = 83 P L R 1919.
2. New Delhi Theatres Ltd. v. Kailash Chand, (1933) 20 A I R Lah 73 = 140 I C 843 = 34 P L R 51.
3. North Western Ry. Administration v. N. W. Ry. Union, Lahore, (1933) 20 A I R Lah 203 = 148 I C 49 = 14 Lah 330 = 34 P L R 975.
4. Prabhu Das Suri v. Law Reporter Ltd., Lahore, (1933) 20 A I R Lah 448 = 149 I C 984 = 34 P L R 249.
5. Mahomed Ahmad Khan v. Ahmad Nabi, (1933) 20 A I R Lah 621 = 146 I C 67.
6. Hari Chand Anand & Co. v. Singer Manufacturing Co., (1933) 20 A I R Lah 1046 = 149 I C 1064.
7. Yoshimi Beshaka Kaisha Ltd. v. Firm of Dwarkadas Fatehchand, (1933) 20 A I R Sind 26 = 139 I C 490 = 26 S L R 335.
8. Kerr & Co. v. Ahmedabad Cotton Manufacturing & Calico Printing Co., (1938) 25 A I R Cal 458 = 177 I C 473.

A. I. R. 1940 Lahore 40

BLACKER J.

Pandit Shiv Datta — Accused —

Petitioner.

v.

B. K. Sood — Complainant — Respondent.

Criminal Misc. No. 182 of 1939, Decided on 26th July 1939, praying that order of Magistrate, First Class, Lahore, D/- 7th July 1939, be set aside.

(a) Criminal P. C. (1898), S. 253 (2)—Discharge — Magistrate can discharge accused without hearing complainant if complaint does not disclose *prima facie* offence.

In a suitable case the Magistrate may come to the conclusion that the charge is groundless even

before he has heard the complainant under S. 252 of the Code. [P 41 C 2]

Where the Magistrate in issuing process under S. 204 has mistakenly believed that an offence has been disclosed by the complaint and on the matter being brought to his attention when the case comes before him has seen his error and decided that in fact, even if the allegations in the complaint are true, no criminal offence has been disclosed, he may discharge the accused without hearing the complainant: *A I R 1930 Cal 515*; *A I R 1929 Mad 754, Rel. on*; *A I R 1930 Lah 461, Disting.* [P 41 C 2]

(b) **Criminal P. C. (1898), S. 253 (2) — Discharge — Examination of complainant under S. 252 of the Code, not disclosing criminal offence — Magistrate may discharge accused without taking the rest of complainant's evidence.**

If the admissions of the complainant under examination under S. 252, make it clear not only that the facts set forth in the accused's petition are correct but also that, on the basis of those facts admitted by the complainant, no criminal offence has been disclosed he is naturally at liberty to discharge the accused under S. 253 (2) without calling upon the complainant to produce the rest of his evidence. [P 42 C 1]

Mukand Lal Puri and Ratan Lal Chawla
— for Petitioner.

Durga Das Jain — for Respondent.

Order. — In this case the respondent brought a complaint against the petitioner under Sec. 408, Penal Code. After reading the complaint and examining the complainant on oath the Magistrate who had taken cognizance of the case issued process for the attendance of the accused and of the complainant's witnesses. On 30th May 1939, the accused-petitioner put in a petition to the effect that no criminal offence was disclosed and praying for his discharge under Sec. 253 (2). On 7th July 1939 which was the first date of hearing, the learned Magistrate considered this application and heard the arguments of counsel for both the sides. He thereupon recorded the following order :

I have heard the learned counsel on both sides. The application under Sec. 253 cannot be decided unless the complainant and his witnesses are examined under Sec. 252, Criminal P. C. There is no authority shown to the effect that the complaint can be thrown out as groundless without hearing the complainant and his witnesses. Hence it is ordered that the complainant should produce his evidence on 25th July 1939. The accused also wants to produce his evidence on the point of his exemption from personal attendance. He can do so on that hearing.

The present petition is a petition to have that order set aside on the ground that it is wrong in law. I have been referred by counsel for petitioner to 58 Cal 346¹ and 52

Mad 987² in support of the proposition that the Magistrate under Sec. 253 (2) has full discretion to discharge the accused at any time if he is of opinion that the complaint is groundless and is not bound to hear the complainant or take any of his evidence. The respondent has relied on a judgment of this Court reported in *A I R 1930 Lah 461*³ in support of his argument that the Magistrate must hear the complainant before he can pass an order under S. 253 (2), Criminal P. C.

On examining these authorities I am of opinion that *A I R 1930 Lah 461*³ does not go quite so far as counsel for respondent thinks it does. That authority—with which I respectfully agree—pre-supposes that the complaint does in fact disclose a prima facie offence. In those circumstances my learned brother Tek Chand was clearly right—if I may say so with all respect—in holding that until the complainant has been heard it is impossible to say that the charge is groundless. The authorities quoted by the learned counsel for the petitioner deal with the point in very much the same way but they lay down a proposition which I think certainly cannot be controverted that in a suitable case the Magistrate may come to the conclusion that the charge is groundless even before he has heard the complainant under Sec. 252, Criminal P. C. Such a case might well be one in which the Magistrate in issuing process under Sec. 204 has mistakenly believed that an offence has been disclosed by the complaint and on the matter being brought to his attention when the case comes before him has seen his error and decided that in fact, even if the allegations in the complaint are true, no criminal offence has been disclosed. To that extent therefore the order of the Magistrate in this case does not appear to be correct. He appears from the language of his order to have thought that in no case can the accused be discharged under S. 253 (2), Criminal P. C., without the complainant being heard at all.

But even though this may be the law on the subject I have seen the petition which was put in by the petitioner asking for his discharge, and after reading that I am not satisfied that this is one of those cases in

2. *Kasinatha Pillai v. Sanmugham Pillai*, (1929) 16 *A I R Mad 754*=121 *I C 619*=52 *Mad 987*=57 *M L J 490*=31 *Cr L J 275*.

3. *Mehtab v. Nathu*, (1930) 17 *A I R Lah 461*=1930 *Cr C 530*=123 *I C 275*=31 *Cr L J 481*=31 *P L R 204*.

1. *Fazlar Rahaman v. Emperor*, (1930) 17 *A I R Cal 515*=1930 *Cr O 859*=126 *I C 553*=31 *Cr L J 1055*=58 *Cal 846*.

which the Magistrate could find that the charge was groundless without hearing at least the complainant. The arguments in this petition go outside the complaint as they include allegations controverting the complaint on questions of fact. In such circumstances naturally the Magistrate could not find that the charge was groundless until he had given the complainant an opportunity of either admitting or denying these allegations. The Magistrate's order that he could not discharge the accused at that stage is therefore to that extent correct. There is one matter however to which I think it is necessary to draw the Magistrate's attention. He is not correct in thinking that not only must the complainant be heard but also that all his evidence must be taken before discharging. S. 253 (2) makes this perfectly clear. If, for instance, the admissions of the complainant under examination under S. 252, Criminal P. C., make it clear not only that the facts set forth in the accused's petition are correct but also that, on the basis of those facts admitted by the complainant, no criminal offence has been disclosed, he is naturally at liberty to discharge the accused under Sec. 253 (2) without calling upon the complainant to produce the rest of his evidence. With these remarks the present petition is dismissed.

G.N./R.K. *Application dismissed.*

A. I. R. 1940 Lahore 42

DALIP SINGH J.

Sheikh Karamat Ullah — Petitioner
v.

Emperor.

Criminal Revn. No. 722 of 1939, Decided on 4th October 1939; case reported by Sess. Judge, Rawalpindi, D/- 5th May 1939.

(a) Criminal P. C. (1898), S. 367—Judge is entitled to pass remarks in judgment on conduct of party or of witness to proceedings provided remarks are justified by findings.

A Magistrate is not bound to confine himself merely to a finding that the accused is not proved guilty. Such a verdict often leaves the accused with a stain on his character in the public estimation though not in law and it is the duty of a Magistrate, if he considers that the prosecution case is not only not proved but was deliberately false and concocted to, give such a finding in favour of the accused so that the accused should leave the Court without a stain on his character. [P 43 C 1]

The Judge must also be at liberty to make remarks on the character or conduct of certain witnesses who appeared to support that case for otherwise he cannot arrive at a finding that the documents on which the prosecution rely are false and fabricated. When he has done so the remarks

that the conduct of persons doing such a thing is criminal or contemptible follows and is justified on the findings arrived at. [P 43 C 1, 2]

(b) Criminal P. C. (1898), Ss. 561-A, 367—Deletion of disparaging remarks from judgment—Power of High Court to interfere.

The High Court can interfere under S. 561-A to expunge disparaging remarks from a judgment in cases where the remarks are made about a person who is not a party to the proceedings or a witness in the case. The High Court can also interfere when remarks are made about a party to the proceedings or a witness in the case and those remarks are not justified by the findings or when the judgment itself is shown to be due to bias or perverse. [P 43 C 2]

S. M. Iftikhar Ali — *for Petitioner.*

Sham Lal — *for Complainant*

(*Saudagar Mal*).

Facts and Report.—In criminal file No. 30/2 of 1938 of the Court of the Sub-Divisional Magistrate, Murree, Mr. B. K. Nehru, I. C. S., Sodagar Mal an ex-employee of the Cantonment Board, Murree, was prosecuted under S. 420 read with S. 511, I. P. C., and was discharged. It is not necessary to refer to the facts of the case, as they are contained fully in the judgment of the learned Sub-Divisional Magistrate. I would mention that in my order in Criminal Revision No. 90 of 1938, of this Court, I have dismissed an application for further enquiry against Sodagar Mal. Sheikh Karamat Ullah, Executive Officer, Murree Cantonment, who is one of the principal persons concerned in the prosecution against Sodagar Mal has filed this Criminal Revision No. 91 of 1938, asking that the following remarks

I cannot conclude this judgment without placing on record the fact that the conduct primarily of Sheikh Karamat Ullah and secondarily of Roshan Lal, in this case has been both criminal and contemptible, appearing at the end of the Sub-Divisional Magistrate's judgment should be expunged.

The remarks to which objection is taken state that the conduct of Sheikh Karamat Ullah has been both "criminal and contemptible." I do not think that it is necessary to go into the question whether the prosecution case was true or false. It is sufficient, I think, to say that Sheikh Karamat Ullah who is a public officer, has been described as "criminal and contemptible" without his having any proper opportunity to rebut what is said about him, and I do not think that it is fair to him under these circumstances that these remarks should be allowed to remain in the judgment and that his application is justified. It follows that if the remarks about him are expunged, the remarks

about Roshan Lal would also be expunged. I therefore recommend that these remarks may be expunged from the judgment.

Order. — In this case a petition has been forwarded by the learned Sessions Judge with the recommendation that certain remarks be expunged from the judgment of the Magistrate. Those remarks are that the conduct of certain persons has been both criminal and contemptible. The finding to which the learned Judge came on the evidence as to the correctness of which I offer no opinion whatsoever and must be taken not to be offering any opinion, was that the prosecution story was not proved and that secondly the defence theory was more probable and was in all probability true that the documents had been deliberately fabricated for the purposes of this case. If this finding was correct, and again I offer no opinion as to its correctness, it would follow as a necessary inference that the only people concerned in the matter were responsible for this fabrication and falseness and that being so their conduct could be correctly described as criminal and contemptible. The case therefore resolves itself into this proposition, should the High Court expunge remarks made by a Magistrate who has tried a case as regards the falsity of the prosecution or must the Magistrate confine himself to a finding that the accused is not proved guilty? I do not consider that the Magistrate is bound to confine himself merely to a finding that the accused is not proved guilty. Such a verdict often leaves the accused with a stain on his character in the public estimation though not in law and it is the duty of a Magistrate if he considers that the prosecution case is not only not proved but was deliberately false and concocted to give such a finding in favour of the accused so that the accused should leave the Court without a stain on his character.

Now comes the question whether in arriving at the conclusion that a prosecution case is false and fabricated the Judge is at liberty to make remarks on the character or conduct of certain witnesses who have appeared to support that case. It is again obvious to me that the Judge must be at liberty to make these remarks for otherwise he cannot arrive at a finding that the documents on which the prosecution rely are false and fabricated. When he has done so the remark that the conduct of persons doing such a thing is criminal or contemptible follows and is justified on the findings arrived at. The High Court of course can interfere under S. 561-A in cases where remarks are made about a person who is not a party to the proceedings or not a witness in the case. The High Court can also interfere when remarks are made about a party to the proceedings or a witness to the case which are not justified by the findings. For instance in this very case if the conduct of the persons mentioned in it had been described as criminal and contemptible because one of them had admitted that he did not follow a certain departmental rule I would have had no hesitation in expunging those remarks because the finding would not have justified the remarks. But where the finding is that the case of the prosecution had been falsified and fabricated the remarks about the character of the persons so doing are justified I must once again explain that I take no responsibility for the finding. I am not sitting as a Court of appeal to see whether that finding was correct or incorrect. All I have got to see is whether the finding is justified in the sense that it is not perverse and that the remarks are not based on no evidence or irrelevant or inadmissible evidence. No such thing has been shown to me. The conclusions drawn may be correct or may not be correct. I must not be taken to hold either that the prosecution case was not proved if true or that the prosecution case was false and fabricated. All I am holding is that the findings are not shown to be perverse and on those findings the remarks on the character of certain persons mentioned were justified, and there is therefore no occasion to expunge them. I therefore decline to interfere on the recommendation of the learned Sessions Judge for the learned Sessions Judge seems to be of opinion that it does not matter whether the prosecution case is true or false, a witness still cannot be described as criminal or contemptible because the witness has not had the chance of fully defending himself. But the witness has had every chance of explaining his statement and if the Court finds those statements are unbelievable in its judgment then unless it can be shown that the judgment is due to bias or perverse I fail to see why the Courts should be muzzled in expressing their opinion on the character of the witness who has appeared to support a prosecution case which the Court considers was false and fabricated.

G.N./R.K. *Application dismissed.*

* A. I. R. 1940 Lahore 44

DIN MOHAMMAD AND RAM LALL JJ.

Billu — Convict — Petitioner

v.

Emperor.

Criminal Revn. No. 1775 of 1938, Decided on 26th October 1939, from reference of Din Mohammad J., D/- 5th April 1939.

* Penal Code (1860), Sec. 224 — Accused arrested for offence committed in State escaping in British India while in custody of State police—He cannot be convicted under S. 224.

The detention contemplated in S. 224 should necessarily be for any of the offences mentioned in the Penal Code or under any local or special law applicable to British India. The mere fact that a State adapts the Codes of British India as its own does not justify the conclusion that those Codes can be treated as original Codes. Hence, where an accused arrested for an offence committed in a State escapes in British India while in custody of the State police he cannot be convicted under S. 224 even if that State has adapted Penal Code as its own Code. [P 45 C 2; P 46 C 1]

M. Sleem, Advocate-General —

for the Crown.

Facts. — The provisions of the Penal Code appear to have been adopted by the Sirmoor State. The petitioner was being brought to Ambala for the investigation of an offence under S. 454 committed in State territory by two officers of the State Police. While on the way he escaped from custody at Barara in the early hours of the morning of 12th September 1938. He was arrested by the British Police, challaned, and convicted and sentenced as aforesaid.

Report. — Section 224, I. P. C., runs as follows :

Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself for any offence with which he is charged or of which he has been convicted, or escapes or attempts to escape from any custody in which he is lawfully detained for any such offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

The expression 'offence' has been defined in S. 40, I. P. C., as a thing punishable under the Code, and in certain cases—including a case under S. 224, I. P. C.—a thing punishable under the Code or under any special or local law. In my opinion, the offence committed by the accused in State territory is not an offence punishable under the Penal Code which extends only to British India. The fact that the provisions of the Code have been adopted by the Sirmoor State does not alter the position. The petitioner cannot be said to have been lawfully detained in British India for any

offence within the meaning of S. 40, I. P. C., and his conviction under S. 224, I. P. C. is therefore bad in law. I accordingly recommend that the same be quashed and the sentence passed against him be set aside.

ORDER OF REFERENCE

Din Mohammad J.—This petition raises an interesting question of law. The petitioner who is a subject of an Indian State was lawfully arrested by the State police within the State territory. While in custody he happened to pass through the British territory and escaped. Thereupon, he was sent up to undergo his trial under S. 224, I. P. C. The contention raised on his behalf was that his detention within the British territory was not lawful and consequently he could not be prosecuted under S. 224, I. P. C. The Magistrate however repelled this contention and convicted him. He then moved the Sessions Judge with whom his contention prevailed and who has forwarded the record to this Court with the recommendation that his conviction be set aside.

Section 224 comes into play when inter alia any person escapes or attempts to escape from any custody in which he is lawfully detained for any offence with which he is charged. The Magistrate was of the view that the custody of the State police was lawful detention even within the British territory inasmuch as it was lawful at its inception and the change of territory could not render it unlawful. He was in this respect impressed by the difficulty of the situation that might arise if persons lawfully arrested within British territory by the British police were allowed to escape with impunity when they happened to pass through the territory of an Indian State. He further held that the offence with which the petitioner was charged fell within the definition of the word as mentioned in Sec. 224, Penal Code. The Sessions Judge on the other hand came to the conclusion that the word 'offence' as used in S. 224, Penal Code, by virtue of the definition as given in Sec. 40, Penal Code, denoted a thing made punishable by the Penal Code or under any special or local law as defined in Ss. 41 and 42 respectively and inasmuch as the petitioner had been arrested under a different Code altogether he could not be said to have been detained for any offence with which he was charged within the meaning of S. 224, Penal Code.

My own view is that though the position maintained by the Magistrate is apparently

reasonable, the situation is not provided for under the existing law and consequently a State subject who is arrested within the boundaries of a State cannot be proceeded against under S. 224, Penal Code, if he escapes when he is within the British territory. The point is bare of authority and is likely to arise very often as the territories of Indian States are contiguous in many places and sometimes intervene between two different parts of the Province. An authoritative pronouncement is therefore called for in this matter by a larger Bench and I accordingly forward the record to the Hon'ble Chief Justice for such action as he deems necessary.

Order of Division Bench

Din Mohammad J.—This case has been referred to a Division Bench in the following circumstances:

One Billu, a lad of 16 years of age, was arrested by the Nahan State Police for an offence which is described as one under Sec. 454, Penal Code, but which was committed within the territories of the State. On the evening of 11th September 1938, he was being taken to Ambala by Said-ud-Din, Head Constable, Nahan State Police, and happened to halt at a place called Barara where they had to catch the train for Ambala. He was both handcuffed and fettered. A constable Kalyan Singh along with Said-ud-Din kept watch for the night. About 4-30 A. M. he was found missing. A search for the fugitive proved in vain. The Sub-Inspector of the Mullana Police Station happened to arrive there to whom a report under S. 224, Penal Code, was made. It appears that Barara is in the British territory.

On 14th September, the Sub-Inspector of the Mullana Police Station deputed Nand Kishore and four constables to search for the offender once more. He was found hiding in a chari field in the boundary of Barara. The fetters were still on his legs. He was produced before the Sub-Inspector who sent him up for trial under Sec. 224, Penal Code. At his trial a question arose whether he could legally be proceeded against under S. 224, Penal Code, in view of the fact that he was being detained at the time of his escape by the Nahan State Police for an offence which was said to have been committed within the boundary of the State and which could not consequently be described as an offence under S. 454, Penal Code, inasmuch as that Code as such does not apply within the limits of

the State. The Magistrate, First Class, however came to the conclusion that his trial was legal and he accordingly convicting him of the offence with which he was charged sentenced him to a fine of Rs. 50. Thereupon a petition was made to the Sessions Judge who came to the conclusion that Billu could not be said to have been lawfully detained for any such offence as was contemplated by S. 224, I. P. C., and consequently his escape in British India could not be punished here. He accordingly submitted the record to this Court with the recommendation that his conviction and sentence be set aside.

The case came before me in due course and was represented on behalf of the Crown by the Assistant Advocate-General. I tentatively expressed my view that the Sessions Judge was right in thinking that the conviction was not maintainable but, in view of the importance of the question involved, I forwarded the case to the Hon'ble Chief Justice with a view to its being placed before a larger Bench. It has now been so placed before a Division Bench and the Advocate-General has appeared on behalf of the Crown. The material part of S. 224, I. P. C., reads as follows:

Whoever intentionally escapes or attempts to escape from any custody in which he is lawfully detained for any such offence with which he is charged or of which he has been convicted shall be punished.

The word "offence" as used in the Penal Code is defined in S. 40. In cl. (2) of that Section it is said that in Sec. 224 the word "offence" denotes a thing punishable under this Code or under any special or local law as hereinafter defined.

Under Sec. 41 a "special law" is a law applicable to a particular subject and under S. 42 a "local law" is a law applicable only to a particular part of British India. Reading Sec. 224 with these Sections, the only conclusion at which it is possible to arrive is that the detention contemplated there should necessarily be for any of the offences mentioned in the Penal Code or under any local or special law applicable to British India. The detention of Billu as stated above was under a Section corresponding to S. 454, I. P. C., in the Nahan State which for the purposes of the Penal Code is outside British India and consequently it was not a detention which could be taken notice of under S. 224, I. P. C. The mere fact that a State adapts the Codes of British India as its own does not justify the conclusion that those Codes can be treated as original Codes.

This being so, the escape from the detention as found in this case could not be held culpable in British India. The Advocate-General has expressed his agreement with this view of the law and states that he is not in a position to controvert it. I would therefore hold that the conviction of Billu was illegal and would consequently set aside his conviction and sentence and order the refund of his fine, if paid.

Ram Lall J.—I agree and have nothing to add.

D.S./R.K. *Conviction set aside.*

A. I. R. 1940 Lahore 46

BHIDE J.

Ranjit Ram — Decree-holder —
Appellant.

v.

Karim Bakhsh through Taj Din and Chiragha, Mukhtar-i-ams — Judgment-debtor — Respondent.

Execution First Appeal No. 69 of 1939, Decided on 9th October 1939, from order of Sub-Judge, First Class, Gujranwala, D/- 25th November 1938.

Compromise decree—Decree-holder agreeing to accept by way of instalments amount less than actually due — Compromise containing default clause — On default of any instalment decree-holder is entitled to claim whole amount.

Where by a consent decree the decree-holder has agreed to accept by way of certain instalments an amount less than that which is actually due to him and there is a default clause in the decree, time will be ordinarily deemed to be the essence of the contract and in case of default of any of the instalments the executing Court will not give any relief against forfeiture. The decree-holder would be entitled to claim the whole amount: *A I R 1931 Lah 696; A I R 1933 Lah 23 and A I R 1937 Lah 828, Rel. on; A I R 1915 P C 83, Expl.; 8 M I A 239 (P C), Disting.* [P 46 C 2; P 47 C 1]

Mehr Chand Mahajan — *for Appellant.*
Barkat Ali — *for Respondent.*

Judgment. — This is an appeal arising out of proceedings relating to the execution of a decree which was passed with the consent of the parties. The decree-holder Ranjit Rai had sued for recovery of Rs. 6500 on the basis of a pronote. The judgment-debtor Karim Bakhsh had pleaded that the pronote had been discharged, but before the decision of the case the parties arrived at a compromise that the judgment-debtor should pay Rs. 3500 in two instalments of Rs. 1750 each, the first on 1st September 1937 and the second on 1st June 1938. In default of payment of either of the instal-

ments, the decree-holder was to be entitled to recover the full amount of Rs. 6500. The judgment-debtor having failed to pay the first instalment on the date fixed, the decree-holder applied for recovery of the whole amount, namely Rs. 6500. The judgment-debtor pleaded that he had offered to pay Rs. 1750 before the due date but the decree-holder had put him off saying that he would accept the whole amount later on. Oral evidence was led in support of this plea; but it appears to be obviously interested and unreliable. The statements of the witnesses that the decree-holder refused to accept the instalment of Rs. 1750 saying that he would accept the whole amount, namely Rs. 3500, later on, seem to me difficult to believe. The judgment-debtor was aware that there was a default clause in the consent decree and if the decree-holder tried to put him off, he might have been expected to come to Court at once and deposit the amount. The money is alleged to have been sent from China by money order; but there is no documentary evidence in support of this fact. I have therefore no hesitation in holding that the judgment-debtor had made default in paying the first instalment, which was due on 1st September 1937.

The next point for consideration is whether the condition in the consent decree that the decree-holder was to be entitled to realize the whole amount in the event of default, is penal, and whether the judgment-debtor is entitled to any equitable relief against forfeiture. The rule of law on the point followed in this Court in cases of this kind will be found in *A I R 1931 Lah 696*,¹ *A I R 1933 Lah 23*² and *A I R 1937 Lah 828*,³ which have been referred to by the Court below and it will appear therefrom that whenever a decree-holder agrees to accept less than the amount which is actually due and default is made in payment of the instalments, time will be ordinarily deemed to be the essence of the contract and an executing Court will not give any relief against forfeiture. The learned counsel for the judgment-debtor has urged that the rule laid down in these rulings cannot be considered to be correct in view of the decision of their Lordships of the Privy Council

1. *Jawala Ram v. Mathra Das*, (1931) 18 A I R Lah 696=132 I C 580=32 P L R 945.

2. *Jhanda Singh v. Piara Singh*, (1933) 20 A I R Lah 23=140 I C 225=33 P L R 1026.

3. *Mitha v. Remal Dass*, (1937) 24 A I R Lah 828=175 I C 751=40 P L R 458.

in 40 Bom 289,⁴ in which it was held that in cases of specific performance of contracts to sell real estate, time is not to be deemed to be the essence of the contract and all that is intended is that the contract should be performed within a reasonable time. It was urged that this rule should apply with greater force to contracts where no immovable property is concerned. No authority was cited in support of this contention and it seems to be opposed to the view taken in Appeal Cases (House of Lords), Vol. 4, p. 1, and clearly unsustainable. Punctual payment of the instalment fixed is the only consideration for the concession made by a decree-holder in such cases and hence time must be considered to be the essence of a contract of this kind.

The next argument advanced by the learned counsel was that in the present case it was not proved that a sum of Rs. 6500 was actually due to the decree-holder and that he gave up a portion of the amount due to him in agreeing to the terms of the consent decree. As regards this point it is to be noted that the judgment-debtor had pleaded that he had discharged the whole amount due on the pronote. He was however unable to produce any evidence in support of this contention in the suit and there is no documentary evidence on the present record also to show any payment by the judgment-debtor. The judgment-debtor's oral evidence is to the effect that ornaments had been pledged in connexion with another pronote, Ex. D-H-1 and that the value of these ornaments was set off against the amount due on the present pronote. It is however significant that the judgment-debtor took no receipt or any agreement to this effect from the decree-holder. The pronote, Ex. D-H-1 in connexion with which the gold ornaments were pledged was executed not by the present judgment-debtor but by some of his relations. The amount due on the pronote Ex. D-H-1 came to more than Rs. 8000 by the time the consent decree was passed and in the circumstances the decree-holder's allegation that the value of the ornaments was set off against the amount due on that pronote appears to be more probable. In view of all the circumstances I do not think the oral evidence produced by the judgment-debtor on the point can be accepted. The consent decree clearly mentions that in case

the instalments were duly paid, the rest of the amount due to the decree-holder would be considered to have been waived. This seems to me to be tantamount to an admission on the part of the judgment-debtor that the whole amount was in fact due to the decree-holder.

I accordingly hold that the decree-holder did make a concession to the judgment-debtor in agreeing to accept Rs. 3500 only in full discharge of his debt if the amount was paid on the dates fixed by the consent decree. He would therefore seem to be entitled to claim the whole amount as the judgment-debtor made a default in paying the instalments. The learned counsel for the respondent has referred to a decision of their Lordships of the Privy Council reported in 8 M I A 239,⁵ but the facts of that case are clearly distinguishable as it was found there that the judgment-debtor had made a bona fide endeavour to fairly perform his engagement and that there was reason to believe that there was a desire on the part of the decree-holder to throw obstacles in the way of the performance. In the present instance, it has been found above that the judgment-debtor did not pay the first instalment which was due on 1st September 1937. He paid the sum of Rs. 3500 in Court but that was long afterwards, that is on 27th May 1938, after the decree-holder had applied for execution of the consent decree. I hold that the decree-holder is entitled to execute the decree with respect to the whole sum of Rs. 6500 and accepting the appeal direct the execution to proceed for recovery of the balance due to the decree-holder. The appellant will get costs of this appeal.

D.S./R.K.

Appeal allowed.

5. Ram Gopal Mukerjee v. Samuel Masseyk, (1859-61) 8 M I A 239=2 W R 48=1 Suther 409=1 Sar 760 (P C).

A. I. R. 1940 Lahore 47

RAM LALL J.

Mam Raj — Plaintiff — Appellant.

v.

*Maqsudan Lal, Defendant, and others,
Plaintiffs — Respondents.*

Second Appeal No. 247 of 1939, Decided on 4th July 1939, from decree of Dist. Judge, Karnal, D/- 26th November 1938.

Punjab Alienation of Land Act (13 of 1900), Ss. 3, 14 — Benami purchase of land by non-agriculturist from statutory agriculturist, ostensible purchaser being statutory agriculturist — Collaterals of vendor cannot challenge sale.

4. Jamshed Khodaram v. Burjorji Dhunjibhai, (1915) 2 A I R P O 88=32 I O 246=43 I A 26=40 Bom 289 (P O).

A statutory agriculturist sold his land to another statutory agriculturist but it was found that the purchaser was only ostensible one, the real vendee being a non-agriculturist could not purchase the land. The collateral of the vendor sued for possession of the land from the benamidar contending that under S. 14 the sale could take effect only as a usufructuary mortgage:

Held that the law would only recognize the sale in favour of the ostensible owner, who is entitled to hold the property, and not the benamidar who under the Act could not get it by sale and that as on the face of it the sale in favour of the vendee did not contravene the Act, the collaterals of the vendor had no locus standi to challenge it: *A I R 1937 Lah 408 and A I R 1938 Lah 820, Disting.* [P 48 C 2]

Sardar Jhanda Singh — *for Appellant.*

Shamair Chand — *for Respondent 1.*

Judgment.—In 1909 one Harnam, who is a statutory agriculturist, sold a piece of land to Tej Ram, also a statutory agriculturist. The consideration money was really paid by one Mathra, who is not a statutory agriculturist, and therefore could not purchase land from Harnam. Harnam died and in July 1937 some revenue officer held on an enquiry that the sale was benami, the real vendee being Mathra and not Tej Ram. The revenue officials thereupon made mutation entries cancelling the sale. In November 1937 Mam Raj claiming to be a collateral of Harnam sued for possession of this land from Mathra. The learned Judge who tried the case held that the sale by Harnam to Tej Ram was benami and was really for the benefit of Mathra who paid the consideration. He however held that possession had been held adversely for over 12 years by Mathra or his successors-in-interest and that therefore their title had ripened by prescription. The learned District Judge rejected the appeal holding that as from 1909 the vendees of Harnam had been holding the land adversely in their own right and therefore the starting point of limitation was the date of the sale by Harnam and in this aspect whichever Article of the Limitation Act was applied, the suit was hopelessly barred by time.

Sardar Sahib Jhanda Singh urges in second appeal that the sale by Harnam, which is benami, was really in favour of Mathra and therefore could only take effect as a usufructuary mortgage and that adverse possession as owner would not commence till after the expiry of 20 years from the date of this mortgage. He referred in this connexion to I L R (1938) Lah 183¹ and

I L R (1939) Lah 30.² It is laid down in the former of these two decisions that if a Deputy Commissioner refuses to sanction a permanent alienation of land which requires his sanction under S. 3, Punjab Alienation of Land Act, such permanent alienation automatically takes effect as a usufructuary mortgage for such period not exceeding 20 years as the Deputy Commissioner may consider reasonable, and adverse possession does not start till the expiry of 20 years from the date of alienation. Similarly, in the second of these two decisions it was held that without the sanction of the Deputy Commissioner the sale to a non-agriculturist by an agriculturist takes effect as a usufructuary mortgage which becomes a sale out and out if and when the Deputy Commissioner sanctions the sale. These cases appear to me to be distinguishable on the ground that the sales there were in favour of non-agriculturists by agriculturists. In the present case however on the face of the transaction the sale is by an agriculturist in favour of an agriculturist and as such does not contravene the provisions of the Act. The law would only recognize the sale in favour of the ostensible owner, who is entitled to hold the property, and not the benamidar who under the Act could not get it by sale. As on the face of it the sale in favour of Tej Ram did not contravene the Act, the collaterals of the vendor have no locus standi to challenge it. Under the provisions of S. 21-A, Alienation of Land Act, the Deputy Commissioner has ample powers to protect and preserve the Act and he can step in so far as the law allows him to do so. So far as the ostensible vendee is concerned, he is entitled at all times to hold the property against the benamidar and can raise the defence against such benamidar that the transaction being one intended to defeat the Act was against public policy and so void. The fact that the ostensible vendee can claim to remain in possession of the land transferred to him as proprietor is in my opinion another salutary check on persons intending to defeat the provisions of the Land Alienation Act. As between the ostensible owner and the benami purchaser it seems to me that the reversioners of a vendor or for that matter the vendor himself has no locus standi.

It is always open to the Deputy Commissioner of a District to challenge a transaction of this nature under S. 21-A, Alienation

1. Deputy Commr. Gujrat v. Allah Dad, (1937) 24 A I R Lah 408 = 178 I C 520 = I L R (1938) Lah 183 = 38 P L R 391.

2. Jalal v. Hukam, (1938) 25 AIR Lah 820 = 179 IC 646 = ILR (1939) Lah 30 = 40 PLR 772.

of Land Act within the limits allowed and subject to the reservations contained in that Act. The argument is plausible that the benami purchase vests no title except in the real purchaser who furnishes the consideration, and as the only title that such a person can legally take in this case is that of a usufructuary mortgagee for a period not exceeding 20 years, therefore his possession should be deemed to be as usufructuary mortgagee for 20 years and thereafter adverse to the original vendor or his heirs. The matter is not entirely free from doubt and difficulty and I would allow a Letters Patent appeal if a certificate for leave is applied for in this case. My own view is that the title vests in the ostensible vendee and the law will recognize no other proprietor. In this view I would dismiss this appeal but leave the parties to bear their own costs throughout.

D.B./R.K.

Appeal dismissed.

* A. I. R. 1940 Lahore 49

BHIDE J.

Thakar Nil Chand — Appellant.

v.

Thakar Hamal Chand and another — Respondents.

First Appeal No. 41 of 1939, Decided on 6th October 1939, from order of Dist. Judge, Hoshiarpur and Kangra Districts, D/- 20th December 1938.

* (a) Limitation Act (1908), Art. 169 — Expression "notice of appeal" means notice of date on which appeal is disposed of.

The expression "notice of appeal" should be taken to mean notice (actual or constructive) of the date on which the appeal is disposed of.

(b) Civil P. C. (1908), O. 41, R. 17—Notice served on counsel—Counsel not communicating to party and himself remaining absent—Appeal decided ex parte—Party can apply for rehearing of appeal within 30 days of knowledge of decree.

Where notice of the hearing of an adjourned appeal was served on the counsel but he not being engaged to appear at the place of hearing remained absent and the party not being aware of the hearing did not put in appearance with the result that the appeal was decided ex parte :

Held that a litigant could not be penalized for the fault of his pleader and the fact that he was originally served with notice would be immaterial. Hence, he could apply for rehearing of the appeal within 30 days of his knowledge of the decree : *A I R 1934 Lah 91, Foll. ; A I R 1933 Lah 882, Disting.*

[P 50 C 1]

D. N. Aggarwal — *for Appellant.*M. C. Mahajan and Madan Lal Kapur—*for Respondents.*

Judgment.—This is an appeal from the order of the District Judge, Hoshiarpur, 1940 L/7 & 8

rejecting an application for the setting aside of an ex parte decree passed in appeal. It appears that after some adjournments, 20th July 1937 was fixed as a date for the hearing of the appeal and notice was served on the petitioner's pleader Lala Pran Nath, but the latter reported that he had not been engaged for appearance at Dharamsala where the appeal was heard. The learned District Judge however held that it was the duty of the pleader to inform his client and that service on the pleader was due service according to law. He therefore held that the application for the setting aside of the ex parte decree, which was made more than 30 days from the date of the decree, was barred by limitation under Art. 169, Limitation Act, and accordingly dismissed it. On behalf of the appellant, it is urged that service on the pleader was not sufficient as he had not been engaged for appearance at Dharamsala, and the petitioner should therefore have been served in person. As he was not so served, it was argued that the application for the setting aside of the ex parte decree, which was made within 30 days from the date on which the petitioner came to know of the decree, was within time. On behalf of the respondents it was contended that the petitioner had notice of the appeal and as he had been admittedly once served with notice of the filing of the appeal, the mere fact that he had not received any proper notice of an adjourned hearing would be immaterial. Secondly, it was urged that the learned District Judge was right in holding that service on the petitioner's pleader was sufficient according to law.

As regards the first argument of the learned counsel for the respondents, it must be said that the language of Art. 169 is not very happy and its interpretation is not free from difficulty as I have remarked in *A I R 1933 Lah 882*.¹ It would be unfair to expect a party to attend the Court on a date of which no due notice has been given and I am inclined to think that the expression "notice of appeal" should be taken to mean notice (actual or constructive) of the date on which the appeal is disposed of. Any other interpretation would lead to obvious injustice. If, for instance, a Court adjourns an appeal sine die for some reason and later on takes it up in the absence of a party who had no notice of the date of hearing and then decides it against him,

1. *Ghulam Hussain v. Makhan Lal*, (1933) 20 *A I R Lah 882=147 I C 288=85 P L R 146.*

that party cannot be expected to know the result of the appeal. It would be obviously unjust to dismiss the petition of such party for setting aside the ex parte order merely on the ground that it was not presented within 30 days. The mere fact that the party had been originally served with notice of the appeal would seem to be wholly immaterial in such circumstances and cannot be considered to be any justification for the ex parte decision. A I R 1933 Lah 882¹ had reference to the special rules of this Court and was decided on its own facts. As to the second point, the counsel for the petitioner had intimated that he had been engaged only to appear at Kulu and not at Dharamsala and had requested the Court to send notice direct to the appellant. The Court had accepted a similar request from the appellant's counsel on 7th July 1937 and had acted on it and it does not appear why it adopted a different procedure in the case of the respondent-petitioner. The facts of the present case are similar to that in A I R 1934 Lah 91² and, as pointed out therein, it would be unfair to penalize a litigant for the fault of his pleader in such circumstances. Even if the pleader was wrong in not communicating the notice to his client, the petitioner cannot be blamed for his non-appearance on 20th July, as he had no notice of that date. Moreover, I find that the appeal was actually heard on 21st July and it does not appear that any notice of this date was ever given to the petitioner or his pleader. I accordingly accept this appeal and setting aside the order of the learned District Judge remand the case to him for re-hearing of the appeal before him. Stamp on appeal to be refunded. Costs to follow final decision. Parties are directed to appear before the learned District Judge on 23rd October 1939.

D.B./R.K. *Appeal allowed.*

2. Satyapal v. Santram, (1934) 21 A I R Lah 91 = 146 I C 944.

A. I. R. 1940 Lahore 50

DIN MOHAMMAD AND RAM LALL JJ.

Messrs. Mohammad Mohsin Maula Bakhsh — Petitioner.

v.

Commissioner of Income-tax, Punjab, N.W.F.P. and Delhi Province, Lahore

— Respondent.

Civil Misc. No. 331 of 1939 in Civil Ref. No. 14 of 1937, Decided on 7th July 1939, to confirm order of High Court, Reported in A. I. R. 1938 Lah 194.

Income-tax Act (1922), S. 66 (2)—Costs of reference include preliminary deposit under S. 66 (2).

Preliminary deposit by the assessee under S. 66 (2) forms part of the costs incurred in relation to the reference: A I R 1936 Bom 385; A I R 1934 Rang 4; AIR 1933 All 853; AIR 1931 All 23; 3 ITC 302 and 3 I T C 73, Rel. on. [P 50 C 2; P 51 C 1]

Bashir Ahmad — for Petitioner.

Jagan Nath Aggarwal — for Respondent.

Din Mohammad J. — This matter has arisen in the following circumstances: The petitioners made an application under sub-s. 2 of S. 66, Income-tax Act, accompanied by a fee of Rs. 100 as provided for therein. The Commissioner refused to state the case, on which an application was made to this Court under sub-section 3 of S. 66. The Commissioner was then required to state the case and to refer it to this Court. A Division Bench, of which I was a member, decided the reference so submitted in favour of the petitioners and ordered at the same time that "the petitioners will be entitled to their costs." The Deputy Registrar while drawing up the memo of costs allowed the petitioners their counsel's fee only and not the amount deposited by them under sub-s. 2 of S. 66. The petitioners have now moved this Court praying that this sum be included, inasmuch as it was covered by the word 'costs' as used in the order of this Court.

Counsel for the Commissioner resists this application on the ground that the petitioners are entitled to the refund of Rs. 100 only in the circumstances enumerated in proviso 2 to sub-s. 2 of S. 66 and in no other case. I however do not agree. This matter has been the subject of several judicial decisions in various High Courts of India and it has been uniformly decided everywhere that the preliminary deposit under sub-s. 2 of S. 66 forms part of the costs incurred in relation to the reference. In 3 I T C 73¹ at p. 76 decided by a Division Bench of this Court composed of Harrison and Dalip Singh JJ. as well as in 3 I T C 302² at p. 308 this was taken as a matter of course. In 52 All 991,³ A I R 1933 All 853,⁴ 11 Rang 454⁵ and A I R

1. Radha Kishan v. Commissioner of Income-tax Punjab and N. W. F. Province, (1928) 3 ITC 73.

2. Massey & Co. Ltd. v. Commissioner of Income-tax, Madras, (1928) 3 I T C 302.

3. In re Radhey Lal Bal Makund, (1931) 18 AIR All 23=130 IC 634=52 All 991=1930 ALJ 1548.

4. Lachman Das Babu Ram v. Commissioner of Income-tax, (1933) 20 A I R All 853=148 I C 352=1933 A L J 942.

5. Commissioner of Income-tax, Burma v. J. I. Milne, (1934) 21 A I R Rang 4=148 I C 98=11 Rang 454 (S B).

1936 Bom 385⁶ the question was discussed and decided against the Commissioner. I am in respectful agreement with the opinion expressed in the judgments cited above and would hold that the costs allowed by this Court cover the preliminary deposit of Rs. 100. The memo of costs should, in my view, be amended accordingly. I would not allow any costs of this petition.

Ram Lall J.—I agree.

G.N./R.K.

Order accordingly.

6. Commissioner of Income-tax v. Gopal Vajjnath Manohar, (1936) 23 A I R Bom 385=165 I C 518=60 Bom 999=38 Bom L R 929.

A. I. R. 1940 Lahore 51

BHIDE J.

Basho Ram and others — Plaintiffs — Appellants.

v.

Mt. Sarupi and others — Defendants — Respondents.

Second Appeal No. 1317 of 1938, Decided on 16th October 1939, from decree of Dist. Judge, Karnal, D/- 9th May 1938.

(a) Custom (Punjab) — Gaur Brahmins of Karnal town — Burden to prove that they are governed by custom lies on them — Fact that they have settled in town of Karnal from time of Mughal Emperors or that they have also been notified as agricultural tribe would not prove that they follow custom.

Where the parties are Gaur Brahmins of Karnal town the burden to prove that they are governed by custom and not by Hindu law lies on them and the burden is heavy in such case as the parties are Hindus of the highest caste: 1 P R 1910; A I R 1923 Lah 501; A I R 1925 Lah 646 and A I R 1931 Lah 491, *Rel. on.* [P 51 C 2]

The facts that Gaur Brahmins of Karnal Town have been settled in the town of Karnal from the time of the Mughal Emperors and that Gaur Brahmins of Karnal district have been also notified as an agricultural tribe would not necessarily show that Brahmins of Karnal town follow custom: A I R 1931 Lah 491, *Rel. on.* [P 52 C 1]

(b) Custom (Punjab) — Custom has to be established by proof in shape of instances.

Custom is a question of fact and it has to be established by proof in the shape of instances, etc., and a finding as to custom cannot be based on mere inferences. The *riwaj-i-am* would undoubtedly raise a strong presumption in favour of custom if it were held to be applicable: A I R 1916 P C 129, *Rel. on.* [P 52 C 1]

Mukand Lal Puri — for Appellants.

Shamair Chand and Ram Chander —

for Respondents 1 to 3.

Judgment. — This is a second appeal arising out of a suit by the reversioners of one Mt. Sarupi for a declaration that a gift of land made by her in favour of her daughter's sons was not binding on them according to custom. The defendants pleaded inter

alia that the parties were governed by Hindu law and not by custom and the Courts below have found this issue in their favour and dismissed the plaintiffs' suit. From this decision, a second appeal is preferred by the plaintiffs, supported by a certificate from the learned District Judge on the question of custom.

The sole point for decision in this appeal is whether the plaintiffs have proved that they are governed by custom and not by Hindu law and whether according to that custom the daughter's sons in whose favour the gift in question was made were not entitled to inherit the property, as they would under Hindu law. The parties are Gaur Brahmins and are residents of Karnal town. The burden of proof as regards the alleged custom admittedly lay on them and the burden was heavy in the present case as the parties are Hindus of the highest caste: *cf.* 1 P R 1910,¹ 4 Lah 254,² 6 Lah 524³ and A I R 1931 Lah 491,⁴ etc. The oral evidence of the plaintiffs was vague and of little value as the learned District Judge has shown and I agree with him. The plaintiffs were unable to produce any documentary evidence in the shape of judicial decisions, etc. to support their case. The only evidence on which the learned counsel relied before me was the *riwaj-i-am* of Pargana Karnal of the year 1880 (Exs. p. 11 to p. 15 of which copies have been placed on the record). It was contended that this *riwaj-i-am* is a strong piece of evidence in plaintiffs' favour and the presumption arising therefrom has not been rebutted in the present case. I am however unable to accept these contentions. It seems to me very doubtful in the first place if the *riwaj-i-am* produced in this case can be held to be applicable to the parties to the suit, who are residents of a town and not of a village and belong to a caste, which is usually dependent not on agriculture but on other occupations. The learned District Judge has pointed out that according to the evidence, about half of the Brahmins living in Karnal town do not own any land at all and most of them follow other occupations. Many of them follow their priestly avocation.

1. Maya v. Gurdit Singh, (1910) 1 P R 1910 = 4 I C 947=145 P L R 1909=128 P W R 1909.

2. Salig Ram v. Badhawa, (1923) 10 A I R Lah 501=73 I C 759=4 Lah 254.

3. Khazunchand v. Paras Ram, (1925) 12 A I R Lah 646=90 I C 1045=6 Lah 524=26 P L R 627.

4. Bhagwani v. Sitaram, (1931) 18 A I R Lah 491=134 I C 802=82 P L R 284.

They are owners of 2000 bighas out of a total of 60,000 bighas.

It was urged that these Brahmans have been settled in the town of Karnal from the time of the Mughal Emperors and that Gaur Brahmans of Karnal District have been also notified as an agricultural tribe. But these facts would not necessarily show that Brahmans of Karnal town follow custom. Even if the Brahmans have been residents of Karnal from the time of the Mughal kings, they may well be following their personal law as regards succession, etc., and the fact that Gaur Brahmans in the district have been notified as an agricultural tribe would not necessarily show that they (and especially those who are residents of a town) follow custom: see A I R 1931 Lah 491.⁴ Custom is a question of fact and it has to be established by proof in the shape of instances, etc., and a finding as to custom cannot be based on mere inferences. The *riwaj-i-am* would undoubtedly raise a strong presumption in plaintiffs' favour, 45 P R 1917,⁵ if it were held to be applicable; but as stated above it seems to me very doubtful if it can be properly held to be applicable to the parties to this suit. I had occasion to consider a similar question in the case of Mahajans of Hissar town in A I R 1938 Lah 461⁶ and I held therein that the *riwaj-i-am* was not applicable to them. Most of the reasons given in that judgment will, I think, apply to the present case also.

The learned counsel for the appellants mainly relied on the fact that from the introduction to the Customary law of the district it appears that Brahmans were consulted at the time of the preparation of the *riwaj-i-ams* of the Karnal District. But this general statement would not necessarily show that residents of Karnal town were consulted. In the list of tribes, who were consulted, Rajputs of Panipat town are specifically mentioned in addition to Rajputs of the districts generally and if the Gaur Brahmans of Karnal town were consulted they might have been expected to be mentioned separately in the list. The Settlement Officer who was responsible for the preparation of the *riwaj-i-am* of 1880 noted about the Brahmans of the district as follows in para. 218 of his report :

5. *Beg v. Allah Ditta*, (1916) 3 A I R P C 129=38 I C 354=44 I A 89=44 Cal 749=45 P R 1917 (P C).

6. *Patrumal v. Badri Parshad*, (1938) 25 A I R Lah 461=177 I C 403=40 P L R 781.

The Brahmans have in almost all cases followed the clients from their original abodes to villages in which they are now settled. They hold so little land that I have made but few inquiries about them. (See report of the Revision of the Settlement of the Panipat Tahsil and Karnal Parganah by D. C. J. Ibbetson published in 1883.)

It is, also noteworthy that in statistical tables Nos. 23, 24 and 25 attached to the report relating to the principal tribes of the district, cities of Karnal and Panipat are excluded. As the learned Judge of the trial Court has pointed out the heading of the *riwaj-i-am* itself shows that the customs recorded are those relating to residents of villages (*dehat*). There is no direct evidence that representatives of Brahmans of Karnal town were consulted and in view of all the facts stated above, I do not think it would be safe to presume that they were so consulted. In 124 P R 1907⁷ even the attestation of the *riwaj-i-am* by a non-agriculturist who had invested in some land in a village was held to be not sufficient to show that he was governed by custom. The present case for the plaintiffs is still weaker as there is no direct evidence to show that the representatives of Gaur Brahmans of Karnal town were actually consulted when recording the custom. It was pointed out that some of the illustrations given in the Manual of the Customary Law of the Panipat Tahsil and Karnal Pargana prepared in 1910 relate to Brahmans of Karnal. It is not quite clear whether these illustrations refer to Karnal town. Besides, it appears from the preface that these illustrations were added later, and I doubt whether it would be safe to presume therefrom that representatives of Brahmans of Karnal town were consulted in preparing the *riwaj-i-am*. In any case, even if it be assumed that the *riwaj-i-am* applies to Gaur Brahmans of Karnal town, the presumption has been in my opinion sufficiently rebutted by the evidence on the record.

It has been stated above that the plaintiffs' oral evidence was vague and of little value. But it is significant as pointed out by the learned District Judge that their own witnesses have admitted instances of daughters' succession which go against their case. The plaintiffs have not been able to produce any reliable documentary evidence in the shape of judicial decisions relating to Gaur Brahmans while the defendants have produced several such decisions—one of them relating to Karnal town, and others

7. *Sardar Darchan Khan v. Sohaura Mal*, (1907) 124 P R 1907=3 P L R 1907=48 PWR 1907.

to Panipat. The best proof of custom, after all, consists of instances in which it has been followed and if the custom amongst Gaur Brahmans of Karnal town on the point in question is alleged by the plaintiffs, there is no reason why they should not have been able to produce some reliable documentary evidence in the shape of instances in support of it. Lastly, there is evidence in the shape of an important admission by Ganga Dutt, one of the plaintiffs, and Sham Sundar, a son of another plaintiff (*vide* Exs. D-7 and D-11). The former admitted in the course of his evidence in another suit that amongst Gaur Brahmans daughters succeed in preference to collaterals. It was urged that this statement was not put to Ganga Dutt. But the copy of Ganga Dutt's statement was produced as evidence of an admission by him and was apparently allowed to be put in without any objection. It is significant that he did not go into the witness-box to explain it and no explanation of the statement was offered on his behalf even in the course of the arguments. In Ex. D-11 also Sham Sundar seems to have clearly based his claim to a succession certificate on Hindu law. No explanation was offered as to this fact either. In view of all the facts discussed above, I see no good reason to dissent from the findings of the Courts below on the question of custom. I dismiss the appeal with costs.

D.S./R.K.

*Appeal dismissed.***A. I. R. 1940 Lahore 53****DIN MOHAMMAD AND RAM LALL JJ.***Sohna and others — Convicts*

Appellants

v.

Emperor.

Criminal Appeal No. 581 of 1939, Decided on 25th September 1939, from order of Sess. Judge, Gujranwala, D/- 19th May 1939.

(a) Criminal Trial—Evidence—Inter-relation of prosecution witnesses no ground for disbelieving their story when corroborated by facts and no contrary evidence is adduced.

The fact that the prosecution witnesses are inter-related is no reason why their statements should not be believed especially when the surrounding facts afford a valuable corroboration to the story as advanced by them and no cogent circumstances bespeaking the contrary are shown. [P 54 C 1]

(b) Penal Code (1860), Ss. 302, 149 and 34—Offence committed by one member of unlawful assembly in prosecution of common object—Individual intention is immaterial—Intention to be considered in cases governed by S. 34 of the Code.

Where one of the members of an unlawful assembly being armed with a spear commits an offence under S. 302 when the unlawful assembly is prosecuting its common object which is obviously unlawful, every member of the assembly is equally responsible under S. 149 and it is immaterial whether any member individually intended to commit that offence or not. [P 54 C 2]

Intention being dealt with in S. 34 can be considered in those cases only which are governed by it. [P 54 C 2]

S. R. Sawhney — *for Appellants.*Bhagwan Das Mehra for Advocate-General — *for the Crown.*

Din Mohammad J. — The appellants Nadri, Sohna, Raja, whose names are noted Yara and Rehman. in the margin, have been tried by the Sessions Judge, Gujranwala, principally for an offence under Sec. 302, I. P. C., for having caused the death of Bahaduri. Sohna, who was held individually responsible for causing the death of Bahaduri, has been sentenced to death, while his four companions have been awarded transportation for life by virtue of S. 149, I. P. C. They have appealed and the case of Sohna is also before us under S. 374, Criminal P. C.

The case for the prosecution is that the deceased and the accused are neighbours and that Shera, a son of the deceased, contracted a liaison with Mt. Bahishtan who was a daughter of Nadri's brother and was also married to Nadri's son. Eventually he took her away to some unknown destination. Bahaduri made an attempt to trace their whereabouts but was unsuccessful. On the morning following his return to the village, the appellants along with the two absconders entered into an altercation with the members of the deceased party and finally made a concerted attack on them armed with all sorts of deadly weapons. The deceased along with the other members of his party rushed into their room and closed the door. The party of the accused battered the door and flung it open. They then made an entry into the room and showered blows on all the persons who were found present there. Sohna, who was armed with a spear, thrust his weapon into the chest of Bahaduri, deceased, while Yara gave him a blow with a hatchet. Bahaduri died instantaneously. His wife Mt. Nuran and her two brothers, Malla and Karam Ali, were also attacked and sustained injuries in consequence. The party of the accused then disappeared. A report of this occurrence was made by Karam Ali within three and half hours of the occurrence.

The post mortem examination on the body of Bahaduri revealed two incised wounds besides a punctured wound on the right side of the chest, 7 inches in depth, which ultimately proved fatal. Mt. Nuran bore two incised wounds in the region of the head besides another incised wound on the right wrist. Both Malla and Karam Ali had also received an injury each with a sharp-edged instrument besides several injuries with blunt weapons. The case as put forward by the prosecution is supported by Karam Ali, P. W. 3, Malla, P. W. 4, and Mt. Nuran, P. W. 5, who as stated above, had rushed into the room along with Bahaduri. In addition to these witnesses, Ahmad and Hayat have also corroborated the statements made by them in material particulars. It may be remarked that the latter is a son-in-law of Nadri, accused. All the appellants have made a categorical denial of the case alleged against them but they have not produced any evidence in defence. Counsel for the appellants has mainly urged that inasmuch as the principal prosecution witnesses are interrelated, their statements should not be believed in toto and that benefit of the doubt should be given to those appellants at least who bore no injuries on their persons and whose participation in the assault has not consequently been established beyond doubt. We are not however disposed to agree. No general rule can be laid down in such broad terms as suggested. Every case is to be decided on its own merits and in the light of the circumstances disclosed. In the present case, the three witnesses Mt. Nuran, Malla and Karam Ali were admittedly present at the spot and their version is amply corroborated by the fact that the shutters of the door were found damaged and the walls of the room bespattered with blood. This affords a valuable corroboration to the story as advanced by them and in the absence of any cogent circumstances bespeaking the contrary there is no reason why their version should not be believed. It is true that in this province cases have come to the notice of judicial authorities where innocent persons also have been implicated along with the guilty but where there are no distinguishing features, this circumstance alone cannot help those who deny their participation in the affair. If once it is believed that Nadri wanted to penalize Bahaduri for a sin committed by his son and was aware of the fact that the latter had two strong built companions also with him at the time, it is not strange that

in order to overpower any resistance which might be put forward by his victims, he might have collected a larger number of people to crush down opposition in order to come off victorious. We have no hesitation therefore in holding that all the appellants were members of the unlawful assembly that committed a premeditated assault on the party of the deceased.

Counsel has next urged that in any case an offence under S. 302, I. P. C., has not been established against any of the appellants. Here also he is on weak ground. Sohna, who was armed with a spear, was one of the members of the unlawful assembly that committed the attack. He most callously thrust it seven inches deep into the chest of his victim and brought about his death immediately. His case evidently comes within the purview of the substantive part of S. 300. This offence was committed when the unlawful assembly was prosecuting its common object which was obviously unlawful. In these circumstances every member of the assembly was equally responsible under the terms of Sec. 149, I. P. C. It is immaterial whether any member individually intended to commit that offence or not. "Intention" is dealt with in S. 34, I. P. C., and can be considered in those cases only which are governed by it. We accordingly confirm the sentence of death imposed on Sohna and the sentence of transportation for life awarded to the other appellants and dismiss this appeal.

G.N./R.K.

Appeal dismissed.

A. I. R. 1940 Lahore 54

DIN MOHAMMAD AND RAM LALL JJ.

Bhag Singh Pakhar Singh — Convict Appellant

v.

Emperor.

Criminal Appeal No. 690 of 1939, Decided on 16th November 1939, from order of Sess. Judge, Ludhiana, D/- 19th June 1939.

Criminal Trial — General rule that onus to prove guilt of accused always lies on prosecution is subject to exception contained in S. 105, Evidence Act.

It is true that the onus of proving the guilt of an accused person invariably and throughout the trial rests on the prosecution. But the proposition is subject to the statutory exception, contained in S. 105, Evidence Act. It is true that the prosecution cannot claim a verdict of guilty because the accused puts forward a false defence. The guilt must be determined on the strength of the prosecution evidence alone, but where the accused puts forward a plea that he had committed the offence

charged but in circumstances that excused or mitigated, the prosecution in such cases can show that no such circumstances exist and so the claim is averted. With the rejection of the defence version however the duty of the prosecution does not end and they have still to show in case of murder that the accused caused death in circumstances which make the offence murder and in this sense the onus never shifts from the prosecution: (1935) *A C 462, Expl.* [P 57 C 1, 2]

J. G. Sethi and Dasaundha Singh —
for Appellant.

Basant Krishan for Advocate-General —
for the Crown.

Ram Lall J. — Bhag Singh with his father Pakhar Singh was tried under Ss. 302/34, I. P. C., on the allegation that these two persons together with Nahar Singh, absconder, caused murders of Bishen Singh, Jagir Singh and Kehr Singh just outside their village on the morning of 6th February 1939. The learned Sessions Judge acquitted Pakhar Singh, convicted Bhag Singh and sentenced him to death and Nahar Singh is still absconding. Bhag Singh has preferred an appeal to this Court and the sentence is also before us for confirmation under S. 374, Criminal P. C. The case for the prosecution is that Kher Singh and Jagir Singh were working the well outside the village on the morning of 6th February 1939, when Bhag Singh, appellant, and Nahar Singh, absconder, came there armed with spears and told Kher Singh and Jagir Singh not to work the well any more. Apparently both the accused and the deceased were entitled to work this well but no definite terms had been fixed. Kehr Singh and Jagir Singh replied that they had still a little more land to water and they would leave off working the well soon. While an altercation was going on Narain Singh, Santa Singh, Salaha Singh, Bachan Singh and Mt. Basso, the mother of Jagir Singh, also reached there as did Bishen Singh, father of Jagir Singh and Pakhar Singh, father of Bhag Singh. Pakhar Singh is alleged to have shouted encouragement to Bhag Singh and Nahar Singh whereupon they were attacked by Bhag Singh, appellant, and Nahar Singh, absconder, with spears. Kehr Singh, Jagir Singh and Bishen Singh tried to run towards the village abadi which is close by, but they were intercepted and Nahar Singh gave a spear thrust to Bishen Singh in the stomach and Bhag Singh overtook Kehr Singh who stumbled over the boundary of a field as he was running, and he gave him a spear blow on his back towards the left side. Immediately afterwards Bhag Singh got in front of Jagir Singh and thrust his spear into the

right side of Jagir Singh. While Bhag Singh was attacking Jagir Singh, Jagir Singh's mother, Mt. Basso, tried to catch hold of the spear blade and, in doing so, her right hand was injured.

After doing all this damage the culprits ran away and the three injured men were taken to Jagraon, where Dr. Mohammad Ajmal Husain, Assistant Surgeon, examined them at about 11 A. M. The doctor sent a ruqqa to the Police Station, Jagraon, to get the statements of the injured men recorded by a Magistrate as their conditions were precarious. The statements of all these three persons were recorded by a Magistrate at the hospital at about 1-20 P. M. and thereafter a formal first information report was recorded on the basis of these statements at 2-15 P. M. Kehr Singh died the same day, that is, on 6th February 1939, at about 4-45 P. M., Jagir Singh died on 13th February at 6-30 P. M. and Bishen Singh died on 15th February at 2-15 P. M. The medical evidence proved beyond all doubt that the cause of death in each case was spear thrusts. Mt. Basso was found to have two incised wounds on the palm of the right hand and an incised wound on the palmer aspect of the right middle finger. The injuries were fresh when they were examined and there is little doubt therefore that they were caused while she had got hold of the spear blade in her hand. The case for the prosecution was supported by the evidence of Bachan Singh, P. W. 16, Santa Singh, P. W. 17, Salaha Singh, P. W. 18, and Mt. Basso, P. W. 19, who have all deposed as eye-witnesses of the occurrence. There are also dying declarations by each of the three deceased persons recorded at the earliest possible opportunity and in each of which the appellant Bhag Singh has been clearly implicated as the murderer. Bhag Singh and Nahar Singh had both absconded, but Bhag Singh was captured by Chaudhri Nazir Ahmad on 24th May when he at first gave a false name. Nahar Singh, as already stated, is still absconding.

Bhag Singh, appellant, and his father Pakhar Singh both pleaded not guilty to the charge. Bhag Singh stated to the committing Magistrate that he was working the well at the time of the occurrence and was attacked by the deceased whom he injured in self-defence, and to this statement he adhered besides filing a lengthy written statement. The story as told by Bhag Singh in his written statement is to the effect that

he was working the Persian wheel of the well and Thakra Singh, D. W. 1, was helping him at the time when Jagir Singh, son of Bishen Singh, came and wanted the use of the well himself and on the refusal of Bhag Singh mutual abuse took place and Jagir Singh went back to the village in a temper. After a short while, Jagir Singh and Kehr Singh armed with a spear and a takwa respectively came from the direction of the village followed by Mt. Basso who was entreating them not to fight. The noise attracted a number of persons who appeared as defence witnesses and these persons tried to stop Jagir Singh and Kehr Singh from fighting. Jagir Singh's spear was taken away from him and handed over to Mt. Basso. In the meantime, Bishen Singh also came running from the village with a spear in his hand and at this juncture Bhag Singh says he snatched the spear which the defence witnesses had handed over to Mt. Basso from Mt. Basso's hand and stood at bay waiting for Bishen Singh's attack. Bishen Singh as soon as he reached the well shouted to Kehr Singh and Jagir Singh to attack whereupon Kehr Singh attacked Bhag Singh with his takwa and caused an injury on his right hand. Thereafter, the appellant says, that he used the spear which he had snatched from Mt. Basso against Kehr Singh and injured him in self-defence. After he had injured Kehr Singh Jagir Singh attacked him with a spear as also did Bishen Singh. In order to protect himself he injured both Jagir Singh and Bishen Singh. He goes on to say that at this stage he escaped and went to a doctor at Kokri Hospital to get his injured hand treated.

The version put forward by the defence appears to be inherently absurd. It is impossible to believe that one man initially unarmed should be able, when attacked by three heavily armed men in the prime of life, to snatch a spear from a member of the opposite party, even if that person be a woman, and therewith cause mortal injuries to each of his three assailants successively. If the appellant was injured, as he says he was with a takwa, before he himself inflicted any injury the causing of the damage that he did cause becomes all the more difficult to understand. The whole setting of the story seems unnatural. It is unlikely that defence witnesses who had disarmed Jagir Singh should hand over Jagir Singh's spear to Mt. Basso, and not keep it themselves. It is still more unnatural that the witnesses who professed to be

there in order to prevent a fight should not have tried to protect Bhag Singh till after Bhag Singh had killed each one of his three assailants. It appears further unlikely that if Bhag Singh's story was true he would run away and so create suspicion against himself. Dr. Naranjan Singh says that he examined the appellant on 7th February at his dispensary at Kokri Kalan in the Ferozepore District. At that time he had a superficial incised wound on his right hand and three stitches had to be applied to it. A superficial wound can be caused at any time in order to bolster up a defence to a serious charge like murder, and this injury appears to be either self-inflicted or self-suffered. That this injury was not caused in the manner alleged by Bhag Singh, appellant, appears to be clear from the fact that if a heavy blow was given by an able-bodied assailant with a hatchet it would cause something more serious than a superficial wound on the hand and, secondly, it is not without significance that the appellant thought of getting himself examined the next day at a village dispensary in a district different to his own. It appears far more likely that the elaborate written statement put in by the appellant was prepared by a legal mind and sought to find some explanation, however crazy, of all the injuries found on the party of the complainants and legal colour was added to the story by manufacturing a superficial injury on the hand of the appellant and getting it examined by a doctor in a surreptitious manner in a different district. Learned counsel who has appeared before us has argued that if a man had made up his mind to abscond he would not think of manufacturing such false evidence. It appears to us however that there is nothing strange or unlikely about an accused person in the position of Bhag Singh in manufacturing evidence and then absconding with the object of using this manufactured evidence if and when he is arrested and brought to trial. We have no hesitation therefore in rejecting the defence version as wholly concocted and false.

Learned counsel who appeared before us on behalf of the appellant urged that the case for the prosecution had not been proved with any degree of satisfaction and that if that be so we are not entitled to look at the defence that his client has put forward and victimize him for having told a story which is not convincing. In this connexion he urged on the authority of a recent well-

known decision in the House of Lords (1935) A C 462¹ that the onus of proving the guilt of an accused person invariably and throughout the trial rests on the prosecution and it is incorrect to say that the onus ever shifts. This proposition is true only to a limited extent. Under Sec. 105, Evidence Act, when a person is accused of any offence and he pleads the existence of circumstances which show that the act committed by him comes within any of the general exceptions in the Penal Code, the burden of proving such circumstances is on the person accused and the Court must presume the absence of such circumstances. In other words, under the Indian law the Statute expressly creates a presumption which an accused person has to rebut if he wishes to get the benefit of any exceptions exonerating him or mitigating his offence. This circumstance alone appears to us to distinguish (1935) A C 462¹ where Lord Sankey observed that the general rule that the onus always lies on the prosecution to prove the guilt rests on the prosecution is subject to any statutory exception that may exist. This statutory exception appears to us to exist in this country in S. 105, Evidence Act.

The proposition however is correct if it means that the prosecution cannot claim a verdict of guilty because the accused puts forward a false defence. The guilt must be determined on the strength of the prosecution evidence alone, but where the appellant puts forward a plea that he did commit the offence charged but in circumstances that excused or mitigated, the prosecution in such cases can show that no such circumstances exist and so the claim is averted. In the present case the right of private defence of person is pleaded and an injury to the hand of the appellant is put forward in support of this plea. It is open to the prosecution to argue that the injury if received by the appellant as alleged by him would have made it impossible for the appellant to inflict further injuries so as to kill three men one after another. Again, the prosecution can show that if an attack had been made on him, as suggested by him, the injuries to him would have been far more serious than a flesh wound on the hand. With the rejection of the defence version however the duty of the prosecution

does not end and they have still to show that the appellant caused death in circumstances which makes the offence murder and in this sense the onus never shifts from the prosecution.

In the case before us, the story for the prosecution is supported by the three dying declarations which were recorded on the day of the occurrence by a Magistrate and is further supported by a number of eye-witnesses of whom the presence of Mt. Basso is corroborated by injuries on her hand and her presence is indeed not denied by the defence. It is objected regarding these dying declarations that their language is almost identical, but this is easily explained by the fact that these statements are very short and were recorded by the same person at about the same time. In all three the same story is told and Bhag Singh, appellant, is clearly implicated in all as a murderer. Beyond the fact that Dharan Singh and Bachan Singh were present when the dying declarations were recorded, there is nothing to show that these statements were prompted or made at the instigation or under the influence of a relative.

If the dying declarations are believed, they themselves afford a sufficient basis for the conviction, but the case is supported by other evidence. Mt. Dasso, as stated already, was admittedly present and was therefore an eyewitness. In this view of the matter, the objection raised by learned counsel that Mt. Basso is wrong when she says that she was taking tea for Jagir Singh and Kehr Singh loses all significance. Whether she was taking tea or was attracted by the cries of Jagir Singh and Kehr Singh becomes in our opinion immaterial. It is true that her statement like that of some of the other witnesses for the prosecution who have appeared as eyewitnesses is open to the objection that there are minor discrepancies between the statements in Court and those made before the police particularly regarding the circumstances in which Pakhar Singh came to the spot and what he said to Bhag Singh by way of encouragement before or during the assault. Pakhar Singh however has been acquitted on the strength of these somewhat minor variations, but there appears nothing on the record to shake the general truth of the story for the prosecution that because of some quarrel over the turn of water, no matter by whom started, the appellant with others came armed with spears and killed three persons.

1. *Woolmington v. Director of Public Prosecution*, (1935) A C 462=104 L J K B 493 = 25 Cr App R 72=51 T L R 446=153 L T 292=79 S J 401.

The statement of Bachan Singh is objected to on the ground that this man was implicated in a dacoity and had appointed Bishan Singh deceased as his mukhtar for about two months. This is apparently the only interest that the witness had in the deceased and it does not appear to us to be likely that Bachan Singh would for this reason lend himself as a false eyewitness to a murder. The other eyewitnesses are Santa Singh and Salaha Singh. Santa Singh had been implicated in cases of illicit possession of opium and liquor and sentenced and he has otherwise mortgaged the whole of his land and for that reason it is urged that he was unreliable. As the witness's antecedents are more than doubtful, we consider that his statement can be left out of account. The statement of Salaha Singh too is open to objection on various minor grounds. We consider that if these two statements are left out of account there is ample evidence which will support the prosecution. In our opinion on the strength of this evidence a clear case of murder has been made out.

We have already said that the counter-version of the defence which is supported by two or three defence witnesses is unbelievable. Karnail Singh (D. W. 5) says that Jagir Singh was armed with a spear and Kher Singh with a takwa and later Bishan Singh also came armed with another spear, and all three attacked Bhag Singh whereupon Bhag Singh gave a spear blow to Kehr Singh in self-defence and as Bishan Singh, Kehr Singh and Jagir Singh advanced towards him, he killed them one after the other. This witness's father was implicated in a murder case but acquitted. It was suggested by the prosecution that Partapa, brother of Pakhar Singh accused and uncle of Bhag Singh appellant, appeared as a defence witness in that case and the witness did not deny that this was so. In these circumstances, it is not unlikely that he is paying off a debt in kind. The next witness Mit Singh (D. W. 6), tells a similar story and his motive for giving evidence for the defence too is clear, for Ran Singh, father of the absconder in this case, appeared as a witness for the prosecution in a case brought by him under S. 324, I. P. C., against one Sarwan Singh. This witness was in the village when the Head Constable arrived on the scene but he did not appear before him. The next witness for the defence in support of the counter-version is Sham Singh (D. W. 7) and he too did not appear before the police during the course of the investi-

gation. The other evidence to the similar effect was not even touched upon by learned counsel in his arguments. The witnesses for the defence appear to us to be unbelievable in the story they tell and therefore the question of their bias or motive becomes a matter of secondary importance.

In the view that we have taken of the matter, the prosecution appears to us to have clearly established the case of murder against the appellant and the defence to have totally failed to substantiate the plea of the right of private defence put forward. In these circumstances, we are satisfied that Bhag Singh, appellant, has been rightly convicted of the offence of murder. For such an offence there can be no penalty other than death and for these reasons we reject his appeal and confirm the sentence of death.

D.S./R.K.

*Appeal dismissed.***A. I. R. 1940 Lahore 58**

BLACKER J.

Vidya Parkash — Petitioner

v.

Emperor.

Criminal Revn. No. 654 of 1939, Decided on 27th July 1939; case reported by Sess. Judge, Delhi, D/- 22nd April 1939.

Criminal P. C. (1898), S. 244 — Application by accused for summoning witnesses — Failure to consider application is incorrect though not illegal.

Application for summoning his witnesses by the accused under S. 244 cannot be completely ignored by a Magistrate though under S. 244 he has the discretion to refuse to summon these witnesses. Failure to consider the application is incorrect though not illegal. [P 59 C 1,2]

Indar Dev — *for Petitioner.*Muhammad Monir, Assistant to the Advocate-General — *for the Crown.*

Facts. — The petitioner was tried summarily and was convicted under S. 112 (a), Railways Act. The allegation against him was that on 26th August 1938 he was travelling between Delhi and Subzimandi on the same ticket for the second time. He was sentenced to pay a fine of Rs. 25 and has come to this Court in revision.

Report. — The only point of law involved in this case is whether or not the petitioner was afforded an adequate opportunity of adducing his defence. The petitioner appeared before the Court on 28th October and applied for the summoning of four witnesses from Delhi, Jhansi, Rohri (Sindh) and Lahore. The learned Magistrate ordered the summoning of the witnesses but none of them was present on 15th November

1938 and the Court accordingly disposed of the case without examining the defence witnesses. The learned Magistrate reports that reasonable opportunity was afforded to the petitioner for bringing or summoning witnesses of defence but this fact does not appear on the record. In para. 5 of Chap. 1-D of Vol. 3 of the Rules and Orders of the High Court, it has been specifically laid down that even in a revision case while the accused is personally responsible for the production of his evidence on the day of the hearing, the Court should as a measure of caution at the conclusion of the case for the prosecution, ascertain from the accused whether he has any witnesses and should not refuse to give him further opportunity of bringing or summoning witnesses who may not be present in Court. As reasonable opportunity does not appear to have been afforded to the petitioner, I forward the records of the case to the High Court with the request that the case may be remanded to the Court below for decision in accordance with law. It will be open to the Magistrate to require the petitioner to deposit the reasonable expenses of summoning the witnesses required by sub-s. 3 of S. 244, Criminal P. C.

Order of the High Court. — The petitioner was tried summarily by a Magistrate at Delhi. On 28th of October he applied, under S. 244, Criminal P. C., for the summoning of four witnesses. This application was granted. On the first date of hearing the Magistrate was absent and the case was not proceeded with. As these witnesses were not present the petitioner put in a fresh application for them to be summoned on the next day of hearing. An order was made by another Magistrate that it should be put up at the next date of hearing which was 15th November. It would appear that this application was probably never seen by the trial Magistrate who on the date of hearing after recording the evidence for the prosecution proceeded to judgment. It is not clear whether the petitioner made any oral request at that time that his witnesses should be heard. The Magistrate in reply to a query has stated that he did not make any such request. The petitioner, I understand, is ready to swear an affidavit that he did, but I see no particular value in such an affidavit at this stage of the proceedings. I do not think it can be held that the Magistrate has definitely committed an illegality in this case, but I think that he has not acted correctly, possibly through

no fault of his own, in not considering and passing orders on the second application for the summoning of these witnesses. No doubt, under S. 244, Criminal P. C., he had the discretion to refuse to summon these witnesses, but I do not think that it can be held that such an application can be completely ignored. In saying this, I am not suggesting that the Magistrate intentionally ignored it. The facts seem to suggest that the application was not brought to his notice. If this had been considered by the Magistrate the presumption is that having granted the first application he would have granted the second application and the petitioner would have been in a position to produce his evidence. For these reasons, I would accept the recommendation of the learned Sessions Judge and remand the case to the trial Court for re-decision after passing orders upon this application of the petitioner to have his defence witnesses summoned. The attention of the learned Magistrate should also be drawn to the last sentence of the learned Sessions Judge's order of reference.

G.N./R.K.

*Case remanded.***A. I. R. 1940 Lahore 59**

TEK CHAND AND ABDUL RASHID JJ.

A. R. Dawar — Auction-purchaser

— Petitioner.

v.

Ganesh Datta and others, Judgment-debtors and another, Decree-holder — Respondents.

Civil Revn. No. 1076 of 1938, Decided on 21st April 1939; case referred by Tek Chand J., D/- 28th February 1939.

Civil P. C. (1908), Ss. 47, 144 and 151 — Order confirming sale set aside — Application by auction-purchaser for compensation for improvements lies under Sec. 151 and not under S. 144 or S. 47.

The order of the executing Court confirming a sale which is set aside on appeal does not amount to a decree and therefore application for improvements by auction-purchaser in consequence of that order cannot be said to fall within the purview of Sec. 144 as that Section contemplates restitution where a decree has been varied or reversed : *A I R 1930 Pat 280, Rel. on.* [P 60 C 2; P 61 C 1]

Nor does the application fall under S. 47 as the question of improvements is one between the auction-purchaser and judgment-debtor and does not relate to the execution, satisfaction or discharge of the decree as such. The application can therefore fall only under S. 151. [P 61 C 1]

The question of improvements by auction-purchaser is a question incidental to and consequential on the setting aside of the sale. The executing

Court under S. 151 has jurisdiction to go into the question of improvements. The judgment-debtor cannot be allowed to retain the benefit of the improvements made bona fide by the auction-purchaser without paying for them. The case therefore is a fit one for the exercise of the inherent powers of the Court under S. 151: *A I R 1930 Pat 280* and *A I R 1922 P C 269, Rel. on.* [P 61 C 1, 2]

Girdhari Lal Malhotra — *for Petitioner.*

Labh Singh and Manohar Lal Sachdeva
— *for Respondents (Ganesh Datta and Model Town Society, respectively).*

ORDER OF REFERENCE

Tek Chand J. — One of the questions involved in this case is the interpretation of a decree of this Court passed by a Division Bench consisting of Abdul Rashid J. and myself in Letters Patent Appeal 16 of 1937.* The value for purposes of jurisdiction is Rs. 12,000. I think it is desirable that this appeal and connected appeal, Execution First Appeal No. 14 of 1939, be heard by a Division Bench consisting of the Judges who decided the aforesaid appeal. I accordingly refer the case to the Division Bench. The papers will be laid before the Hon'ble Chief Justice for constituting the Bench.

Order of Division Bench

Abdul Rashid J. — On 22nd May 1933 the Model Town Society, Lahore, obtained a decree for Rs. 12,000 against Rai Sahib Jinda Ram. In execution of the decree a house belonging to the judgment-debtor was sold on 15th April 1935, by public auction to Mr. A. R. Dawar for Rs. 8100. The auction-purchaser was required to deposit a sum of Rs. 6075 within fifteen days of the sale. This sum was not deposited within the required time, and an objection was taken in the executing Court that the sale in favour of Mr. Dawar could not be confirmed. This objection was not given effect to by the executing Court and the sale was confirmed on 22nd May 1936. On 8th June a sum of Rs. 7834-8-0 out of the purchase price was paid to the Model Town Society. The usual sale certificate was issued in favour of the auction-purchaser and he obtained possession of the house on 3rd July. In the meantime, the judgment-debtor had preferred an appeal against the order of the executing Court confirming the sale. This appeal was accepted by Jai Lal J. on 8th December. He set aside the execution sale in favour of Mr. Dawar and ordered that the house be resold. It was stated before Jai Lal J. that the auction-purchaser had spent a considerable amount of money

on the improvement of the property after the grant of the sale certificate in his favour. The learned Judge made an observation in his judgment to the effect that it would be open to the auction-purchaser to make an application to the executing Court for compensation on account of improvements and it would be for that Court to determine whether it was permissible to allow any sum and if so, what amount on account of improvements. The judgment of Jai Lal J. was confirmed by us on 21st May 1937, on a Letters Patent appeal having been preferred by Mr. Dawar.

On 12th December 1937 Mr. Dawar made an application in the executing Court stating that he had spent a sum of Rupees 1904-4-0 on improvements in the bona fide belief that he had become the owner of the property by purchase and that out of the proceeds of the re-sale this sum should be paid to him and the balance should be handed over to the decree-holder. On 21st April 1938, the executing Court framed an issue as to 'whether the auction-purchaser has spent Rs. 1904-4-0 on bona fide improvements of the house and is he entitled to this sum.' On 23rd June 1938 an application was made by the judgment-debtor to the effect that an executing Court could not go into the matter of improvements as between the auction-purchaser and the judgment-debtor and that such a matter could only be decided in a separate suit. The executing Court, thereupon, framed the following issues: (a) Whether the executing Court has no jurisdiction to make an enquiry into the question of improvements by an auction-purchaser? (b) Whether, despite the order of the High Court, this objection of judgment-debtor lies? (c) Whether this point of going into the question of improvements is barred by Sec. 11, Civil P. C.?

The executing Court has held that it has no jurisdiction to make an enquiry into the question of improvements by the auction-purchaser. On this finding the application of Mr. Dawar has been dismissed. Against this decision Mr. Dawar has preferred an appeal to this Court. At the hearing, a preliminary objection was taken on behalf of the respondent that the order of the executing Court was not appealable. In our opinion this objection is well founded and must be given effect to. The application by Mr. Dawar for compensation purported to be one under Ss. 47, 144 and 151, Civil P. C. S. 144 has no applicability to the

*[Reported in *A I R 1938 Lah 198.*]

present case as that Section contemplates restitution where a decree has been varied or reversed. The order of the executing Court confirming the sale, which was set aside by Jai Lal J., did not amount to a decree and therefore the application of Mr. Dawar for improvements payable in consequence of that order cannot be said to fall within the purview of S. 144. Reference may be made in this connexion to a Division Bench ruling of the Patna High Court reported in 9 Pat 685.¹ It was held in that case that the provisions of S. 144, Civil P. C., do not apply to a case where a sale in execution of a decree is set aside under O. 21, R. 90, and the judgment-debtor applies for restitution and mesne profits.

Section 47, Civil P. C., is also inapplicable as the question of improvements is one between the auction-purchaser and the judgment-debtor and does not relate to the execution, satisfaction or discharge of the decree as such. The application of Mr. Dawar can, therefore, fall only under S. 151, Civil P. C., and no appeal lies under the Code against an order passed under that Section. It was argued by Mr. Sethi on behalf of Mr. Dawar that as the application raises a question of jurisdiction, the memorandum of appeal should be treated as a petition for revision. This prayer was granted and the case was heard on the merits as a petition for revision. On the merits, it is clear to us that the question of improvements is a question which is incidental to and consequential on the setting aside of the sale. It was held in 9 Pat 685¹ which has already been referred to, that the Court can, in the exercise of its inherent power under S. 151 of the Code, order restitution and direct the auction-purchaser to make over to the judgment-debtor the profits realized from the property when an auction sale has been set aside. In the present case the judgment-debtor has already recovered mesne profits from the auction-purchaser during the course of the execution proceedings. It seems, therefore, highly inequitable to compel the auction-purchaser to file a separate suit to claim the amount due to him on account of improvements, if made bona fide. Some observations made by their Lordships of the Privy Council in 2 Pat 10² at p. 16 may be reproduced in extenso

as they have an important bearing on the question involved in the present petition for revision:

It is the duty of the Court under Sec. 144, Civil P. C., to 'place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed.' Nor indeed does this duty or jurisdiction arise merely under the said Section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved. As was said by Cairns, L. C. in *Rodger v. Comptoir d'Escompte de Paris*³: 'One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors and when the expression 'the act of the Court' is used, it does not mean merely the act of the primary Court, or of any intermediate Court of Appeal, but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case.' The auction-purchasers have parted with their purchase money which they paid into Court on the faith of the order of confirmation and certificate of sale already referred to. This money has been distributed amongst the creditors of the judgment-debtor who had attached the unencumbered property in question and could have realized their judgment debts by a sale of this property in execution and it would be inequitable and contrary to justice that the judgment-debtor should be restored to this property without making good to the auction-purchaser the moneys which have been applied for his benefit.

In view of the observations quoted above, the judgment-debtor cannot be allowed to retain the benefit of the improvements made bona fide by the auction-purchaser without paying for them. This is therefore a fit case for the exercise of the inherent powers of the Court under S. 151, Civil P. C. For the reasons given above, we hold that the executing Court had jurisdiction, under S. 151, Civil P. C., to go into the question of improvements. We accordingly accept this petition for revision and remit the case to the executing Court to determine whether any compensation for improvements is payable and if so, by whom and to what extent. The costs of these proceedings will abide the result.

G.N./R.K.

Petition accepted.

3. (1871) 3 P C 465=19 W R 449 = 7 Moore P C (N S) 314=17 E R 120=40 L J P C 1.

A. I. R. 1940 Lahore 61

DALIP SINGH J.

Santokh Raj Singh Sardar Gopal Singh
—Accused—Petitioner.

v.

Gahwar Khan Sultan Khan — Accused
— Respondent.

Criminal Revn. No. 679 of 1939, Decided
on 5th October 1939.

1. *Ram Rattan Prasad v. Banarsi Lal*, (1930) 17 A I R Pat 280=122 I C 589=9 Pat 685 = 11 P L T 156.

2. *Jai Berham v. Kedar Nath*, (1922) 9 A I R P C 269=69 I C 278=49 I A 351=2 Pat 10 (P C).

Criminal P. C. (1898), S. 202—Procedure—District Magistrate sending case for inquiry and report to police under S. 202 cannot on receipt of report transfer case to another Magistrate without considering it — Order of latter summoning accused is without jurisdiction.

When a District Magistrate acts under S. 202 and sends a case for inquiry and report to the Superintendent of Police, he cannot, on receipt of the report, send the case for disposal to another Magistrate without deciding whether the case should be dismissed under S. 203 or proceeded with under S. 204. Hence, the latter having never been properly seized of the case his order summoning the accused must be set aside as without jurisdiction: *A I R 1925 Cal 742, Rel. on.* [P 63 C 1]

Muhammad Amin Khan for S. R. Sawhney — for Petitioner.

Facts. — The complaint was originally pending, as appears from the District Magistrate's order dated 8th October 1938, in his Court. It was sent for inquiry under S. 202, Criminal P. C., to the Superintendent of Police, Jhang. The report of the Superintendent of Police dated nil was received by the District Magistrate, Jhang, who on 12th September 1938 made certain remarks on it and asked for a further report from the Superintendent of Police. On this a second report was made by the Superintendent of Police on 28th September 1938. On the receipt of this report, apparently without even considering it, the District Magistrate transferred the case 'for disposal' to Sayyed Ghulam Haidar Shah on 8th October 1938. Sayyed Ghulam Haidar Shah, on 8th October 1938, adjourned the complaint to 10th October 1938 for going through the case. On 10th October 1938, after going through it and the evidence recorded by the Superintendent of Police, orders were issued that the complainant shall be served for 18th October 1938 and that the Patwari of the village, Sultan Ali, and Budh Singh Chaukidar shall also be served, and the complainant shall be directed to produce any more evidence if he so pleases. On the next date, i. e., 18th October 1938, the order under reference was passed. The complainant was present. The witnesses called by the Court were not. The Magistrate remarked that after going through the complaint and the evidence recorded by the Superintendent of Police, the case was worth proceeding with, to his mind. He therefore as pointed out above, summoned the accused.

Report.—(1) The trial Court had no jurisdiction to pass the order under reference because the order by which the complaint was transferred to this Court by the District Magistrate was illegal and the

Magistrate consequently was not properly seized of the case. S. 192 (1), Criminal P. C., under which presumably the order of transfer by the District Magistrate was passed, enables a District Magistrate to transfer any case of which he has taken cognizance for inquiry or trial to any Magistrate subordinate to him. Therefore the only order which the District Magistrate could pass in transferring the complaint at the stage at which he did was for inquiry and not merely for summoning the accused on the evidence which was already on the file, as was subsequently done by the Magistrate concerned. The District Magistrate had no jurisdiction to transfer the complaint merely "for disposal" which might have been understood by the Court to mean that the complaint was to be disposed of on the evidence already on the file. The District Magistrate's order thus being illegal the lower Court was not properly seized of the case and was therefore not competent to pass the final order issuing process against the accused.

(2) In case, for argument's sake, it is conceded that the District Magistrate's order "for disposal" implied that further inquiry was to be held, even then the Magistrate's order under reference is illegal because it has been passed without holding any further inquiry although a direction to that effect existed at least impliedly, in view of the provisions of S. 192 (1), Criminal P. C. On 10th October 1938, the Magistrate seems to have realized this position because he not only summoned witnesses but also permitted the complainant to produce fresh evidence, if necessary. What happened between 10th and 18th October 1938 is not clear from the record; but this much is certain that on the latter date process was issued without holding any inquiry or even examining the witnesses who had been called by the Court itself. Authority also exists for the views expressed above in *A I R 1925 Cal 742*.¹ The facts in this case were on all fours with the facts of the present case and the learned Judges of the High Court held that the provisions of S. 192 or of S. 202 did not entitle a Magistrate, after he had proceeded under the latter Section, to make an order under the provisions of the former Section transferring the case for the purpose of being dealt with under S. 203 or

1. *Mahabir Singh v. Giribala Dassi*, (1925) 12 *A I R Cal 742*=87 *I C 526*=26 *Cr L J 990*=29 *C W N 508*.

S. 204 without a fresh investigation as contemplated by S. 202, Criminal P. C. The order issuing the process subsequently, as in the present case, was held to be without jurisdiction. On the basis of reasoning and the authority given above, I recommend that the order dated 18th October 1938, by which process has been issued against the accused, be set aside and the learned District Magistrate be directed to dispose of the complaint himself or get it disposed of by a Magistrate of competent jurisdiction in accordance with law.

Order. — The ruling referred to by the learned Sessions Judge in A I R 1925 Cal 742¹ appears to be exactly in point and the facts are almost on all fours with the present case. It would appear from that ruling that when the learned District Magistrate had acted under S. 202, Criminal P. C., and sent the case for inquiry and report to the Superintendent of Police, he could not, on receipt of the report, send the case for disposal to the learned Magistrate S. Ghulam Haidar Shah without deciding whether the case should be dismissed under S. 203 or proceeded with under S. 204. S. Ghulam Haidar Shah has therefore never been properly seized of the case and his order summoning the accused must be set aside as without jurisdiction. It is open to the learned District Magistrate to take such action under S. 203 or S. 204 as he considers fit and having taken such action, he may, if he chooses and it becomes necessary to do so, transfer the case for disposal to a Magistrate of competent jurisdiction.

D.B./R.K. *Reference answered.*

A. I. R. 1940 Lahore 63

BHIDE J.

Nazir Ahmad—Defendant—Appellant.

v.

Dr. Taj Mahal Begum — Plaintiff — Respondent.

First Appeals Nos. 166 and 167 of 1939, Decided on 13th October 1939.

(a) Civil P. C. (1908), O. 41, R. 23-A (Lahore) — Appeal lies from order reversing decree and directing retrial.

Where an order reversing the decree and remanding the case to be retried has been passed by the Appellate Court an appeal from the order is competent under O. 41, R. 23-A framed by Lahore High Court. [P 64 C 1]

(b) Civil P. C. (1908), O. 6, R. 17 — Amendment should not be allowed where it changes nature of suit and introduces different cause of action — Amendment that plaintiff has life interest in property in suit held to be inconsistent with claim in plaint that they are trust properties.

Although the Court has wide powers to allow amendment under O. 6, R. 17, it is well established that an amendment which changes the whole aspect of the suit and introduces a different cause of action cannot be allowed. Where a plaintiff sues for a declaration that the properties in dispute are trust properties, but subsequently seeks an amendment that she has a life interest in the property or at any rate a charge for maintenance, the claim sought to be introduced by way of amendment is wholly inconsistent with the original plaint: *A I R 1927 Lah 771, Rel. on.* [P 64 C 2]

Abdul Majid — *for Appellant.*

Dr. Mohammad Alam — *for Respondent.*

Judgment. — F. A. O. Nos. 166 and 167 of 1939 are connected and will be disposed of together. The facts of the case giving rise to these appeals may be briefly stated as follows. Khan Bahadur Mian Haq Nawaz had made a will with respect to his properties leaving a certain portion to his heirs and constituting a trust with respect to the rest for the establishment of a hospital for women and children at Baghbanpura. The plaintiff Dr. Taj Mahal Begum, wife of the Khan Bahadur was to be a member and medical officer of the trust. On the death of the testator, she instituted the present suit for a declaration that the properties in suit were the subject-matter of the trust referred to above and that the defendant had no personal interest in them. The defendant admitted that some of the properties were included in the trust but contended that the others were not. The learned Judge of the trial Court decreed the suit in part, and from this decision both parties preferred appeals which came up before the learned Senior Subordinate Judge, and have been disposed of by him together. In the Court of the Senior Subordinate Judge an application was made on behalf of the plaintiff stating that the trust properties as well as the other properties covered by the will were subject to the life interest or in the alternative to the right of maintenance of the plaintiff. It was prayed on her behalf that additional issues be framed on this point and that the plaint may be amended, if necessary. The learned Senior Subordinate Judge decided to allow amendment of the plaint for this purpose and passed the following order :

After carefully considering all the facts and law I am of opinion that the amendment prayed for should be allowed and I order accordingly. Hence the case is remanded to the Court of Sardar Prehlad Singh, Subordinate Judge, First Class, Lahore (successor-in-office of Chaudhri Tirath Das, Subordinate Judge) with the direction to return the plaint to the plaintiff for amendment and to proceed according to law after the amended plaint is filed. The parties shall bear their costs in this Court.

From this decision the defendant has preferred the present appeals. A preliminary objection was raised on behalf of the plaintiff-respondent that these appeals are not competent as the order of remand passed by the learned Senior Subordinate Judge is of an interlocutory nature and all that was contemplated by it was that after the amendment of the plaint the necessary issues should be framed and findings thereon should be sent to the learned Senior Subordinate Judge. This is however not what is stated in the order. The learned Senior Subordinate Judge has remanded the case for allowing the plaintiff to amend the plaint and has directed the trial Court to proceed according to law. He has also passed an order as to costs which indicates that the Court had disposed of the appeals and the case was ordered to be retried. If the intention was that a report should be sent to the Senior Subordinate Judge I think he would have said so in the order and some time would also have been fixed for sending the report. I feel therefore no doubt that the learned Senior Subordinate Judge intended to dispose of the appeals finally and had remanded the case for retrial. It is true that the remand in the present case would not be covered by O. 41, R. 23, Civil P. C., but recently a new rule numbered as 23-A has been framed by this Court which runs as follows :

Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point and the decree is reversed in appeal and a retrial is considered necessary the Appellate Court shall have the same powers as it has under Rule 23.

In the present case the decree having been reversed (impliedly though not in so many words) as shown above and the case having been ordered to be retried an appeal would seem to be competent under this rule : *vide* O. 43, R. 1-n, as amended by this Court.

The next point for consideration is whether the learned senior Subordinate Judge was justified in allowing the amendment and ordering a retrial in the circumstances of the case. As I have stated at the outset, the suit was for a declaration that the properties in dispute were trust properties and that the defendant was not entitled to deal with them except as such—the defendant also being a co-trustee. There was no indication whatever in the plaint or in the pleadings of the parties so far as I have been able to discover that the plaintiff had any life-interest or a charge by way of mainten-

ance on the trust properties. This claim appears to have been brought forth for the first time in the application made in the lower Appellate Court and appears to me to be clearly inconsistent with the case as set forth in the plaint. The plaintiff could not in the same breath claim that the properties in dispute were trust properties and also allege that she had also a life estate or at any rate a charge for maintenance on the same. Although the Court has wide powers to allow amendment under O. 6, R. 17, Civil P. C., it is well established that an amendment of this nature which changes the whole aspect of the suit and introduces a different cause of action cannot be allowed. If the plaintiff has a life interest in the property in suit, there could be no trust at present and she could not be a trustee and medical officer of the trust as claimed.

The learned counsel for the respondent alleged that the claim was based on the will itself and that there was no question of any other evidence, but he was unable to point out any passage in the will by which any life interest or maintenance was granted to the plaintiff in the trust properties in dispute in the present case. He merely stated that this was an inference to be drawn from the will. Further, he was unable to give any satisfactory explanation as to why this claim was not put forward at the very outset. The plaintiff was admittedly assisted by counsel throughout and I cannot understand why this claim should not have been put forward in the beginning if there was any substance in it. In any case, it seems to me clear that the claim now sought to be introduced by way of amendment is wholly inconsistent with the original plaint. As pointed out in A I R 1927 Lah 771,¹ although the Court has wide powers of amendment under O. 6, R. 17 the general rule is that the amendment sought must be consistent with the case as originally laid and in my opinion there was no justification for allowing the proposed amendment at the stage of appeal in the circumstances of this case. I accept both the appeals and setting aside the remand order of the learned Senior Subordinate Judge send back the case to him for disposal of the appeals before him. Costs will follow final decision. The parties are directed to appear before the learned Senior Subordinate Judge on 30th October 1939.

G.N./R.K.

Appeal allowed.

1. Ghulam Muhammad v. Mehta Chandras Dat, (1927) 14 A I R Lah 771=101 I C 280.

* A. I. R. 1940 Lahore 65

BHIDE J.

Rajindar Kumar — Decree-holder —
Appellant.

v.

*Chetan Lal, Judgment-debtor and
another* — Respondents.

Second Appeal No. 481 of 1939, Decided on 5th October 1939, from order of District Judge, Ambala, D/- 5th January 1939.

* Civil P. C. (1908), S. 60, as amended by Act 9 of 1937—Attachment of salary—S. 60 prohibits only forcible attachment—Judgment-debtor can waive privilege.

Section 60 is a prohibition only against forcible attachment and there is nothing in law to prevent a judgment-debtor from agreeing to the attachment of half of his salary even when it is exempt from attachment under S. 60. Therefore, where the agreement by the judgment-debtor is embodied in an award on which a decree has been passed the executing Court must give effect to it: 35 P R 1900; A I R 1935 Lah 164 and A I R 1939 Lah 316, *Rel. on.* [P 65 C 2]

Durga Dass Jain for A. R. Aggarwal —
for Appellant.

Balmukund, Investg, Insp. G. P. O. in person.

Judgment. — This appeal was heard *ex parte* as the respondent failed to appear in spite of service. An official of the Postal Department was present, but as he was not a representative of any of the parties to the execution proceedings, he could not be heard and was not heard. The material facts are that a decree was obtained on the basis of an award and the judgment-debtor had agreed that it may be satisfied by attachment of half of his salary. This term was embodied in the decree itself. When execution was taken an order was sent to the Postmaster, Ambala, for attachment of half the salary of the judgment-debtor. The Postmaster refused to comply with the Court's order on the ground that the order of the Court was contrary to the provisions of Act 9 of 1937, according to which the salary (except to the extent of Rs. 2-8-0) could not be attached; for the pay of the judgment-debtor was only Rs. 105 and a sum of Rs. 100 had to be exempted from attachment according to the provisions of Act 9 of 1937. The learned Senior Subordinate Judge accepted the view of the Postmaster to be correct and ordered the papers to be filed. An appeal was presented to the District Judge but he also agreed that half the pay of the judgment-debtor could not be attached and dismissed the appeal. From this order a second appeal has been preferred and it is contended on behalf of the appellant that

half of the appellant decree-holder that the Courts below were not justified in refusing to attach half the salary of the judgment-debtor when this was provided in the decree itself and the judgment-debtor had also agreed to the attachment in the course of the execution proceedings. It was contended that an executing Court cannot go behind the decree and when the judgment-debtor was a consenting party, the provisions of S. 60, Civil P. C., as amended by Act 9 of 1937, were no bar to the attachment of half the salary. The contention of the appellant is supported by 35 P R 1900¹ in which a similar question arose. The judgment-debtor had pledged his jagir income in that case as security for debt incurred to the decree-holder. In execution proceedings an objection was raised that the pension was not liable to attachment; but it was held by the majority of the Court that the executing Court could not refuse to attach jagir income as the decree was a final adjudication on the liability of the property sought to be charged and so long as the decree stood the decree-holder had a right to execute it. As regards the provisions of S. 60, Civil P. C., it was held by a Division Bench of this Court in A I R 1935 Lah 164² that that Section is a prohibition only against forcible attachment or sale, and there is nothing in law to prevent an agriculturist voluntarily selling or otherwise alienating his house. The same principle would appear to apply to the attachment of half the salary of the judgment-debtor in the present case. The ruling reported in A I R 1935 Lah 164² has also been followed recently in A I R 1939 Lah 316³ in which the case-law on the subject has been considered.

I accordingly accept this appeal and direct that half the salary of the judgment-debtor be attached in satisfaction of the decree in accordance with the terms thereof. The appellant will get his costs throughout. In the end I may point out that the Postal Department was not justified in refusing to attach half the salary when an order for attachment had been received from the Court. At the most, the Postmaster would have been justified in pointing out for the consideration of the Court that the order

1. *Mt. Mehr Nishan v. Muhammad Kazim Ali-khan*, (1900) 35 P R 1900.
2. *Chittar Mal v. Mt. Ram Devi*, (1935) 22 A I R Lah 164.
3. *Natha Singh v. Bhag Mal*, (1939) 26 A I R Lah 316.

appeared to be contrary to the provisions of Act 9 of 1937.

G.N./R.K.

Appeal accepted.

A. I. R. 1940 Lahore 66

DIN MOHAMMAD J.

Kanwar Ranzor Singh — Plaintiff — Appellant.

v.

Pandit Shahzada Ram and another — Defendants — Respondents.

Second Appeal No. 516 of 1939, Decided on 28th November 1939, from decree of Sub-Judge, Ambala, D/- 19th December 1938.

Provincial Small Cause Courts Act (1887), Sch. 2, Art. 35 (ii)—Suit for recovery of sum of more than Rs. 100 as price of trees unlawfully cut by defendant from plaintiff's land — Such suit falls under Art. 35 (ii) — Appeal lies to District Judge.

A person instituted a suit against another person for recovery of a sum of more than Rs. 100 as the price of certain trees unlawfully cut by him from plaintiff's land :

Held that a clear case under S. 426, I. P. C., which is included in Chap. 17, was established against the defendant inasmuch as knowing that his act will cause wrongful loss to the plaintiff, he had caused the destruction of his property. His act therefore was an act which was, or save for the provisions of Chap. 4 would have been, an offence punishable under Chap. 17, Penal Code. The plaintiff's suit consequently fell under Art. 35 (ii) of Sch. II to the Provincial Small Cause Courts Act and as the value of the suit was more than Rs. 100 appeal lay to the District Judge : *A I R 1925 Lah 174 and A I R 1933 Lah 172, Rel. on; A I R 1922 Lah 451 and A I R 1930 Pat 575, Disting.*

[P 66 C 2; P 67 C 1]

Asa Ram Aggarwal—*for Appellant.*

Tek Chand—*for Respondents.*

Judgment. — This appeal has arisen in the following circumstances : The plaintiff, Kanwar Ranzor Singh, instituted a suit against Pandit Shahzada Ram and Kirpa Singh for recovery of Rs. 200 as the price of eleven trees unlawfully cut by them from his land comprised in khasra No. 527. It was alleged in the plaint that Pandit Shahzada Ram had without any right sold the trees in question to Kirpa Singh and had helped him in cutting them in spite of the fact that the plaintiff's servant had stopped them from doing so. The trial Court dismissed the suit. Thereupon, Ranzor Singh submitted a memorandum of appeal to the Court of the District Judge, Ambala, within limitation. He, however, came to the conclusion that the appeal did not lie to his Court but lay to the Court of the Senior Subordinate Judge and consequently re-

turned the memorandum of appeal for presentation to the proper Court. On this, the memorandum of appeal was presented to the Court of the Senior Subordinate Judge with an application that in the circumstances time may be extended under Ss. 5 and 14, Limitation Act. The Senior Subordinate Judge did not accede to this request and dismissed the appeal.

Counsel for the appellant has urged that the suit as lodged was an unclassified suit of the value of more than Rs. 100 and the appeal lay to the District Judge, and I agree with him. Suits which are excepted from the cognizance of the Court of Small Causes are enumerated in Sch. II to the Provincial Small Cause Courts Act (9 of 1887). Art. 35 (ii) of that Schedule includes a suit for compensation, for an act which is, or, save for the provisions of Chap. 4, I. P. C., would be an offence punishable under Chap. 17 of the said Code.

On the allegations made in the plaint, a clear case under S. 426, I. P. C., which is included in Chap. 17, was established against the defendants, inasmuch as knowing that their act will cause wrongful loss to the plaintiff, they had caused the destruction of his property. The defendants might have escaped punishment by urging that by reason of a mistake of fact they in good faith believed themselves to be justified by law in cutting the trees but that defence would have been covered by S. 79, I. P. C. Their act clearly, therefore, was an act which was or save for the provisions of Chap. 4, would have been an offence punishable under Chap. 17, I. P. C. The plaintiff's suit consequently fell under Article 35 (ii) of Sch. II to the Provincial Small Cause Courts Act. This conclusion is supported by authority : *see 79 I C 138¹ and A I R 1933 Lah 172.²*

As against this, counsel for the respondents has referred me to 3 Lah 369³ and 9 Pat 569,⁴ but those authorities are clearly distinguishable. In 3 Lah 369³ a Division Bench of this Court remarked that where the allegations made by the plaintiff constituted an offence under S. 403, I. P. C., and no definite assertion was made that the

1. *Sunder Mal v. Kama Din*, (1925) 12 A I R Lah 174=79 I C 138.

2. *Attar Singh v. Nuru*, (1933) 20 A I R Lah 172=145 I C 155.

3. *Shiv Gir v. Khazan Gir*, (1922) 9 A I R Lah 451=77 I C 561=3 Lah 369.

4. *Damodar Jha v. Baldeo Prasad*, (1930) 17 A I R Pat 575=127 I C 843=9 Pat 569=11 P L T 741.

defendants had the intention requisite for the commission of the offence under that Section, the case would not be covered by Art. 35 (ii). In the present case, criminal intent is not an essential ingredient of the offence of mischief and mere knowledge of wrongful loss is sufficient and on these grounds the principle enunciated in that judgment is inapplicable. In 9 Pat 569⁴ it was observed :

But where upon the facts stated in the plaint the case against the defendant is wrongful or illegal but not necessarily penal so as to bring him within the purview of the Penal Code, the jurisdiction of the Small Cause Court is not at all barred.

Here, as stated before, the act of the defendants was penal inasmuch as it was covered by S. 425, I. P. C., which defines mischief and was punishable under S. 426, I. P. C. On the ground as stated above, the appeal lay to the District Judge and he erred in holding that the appeal did not lie to his Court. The Senior Subordinate Judge had no jurisdiction in the matter. I accordingly set aside the decree and judgment of the Senior Subordinate Judge and remit the case to the Court of the District Judge and direct him to dispose of it in accordance with law.

D.S./R.K.

Case remanded.

*** A. I. R. 1940 Lahore 67**

BHIDE J.

Daulat Ram — Objector — Appellant.

v.

Dr. Anant Ram, Decree-holder and others, Judgment-debtors — Respondents.

Respondents.

Exn. Second Appeal No. 442 of 1939, Decided on 26th October 1939, from order of Dist. Judge, Amritsar, D/- 9th March 1939.

*** Civil P. C. (1908), O. 21, R. 58 and S. 47—Objection under R. 58 by party to suit—Objection summarily dismissed, without enquiry, as collusive—Second application under S. 47 is not barred.**

Where an objection to an attachment is made by a party to the suit under O. 21, R. 58 but is dismissed summarily without any enquiry as being collusive, the dismissal must be deemed to have been on the ground that the objection was incompetent under O. 21, R. 58. No question of res judicata arises in such a case and a second application under S. 47 is not barred. [P 67 C 2]

Shamair Chand — *for Appellant.*

Chandar Gupta — *for Respondents.*

Judgment. — This is a second appeal arising out of execution proceedings relating to a decree. A certain house was attached by the decree-holder upon which one Daulat

Ram put in objection under O. 21, R. 58, Civil P. C., claiming the house as his exclusive property. The objection was summarily dismissed on 19th February 1937, without investigation on the ground that it appeared to be collusive. Daulat Ram then instituted a declaratory suit to establish his right but the suit was dismissed on 23rd June 1937, on the ground that the suit was not brought under Sec. 47, Civil P. C., as Daulat Ram was a party to the suit in which the decree had been obtained and, therefore, his objection should have been under Sec. 47, Civil P. C. Daulat Ram then put in a second objection petition under Sec. 47, Civil P. C. This was allowed by the executing Court but the learned District Judge held on appeal that the second objection petition was not competent in view of the dismissal of the first petition under O. 21, R. 58, Civil P. C., as the first petition also must in law be held to have been under Sec. 47, Civil P. C. He accordingly dismissed the objection petition of Daulat Ram as incompetent. He has preferred a second appeal.

The learned counsel for the appellant has urged that there was no objection to a second petition being entertained in the circumstances of this case as the first petition purported to have been made under O. 21, R. 58, and was summarily dismissed without any enquiry. He contended that there could be no question of any res judicata in the circumstances and therefore the second objection petition under Sec. 47 was competent and ought to have been decided on merits. This contention appears to me to be sound. There are no doubt authorities in which it has been held that even if an objection petition is made under O. 21, R. 58, Civil P. C., the decision may operate as res judicata, but the circumstances of those cases are clearly distinguishable inasmuch as the objection was either decided on merits or in circumstances where the rule of constructive res judicata would come into operation. In the present instance, the objection purported to be under O. 21, R. 58, Civil P. C., and was treated as such by the Court. No notice of the objection was issued to the opposite side and the objection was dismissed summarily on the ground that it appeared to be collusive. In these circumstances it seems to me clear that there could be no question of even constructive res judicata. The first objection in the present case must be held to have been dismissed merely because it was incompetent under O. 21, R. 58, Civil P. C. The second objec-

tion under S. 47, Civil P. C., was certainly competent and in the absence of any objection as to limitation or res judicata I do not see why it should not have been disposed of on merits. I accordingly accept the appeal and setting aside the order of the learned District Judge, remand the case to him for decision of the objection on merits. Stamp on appeal will be refunded, costs will follow final decision. The parties are directed to appear before the learned District Judge on 14th November 1939.

G.N./R.K.

*Case remanded.***A. I. R. 1940 Lahore 68**

BHIDE J.

Bhan Singh — Plaintiff — Appellant.
v.

Narinjan Singh and others —
Defendants — Respondents.

Second Appeal No. 1142 of 1938, Decided on 21st November 1939, from decree of Addl. Dist. Judge, Ferozepore, D/- 10th May 1938.

Registration Act (1908), S. 17 (2) (xi) — Receipt reciting that balance of mortgage money had been paid and possession restored to mortgagor—Receipt must be registered.

The essence of redemption consists in either the cancellation and return of the mortgage deed or where the mortgage is with possession, in the restoration of possession of the mortgaged property to the mortgagor after the mortgage money has been paid. [P 68 C 2]

Where a receipt recites that the balance of the mortgage money had been paid to the mortgagee and possession had been given back, the receipt is inadmissible in evidence if it is not registered: *A I R 1934 Lah 970*; *A I R 1926 All 693* and *A I R 1937 Cal 148, Rel. on*; *A I R 1929 Lah 312, Disting.* [P 68 C 2; P 69 C 1]

Shadi Lal Palta — *for Appellant.*

Shamair Chand and Parkash Chand for
Shamair Chand and Hans Raj Sachdev
— *for Respondents.*

Judgment. — This is a second appeal arising out of a suit for possession of 34 kanals of land. The plaintiff alleged that the land had been mortgaged in favour of the defendants for a sum of Rs. 1400 but had been redeemed. After the redemption the defendants were alleged to have taken forcible possession of the land again and hence the plaintiff instituted the present suit for recovery of possession. The defendants denied that the mortgage had been redeemed. The suit has been dismissed by both the Courts and from this decision the plaintiff has preferred a second appeal. The plaintiff had relied on a receipt for Rs. 700

in support of his contention that the mortgage had been redeemed. The sum of Rs. 700 was alleged to be the balance of the mortgage money and it was stated in the receipt that this amount had been paid to the mortgagees and possession had been given back. The Courts below have held that this receipt was inadmissible in evidence as it required registration under S. 17 (1) (c), Registration Act. The learned counsel for the plaintiff-appellant has urged that this view of the Courts below is wrong and has relied on 10 Lah 709¹ in which it was held that a receipt of this kind does not require registration unless it expressly purports to extinguish the mortgage. The learned counsel contended that the present receipt made no mention of the fact that the mortgage had been fully discharged. The learned counsel for the respondents, on the other hand, contended that the receipt stated that possession had been given back and this statement was sufficient to show that the receipt extinguished the mortgage in favour of the defendants. The learned counsel for the respondents relied on 16 Lah 485,² 48 All 705³ and A I R 1937 Cal 148.⁴

After considering the various authorities cited, it seems to me that the learned District Judge was right in holding the receipt produced in this case to be inadmissible in evidence for want of registration. According to cl. (xi) of sub-s. (2) of S. 17, Registration Act, a receipt for payment of money due under a mortgage does not require registration, if the receipt "does not purport to extinguish the mortgage." The question whether a receipt does or does not purport to extinguish a mortgage has naturally to be decided on the contents of the receipt. In 10 Lah 709,¹ on which the learned counsel for the appellant has mainly relied, the receipt was only for the mortgage money. The essence of redemption consists in either the cancellation and return of the mortgage deed or where the mortgage is with possession, in the restoration of possession of the mortgaged property to the mortgagor after the mortgage money has been paid. In the

1. Muhammad Hussain v. Karm Ilahi, (1929) 16 A I R Lah 312=118 I C 533 = 10 Lah 709=30 P L R 717.

2. Ghulam Mohammad v. Sarkhru, (1934) 21 A I R Lah 970=156 I C 376=36 P L R 211=16 Lah 485.

3. Jwala Prasad v. Mohan Lal, (1926) 13 A I R All 693 = 97 I C 162 = 48 All 705=24 A L J 839.

4. Amar Krishna v. Surendra Bijoy, (1937) 24 A I R Cal 148=171 I C 632.

present instance the receipt does state that possession had been restored and the plaintiff himself relies on this fact as evidence of redemption of the mortgaged property. I am therefore of opinion that this receipt was rightly held to be inadmissible in evidence. I dismiss the appeal with costs.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1940 Lahore 69

DIN MOHAMMAD J.

Basheshar Nath and others —

Plaintiffs — Appellants.

v.

Municipal Committee, Moga —

Defendant — Respondent.

Second Appeal No. 459 of 1939, Decided on 15th November 1939, from Addl. Dist. Judge, Ferozepore, D/- 5th January 1939.

Specific Relief Act (1877), S. 56 (j)—Injunction cannot be granted if party seeking it has acted dishonestly with other party.

Section 56 (j) rests on the maxim that he who seeks equity must do equity and implies that a plaintiff seeking an injunction must come with clean hands. A plaintiff, who asks for an injunction, must be able to satisfy the Court that his own acts and dealings in the matter have been fair and honest and free from any taint of fraud or illegality, and that if, in his dealings with the person against whom he seeks relief or with third parties, he has acted in an unfair or inequitable manner, he cannot have relief: 18 *Mad* 378 and 20 *Mad* 58 (*F B*), *Rel. on.* [P 70 C 2; P 71 C 1]

A Municipal Committee had refused to grant permission to a person to build certain structure. The person subsequently induced the Committee to grant permission on condition that he paid certain sum to the Committee. The Committee passed a resolution accepting the offer but when the person failed to pay the sum as agreed served a notice under S. 172, Punjab Municipal Act, for demolition. The person who had built the structure pleaded that the resolution imposing condition for grant of permission was illegal as no bye-law under S. 188 (u) had been made and brought a suit for injunction against demolition. In other words, he wanted to utilize that portion of permission which benefited him and to repudiate that part of it which went against him:

Held that the person could not be granted injunction as his dealings with the Committee were dishonest. [P 71 C 1, 2]

Indar Dev Dua — *for Appellants.*

Malik Barkat Ali and Tek Chand —

for Respondent.

Judgment. — The suit out of which this appeal has arisen was instituted by Basheshar Nath and his two brothers, Ved Paul and Dev Paul. It was for the issue of a permanent injunction restraining the Municipal Committee at Moga from demolishing the roof built by the plaintiff over a

part of the street connecting their shops Nos. 177 and 178. The main allegation on which the suit was based was that the Municipal Committee had granted permission to the plaintiffs to put up this structure on condition of their paying Rs. 2000 to the Municipal Committee and that, inasmuch as no bye-laws had been framed by the Municipal Committee under S. 188 (u), Municipal Act, the Committee was not authorised to attach any condition to the permission and consequently the permission held good while the condition was ultra vires. The suit was resisted by the Municipal Committee on various grounds and on the pleadings of the parties as many as 11 issues were framed by the Subordinate Judge, Third Class, who tried the suit originally. As a result of the findings arrived at by him, the suit was dismissed with costs. The plaintiffs took an appeal to the Additional District Judge, Ferozepore, who also agreed with the Subordinate Judge in almost all the findings arrived at by him and dismissed the appeal. Counsel for the appellants again stresses the point taken by his clients before the Courts below and mainly relies on A I R 1929 Lah 701¹ as affirmed by 11 Lah 276,² A I R 1934 Lah 1011,³ 32 P L R 211⁴ and 1 Pat 26.⁵ The principle laid down in the judgments relied on is no doubt sound but in my view it does not apply to the facts of the present case.

It is common ground that the plaintiffs applied on 13th September 1934 that they may be permitted to construct a roof over the street connecting their shops Nos. 177 and 178. This application was however rejected on 26th September 1934. The plaintiffs paid no heed to the resolution of the Municipal Committee and started the building operations. This fact came to the notice of the municipal employees who reported the matter to the secretary on 3rd May 1935, whereupon a telegraphic notice was served on Mr. B. N. Kashyap, one of the plaintiffs, drawing his attention to his con-

1. *Chambeli v. Municipal Committee, Delhi*, (1929) 16 A I R Lah 701=123 I C 839.
2. *Municipal Committee Delhi v. Chambeli*, (1930) 17 A I R Lah 246=123 I C 84=11 Lah 276=31 P L R 228.
3. *Kanshi Ram v. Municipal Committee Moga*, (1934) 21 A I R Lah 1011=155 I C 893=36 P L R 277.
4. *Samundar Das v. Municipal Committee Sonapat*, (1931) 32 P L R 211=133 I C 124.
5. *Brij Behari Lal v. Chairman of the Municipality, Daltangunj*, (1922) 9 A I R Pat 118=68 I C 355=1 Pat 26=3 P L T 226.

structing a roof without the permission of the Committee and requiring him to dismantle the portion already built within 14 hours. This action was confirmed by the Municipal Committee in an emergent meeting held on 9th May. In the meantime, on 8th May, the plaintiffs instituted a suit against the Municipal Committee for an injunction to restrain the Committee from interfering with the building. Further notices were issued on 5th June under Ss. 172 and 195 requiring the plaintiffs to demolish the unauthorised structure. This was done in pursuance of a resolution passed on 30th May 1935.

On 8th December 1935 Lala Chandu Lal, Municipal Commissioner, who had been entrusted with the work of defending the Municipal Committee in the suit by its resolution dated 13th May 1935, made a verbal proposal in the meeting of the Municipal Committee that Mr. Kashyap be permitted to construct the roof inasmuch as he was prepared to pay Rs. 3000 for the permission. On this, the Committee resolved that permission be given to roof only that portion of the thoroughfare which was situated towards the north of the gate on condition that Mr. B. N. Kashyap should pay Rs. 2000 to the Municipal Committee. On 17th December a copy of this resolution was made over to Mr. B. N. Kashyap and Mr. Ved Paul whose signatures were obtained on the original document. On the same day, a letter was addressed by the Secretary, Municipal Committee, to Mr. B. N. Kashyap informing him that as verbally agreed he was permitted to put up the proposed building on terms as communicated to him before but that this was all subject to the Commissioner's approval. A copy of this letter too was made over to Mr. Kashyap and Mr. Ved Paul. Being thus assured, the plaintiffs withdrew from their suit under O. 23, R. 1, Civil P. C. On 20th December 1935 the resolution of 8th December was amended to the extent of adding the names of Ved Paul and Dev Paul. On 23rd May 1936 on a report made by the Secretary that no money had been paid by Mr. B. N. Kashyap and his brothers, a resolution was passed to the effect that the money be realised by two equal instalments of Rs. 1000 each payable on 10th June and 10 August 1936 respectively. This was evidently done on a representation made by one of the plaintiffs, Dev Paul.

On 11th June 1936 the Secretary of the Committee made a report to the Vice Presi-

dent that although a resolution was passed at the verbal request by Mr. Dev Paul allowing the plaintiffs to pay the money due by instalments, the first instalment had not been paid and suggested that necessary action be taken in connexion with the demolition of the roof. On the same day an order was recorded by the junior Vice President that, as no money had been paid till then by the plaintiffs, the permission should be withdrawn. Consequently, on 12th June a resolution was passed by the Committee at an emergent meeting cancelling the permission (Ex. D-13). On 2nd November 1936 a notice under S. 172, Municipal Act, was issued to the plaintiffs and on 19th December the present suit was instituted.

It would thus be obvious that prior to the grant of any permission whatsoever the plaintiffs had constructed a portion of the roof which they sought to protect by their suit of 8th May 1935 and that portion was undoubtedly built without any permission. In respect of that portion of the roof therefore it cannot be contended that the Municipal Committee was not entitled to its demolition under Sec. 172, Municipal Act. The contest on the score of the act of the Committee being unauthorized or not, in these circumstances, is confined to that portion of the roof only which has not yet been properly built. In relation to that matter the question arises whether the Committee had absolutely permitted the plaintiffs to construct the roof or whether the resolution of the Committee was a mere offer on behalf of the Committee, the acceptance of which depended on payment of the amount due. No permission could be given by the Committee which was subject to any condition inasmuch as no by-laws had been framed under Sec. 188 (u). The Committee however treated this permission as a sale of the property belonging to the Committee and this fact appears from the letter addressed by the Secretary to the plaintiffs saying that the permission of the Committee was subject to the Commissioner's approval. That approval was necessary only if the Committee was transferring any land belonging to the Committee and not for any permission that it was giving under Sec. 172, Municipal Act.

But whatever the aspect of this part of the case it still remains to consider whether the plaintiffs are entitled to the equitable relief which they claim. Under Sec. 56 (j), Specific Relief Act, an injunction cannot be

granted when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the Court. This provision has been interpreted in various decisions and they all unanimously lay down that he who seeks equity must do equity and, unless the plaintiff comes into Court with clean hands, no relief should be granted to him by way of injunction. In 18 Mad 378,⁶ the following remarks of Story were quoted with approval:

The Court cannot but leave the guilty plaintiff to the consequences of his own inequity and decline to assist him to escape from the toils which he had studiously prepared to entangle others.

In 20 Mad 58⁷ at p. 67, it was observed:

That rule (Sec. 56, cl. (j), Specific Relief Act) rests on the maxim that he who seeks equity must do equity and implies that a plaintiff seeking an injunction must come with clean hands. With reference to this point, it is laid down in Kerr on Injunctions, on the authority of the case therein cited, that a plaintiff, who asks for an injunction, must be able to satisfy the Court that his own acts and dealings in the matter have been fair and honest and free from any taint of fraud or illegality, and that if, in his dealings with the person against whom he seeks relief or with third parties, he has acted in an unfair or inequitable manner, he cannot have relief.

The facts as set out above clearly indicate that the plaintiffs inveigled the Committee into passing a resolution which is now being attacked as ultra vires. The Committee had rejected the application for sanction in unequivocal terms more than a year before the resolution of 8th December was passed. In fact, even a suit had been instituted to contest the notice issued by the Municipal Committee. The attitude of the Committee changed only when the plaintiffs made an offer of Rs. 3000 to Lala Chandu Lal for being allowed to put up the proposed structure. It was on that representation that Lala Chandu Lal intervened as a mediator and at the request of one of the plaintiffs made an oral offer of Rs. 3000 on behalf of the plaintiffs. The Committee made a counter offer and resolved that if the plaintiffs paid Rs. 2000 permission could be given to the constructing of a part of the roof. The plaintiffs treat this offer as a permission granted by the Committee under S. 172 and want to utilize that portion of the permission which benefits them and to repudiate that part of it which goes against them. In other words, they want to put up the construction without any payment on

the ground that the Committee had no authority to demand that payment. This is rank dishonesty. Having induced the Committee to attach that condition which as has been stated above was done under a misapprehension that the permission amounted to a transfer of the rights of the Municipal Committee on the land under the street, the plaintiffs cannot be allowed to base all their legal rights on that part of the resolution of the Committee which resulted from that inducement. If clever persons like the plaintiffs are allowed to defraud unsophisticated members of public bodies the whole administration in small places like Moga will be upset. Without deciding therefore whether the resolution of the Committee was ultra vires or not or whether in case it was ultra vires the plaintiffs could take advantage of the permission ignoring the unauthorized condition, I decline to interfere with the decisions of the Courts below merely on the ground that the conduct of the plaintiffs was most reprehensible in this matter and that they should not be allowed to reap the benefit of their own fraud. I accordingly dismiss this appeal with costs.

D.S./R.K.

Appeal dismissed.

*** A. I. R. 1940 Lahore 71**

BHIDE J.

Malik Narain Das — Plaintiff

— Appellant.

v.

District Board, Jhang — Defendant

— Respondent.

Second Appeal No. 567 of 1939, Decided on 11th November 1939, from decree of Dist. Judge, Jhang at Sargodha, D/- 30th January 1939.

*** Master and Servant—Illegal removal from service of employee of District Board — Civil Court has no jurisdiction to entertain suit for damages.**

The position of an employee in the service of a local authority like the District Board is the same as that of a Government servant in this respect and the tenure of his service is 'at the pleasure' of that authority. Hence, Civil Court has no jurisdiction to entertain a suit for damages for illegal removal from service of such servant: *A I R 1937 P C 31, Rel. on*; *A I R 1938 All 276 and A I R 1934 P C 60, Disting.* [P 72 C 1; P 73 C 1]

J. N. Aggarwal — *for Appellant.*

Barkat Ali and Mahmud Ahmad Janjua
— *for Respondent.*

Judgment. — Plaintiff Narain Das, who was an accountant in the service of the District Board, Jhang, sued in this case for recovery of Rs. 2000 as damages on the

6. Rangammal v. Venkatachari, (1895) 18 Mad 378.

7. Seeni Chettiar v. Santhanathan Chettiar, (1896) 20 Mad 58=6 M L J 281 (F B).

ground that he had been removed from service by the District Board wantonly, illegally, and without any justification. The suit was resisted by the District Board inter alia on the plea that Civil Courts had no jurisdiction to entertain such a suit. The Courts below, however, passed a decree for Rs. 472-4-0 in favour of the plaintiff relying chiefly on a Division Bench ruling of this Court reported in A I R 1937 Lah 226.¹ That ruling follows inter alia 54 Cal 44,² 57 Cal 231³ and 8 Rang 215⁴ in preference to 57 Mad 857.⁵ These rulings were, however, recently considered by their Lordships of the Privy Council in I L R (1937) Mad 532⁶ and the view taken by the Madras High Court in 57 Mad 857⁵ was approved. In the circumstances, the present case must be decided in the light of the principles laid down by their Lordships in I L R (1937) Mad 532.⁶ The facts of that case were similar to those of the present case except that the plaintiff in that case was a Government servant while the plaintiff in the present case is an employee of a District Board. It seems, however, well established that the position of an employee in the service of a local authority like the District Board is the same as that of a Government servant in this respect and the tenure of his service is 'at the pleasure' of that authority: *vide* Aiyangar's Law of Municipal Corporations in British India, p. 124, and the rulings referred to therein. This view is accepted even in I L R (1938) All 252⁷ on which the learned counsel for the plaintiff relied. The only other point of distinction to which the learned counsel for the plaintiff has invited my attention is that in the present case the conditions of service of the plaintiff were governed by rules framed by the Local Government under the Punjab District Boards Act. In the case before their Lordships of the Privy Council, the conditions

of service were governed by classification rules framed under the Government of India Act. But I am unable to see that this would make any material difference. Sec. 96-B, Government of India Act of 1919, which was considered by their Lordships of the Privy Council in I L R (1937) Mad 532⁶ laid down that the tenure of a civil servant will be at the pleasure of the Crown but subject to the provisions of the Government of India Act and the rules thereunder.

Although the rules were framed under the Act their Lordships held that the terms of the Section only amounted to a 'solemn assurance' that the service, though at the pleasure of the Crown, will not be subject to capricious or arbitrary action, and will be regulated by rule, and did not import any special kind of employment with an added contractual term that the rules must be observed. In the present instance, S. 27, District Boards Act, which relates to employment of officers and servants does not say that the servants of the District Board will hold their offices at the pleasure of the local authority but that is the usual condition of the tenure of service of a local authority as pointed out above. Unlike S. 96-B, Government of India Act, 1919, Sec. 27, Punjab District Boards Act, does not even say that the tenure of service will be subject to the rules framed under the District Boards Act. S. 55 of that Act, empowers the Local Government to frame rules as regards the employment, payment, suspension and removal of officers and servants employed under S. 27 and the plaintiff's contention in the present case was that these rules had not been complied with. I am unable to see how the position of the plaintiff in this case can be said to be in any way better than that of the plaintiff in the case before their Lordships of the Privy Council in I L R (1937) Mad 532.⁶

The learned counsel for the plaintiff referred to I L R (1938) All 252⁷ but the facts of that case are distinguishable inasmuch as it was found in that case that the statutory provisions of S. 71, United Provinces District Boards Act, had not been complied with. The case thus came within the exceptional class of cases to which the rule laid down in (1896) A C 575⁸ applies according to the view taken by their Lordships of the Privy Council in I L R (1937) Mad 532.⁶ In (1896) A C 575⁸ the conditions of service

1. Girdhari Lal v. Secy. of State, (1937) 24 A I R Lah 226=159 I C 1107=39 P L R 514.

2. Satish Chandra v. Secy. of State, (1927) 14 A I R Cal 311=101 I C 581=54 Cal 44.

3. Bimalacharan v. Trustees for the Indian Museum, (1930) 17 A I R Cal 404=125 I C 647=57 Cal 231.

4. J. R. Baroni v. Secy. of State, (1929) 16 A I R Rang 207=120 I C 695=8 Rang 215.

5. Rangachari v. Secy. of State, (1934) 21 A I R Mad 516=154 I C 884=57 Mad 857=67 M L J 123.

6. Venkata Rao v. Secy. of State, (1937) 24 A I R P C 31=166 I C 516=64 I A 55=I L R (1937) Mad 532 (P C).

7. Prabhu Lal Upadhyaya v. District Board, Agra, (1938) 25 A I R All 276=175 I C 875=I L R (1938) All 252=1938 A L J 351.

8. Gould v. Stuart, (1896) A C 575=65 L J PC 82=75 L T 110.

were enacted in the body of the New South Wales Civil Service Act. It was therefore held that these were inconsistent with importing into the contract of service the term that the Crown may put an end to it at its pleasure. A I R 1934 P C 60⁹ on which the learned counsel for the plaintiff relied was also a case of a different type and was decided on its special facts. I must, therefore, hold that the present case is governed by the rule laid down by their Lordships of the Privy Council in I L R (1937) Mad 532⁶ and that a Civil Court has no jurisdiction to entertain the suit.

I accordingly dismiss the appeal of the plaintiff and accepting the appeal of the defendant District Board dismiss the plaintiff's suit. In view of all the circumstances I leave the parties to bear their costs throughout.

D.S./R.K.

Appeal dismissed.

9. Clifford B. Reilly v. Emperor, (1934) 21 A I R P C 60=148 I C 637 (P C).

A. I. R. 1940 Lahore 73

DIN MOHAMMAD J.

Kanshi Ram — Plaintiff — Appellant.
v.

Harnam Das and others — Defendants
— Respondents.

First Appeal No. 133 of 1939, Decided on 17th November 1939, from order of Sub-Judge, First Class, Karnal, D/- 28th February 1939.

(a) Arbitration — Manager of joint Hindu family can make reference to arbitration without joining other members.

A manager of a joint Hindu family is competent to make a reference to arbitration without joining other members of the family and the mere fact that one member alone from among the other members of the family joined the reference does not invalidate it in any manner: *Caselaw relied on; A I R 1925 Lah 261 and A I R 1932 Lah 291, Not foll.* [P 74 C 2]

(b) Arbitration — Mere fact that arbitrator did not record any proceedings or did not hold any public enquiry would not vitiate award.

No procedure is laid down for the arbitrator in Sch. II, Civil P. C., and unless it is proved that the arbitrator refused to examine any evidence tendered by the parties, the mere fact that he did not record any proceedings or did not hold a public enquiry will not be enough to vitiate the award. [P 74 C 2]

(c) Arbitration — Award — Parties signing award—Effect.

Parties signing the award should not be allowed to pick holes in it: *A I R 1914 Lah 238 and 135 I C 62, Rel. on.* [P 75 C 1]

(d) Arbitration—Award—Award written on behalf of arbitrator—He alone can present it for

registration — Mere fact that parties signed it would not convert its nature.

Where an award is written on behalf of an arbitrator the mere fact that the parties signed it will not convert the original nature of the document. It is he alone who can present it for registration. The parties are not the executants of the document and cannot therefore be the proper persons to present it in any circumstances. [P 75 C 1]

J. N. Aggarwal and S. M. Sikri —

for Appellant.

Achhru Ram — *for Respondents.*

Judgment. — The respondent Harnam Das executed a promissory note for Rupees 5600 in favour of the firm Piare Lal Kanshi Ram on 8th December 1934. On 5th December 1937 a payment of Rs. 5 was made by him with the object of extending limitation. On 1st April 1938 a deed of reference was drawn up between Kanshi Ram and Banwari Lal, sons of Piare Lal, on the one side and Harnam Das on the other by which the dispute between the parties was referred for arbitration to L. Madan Lal alias Madan Gopal. On 4th April 1938 the arbitrator made an award which was signed both by Kanshi Ram and Harnam Das. On 3rd June 1938 Kanshi Ram made an application under Para. 20 of Sch. II, Civil P. C., for filing the award. This was resisted by Harnam Das on various grounds. The Subordinate Judge remarked that the debt was actually due to the joint Hindu family consisting of Kanshi Ram, Banwari Lal and their sons and grandsons and held the reference to be void on the ground that only two members of the joint family had joined the reference. He further observed that the arbitrator had made no enquiry and even on that ground the award could not be filed. He also found that the arbitrator was guilty of misconduct inasmuch as he was admittedly indebted to a near relation of Kanshi Ram. He also expressed his unwillingness to give effect to the award as a compromise inasmuch as it was not registered despite the fact that it had cast the burden of the sum due on certain immovable property belonging to Harnam Das. Kanshi Ram has appealed.

Counsel for the appellant contends that the award is not open to any legal objection whatever and that the Subordinate Judge has erred in dismissing the application. On the question of the validity of the reference, he urges that a manager of a joint Hindu family is competent to make such a reference without joining other members of the family and that the mere fact that Banwari Lal alone from among the other

members of the family joined the reference does not invalidate it in any manner. In 2 Lah 114¹ a Division Bench of this Court observed that family arrangements or references to arbitration entered into in good faith by a manager of a joint Hindu family or by a father of such a family bound the other members or the minor sons in the absence of fraud or other good reasons to the contrary. In 8 Lah 693² a suit for possession of land instituted against two adult members of a joint Hindu family was referred to arbitration by them. After the award had been filed the sons of the defendant applied as members of the same joint family to be made parties to the suit and on being impleaded as defendants they filed objections to the award. Their objections were overruled and a decree was passed in accordance with the award against all the defendants. On an appeal to this Court, it was held that the sons must be deemed to have placed themselves in the same position in which they would have been, had they been parties to the suit from its commencement, and that it was really not necessary to implead the sons as parties as being members of a joint Hindu family with the original defendants; they were effectively represented by the latter and would have been bound by the result of the litigation. It was further observed that an award following on a reference made by a Hindu father is binding on his sons unless it be shown that the father's act in referring the suit to arbitration was tainted with fraud or collusion. In 13 Lah 483³ Tek Chand and Johnston JJ. remarked that in a suit for division between the two branches of the family the really necessary parties were the heads of each branch of the family and it was not necessary to implead all the members of the two branches. In A I R 1935 Lah 667⁴ Abdul Rashid J. held that where a karta of a joint Hindu family authorized one of the coparceners, who is also a managing member of the joint family firm, to refer certain disputes between the parties to arbitration, such

coparcener could make a valid reference so as to bind the other coparceners.

The ratio decidendi of these judgments was really based on the dictum of their Lordships of the Privy Council in 36 All 383.⁵ It was observed there that the appellants who sued to redeem a mortgage after foreclosure on the plea that they had not been parties to the mortgage suit were properly and effectively represented in the suit by the managing members of the joint Hindu family of which the plaintiffs were also members and that merely because every existing member of the family was not formerly a party to the suit, the execution proceedings could not be set aside. Counsel for the contesting respondent on the other hand relied on A I R 1925 Lah 261⁶ and A I R 1932 Lah 291.⁷ These judgments were considered by Abdul Rashid J. in A I R 1935 Lah 667,⁴ and were distinguished and explained. With all respect to the learned Judges who delivered those judgments, I am of opinion that if they intended to lay down that a karta of a joint Hindu family could not make a valid reference to arbitration without joining other members of the family, their decision comes into conflict with the principle enunciated in the Privy Council judgment as well as the other judgments referred to above. I accordingly hold that the reference cannot be attacked on this score.

Similarly, the Subordinate Judge has erred in holding that as no enquiry was made, the award could not be filed. No procedure is laid down for the arbitrator in Sch. II and unless it is proved that the arbitrator refused to examine any evidence tendered by the parties, the mere fact that he did not record any proceedings or did not hold a public enquiry will not be enough to vitiate the award. The matter of the arbitrator's misconduct does not require any serious consideration. Both the appellant and the respondent placed their confidence in the arbitrator and it cannot be believed that the respondent was at that time unaware of the fact that the arbitrator was indebted to some extent to a near relation of Kanshi Ram. In fact, the respondent is not competent to raise these objections

1. Dwarka Das v. Krishan Kishore, (1921) 8 AIR Lah 34=61 I C 628=2 Lah 114 = 73 P L R 1921.

2. Guran Ditta v. Pakhar Ram, (1927) 14 A I R Lah 362=104 I C 202=8 Lah 693=29 P L R 247.

3. Bishambar Das v. Kanshi Parshad, (1932) 19 A I R Lah 641=141 I C 45=13 Lah 483=33 P L R 842.

4. Nawal Kishore Khairati Lal v. Sardar Singh, (1935) 22 A I R Lah 667=158 I C 1035 = 37 P L R 572.

5. Sheo Shankar Ram v. Jaddo Kunwar, (1914) 1 A I R P C 136=24 I C 504=41 I A 216 = 36 All 383 (P C).

6. Gainsda Mal v. Nihal Chand Chhajju Mal, (1925) 12 A I R Lah 261=84 I C 726.

7. Diwan Chand v. Punjab National Bank Ltd., (1932) 19 A I R Lah 291=133 I C 558.

inasmuch as he had with his eyes open signed the award made by the arbitrator. As observed in 10 P R 1917⁸ and 32 P L R 754,⁹ parties signing the award should not be allowed to pick holes in it. The objection on the ground of the non-registration of the award is obviously futile. The award is registered and no question of its invalidity therefore arises on that score. The Subordinate Judge has by a queer sort of reasoning declared the award to be invalid for want of registration taking it to be a deed of compromise but it is clear that it is not a deed of compromise at all. The mere fact that the parties signed it will not convert the original nature of the document. It was written on behalf of the arbitrator and it was he alone who could have presented it for registration. The parties were not the executants of the document and could, therefore, not be the proper persons to present it in any circumstances. I accordingly accept this appeal, set aside the order of the Commercial Subordinate Judge and order the award to be filed in accordance with law. The appellant will get his costs of both the Courts from the respondent, Harnam Das.

D.S./R.K.

Appeal allowed.

8. Wazir Ali v. Mahbub Ali, (1914) 1 A I R Lah 238=22 I C 412 = 10 P R 1917=134 P L R 1914.

9. Gita Ram v. Kesheo Ram, (1932) 32 P L R 754=135 I C 62.

A. I. R. 1940 Lahore 75

DIN MOHAMMAD J.

Kundo Mal and others — Judgment-debtors — Appellants.
v.

Daulat Ram-Vidya Parkash, Firm — Decree-holder — Respondent.

Execution First Appeal No. 193 of 1939, Decided on 21st November 1939, from order of Senior Sub-Judge, Ludhiana, D/- 4th March 1939.

(a) Limitation Act (1908), S. 15 — Stay of execution—Execution not completely stayed by injunction or order — Only sale of particular house attached in execution stayed — Decree-holder cannot claim benefit of S. 15 as it is open to him to proceed against person and other properties of judgment-debtor.

If execution is not completely and absolutely stayed S. 15 does not come into play. In order to enable the decree-holder to exclude any time in computing the period of limitation, the execution application must have been stayed by injunction or order and unless this is done no time can be excluded: A I R 1933 P C 52; A I R 1933 Mad

418; A I R 1929 Pat 597; A I R 1924 All 707 and A I R 1924 Bom 383, Rel. on. [P 77 C 1, 2]

Therefore, where only the sale of a particular house attached in execution is stayed it is open to the decree-holder to have the other properties of the judgment-debtors attached and also to take action for their arrest and hence the decree-holder cannot claim benefit of S. 15: A I R 1926 Mad 453; 27 All 334; A I R 1935 Lah 911 and A I R 1936 Cal 239, Disting. [P 77 C 1]

(b) Civil P. C. (1908), S. 48 — Limitation — Execution application dismissed in default — Second application cannot be said to be in revival of prior application and would be barred when presented after three years from last application.

Where an application for execution is dismissed in default on account of non-appearance of decree-holder, a second application cannot be said to be in revival of the prior application and would be barred when it is presented more than three years after the date of the last application. [P 77 C 2]

(c) Limitation — Objection as to, cannot be waived — Even if waived can be taken up again by party or Court itself.

Objections regarding limitation cannot be waived and even if they are waived they can be taken up again by the parties waiving them or by the Courts themselves: A I R 1933 Lah 404; A I R 1934 All 386; A I R 1932 All 108; A I R 1917 Mad 892; A I R 1932 All 273 and A I R 1918 Lah 374, Rel. on. [P 78 C 1]

Therefore waiver of the question of limitation by one of the judgment-debtors cannot bind the others and it is open to them to insist on a decision on that point. [P 77 C 2]

D. N. Aggarwal — for Appellants.

Tek Chand — for Respondent.

Judgment. — This is an appeal by the Firm Maya Mal-Kundu Mal judgment-debtors against an order of the Senior Subordinate Judge, Ludhiana, allowing the execution application of the Firm Daulat Ram-Vidya Parkash, decree-holders, to proceed against them. The application for execution was resisted principally on the ground that it was time-barred, but the Senior Subordinate Judge repelled this contention. Hence this appeal. The facts bearing on the question of limitation are these: On 19th December 1924 the decree-holders presented an application for execution by attachment of both moveable and immovable properties of the judgment-debtors and by their arrest. In pursuance of this application on 10th January 1925, a house situated in Mohalla Rupa Mistri was attached. On 13th January 1925 one Lachhman put in objections claiming the house as his own. On 26th January 1925 these objections were allowed to the extent of one-third of the house. The sale of the remaining two-thirds of the house was ordered for 12th June 1925. On 26th January 1925 the decree-holders put in an application

stating that their decree be executed by attaching another house belonging to the judgment-debtors, which was situated in Lakar Bazar. On 13th February 1925, one Bansi Lal objected to the attachment of that house on the ground that it belonged to him. On 13th March 1925, these objections were allowed. On 12th June 1925, one Mt. Shibo put in a claim to one-third of the house situated in Mohalla Rupa Mistri and asked the Court to have the sale of that house stayed. Thereupon, the Junior Subordinate Judge issued a robkar to the Senior Subordinate Judge informing him that a declaratory suit had been instituted regarding one-third of the house which was under attachment under the orders of that Court and for the sale of which 12th June 1925, had been fixed. It was further stated that if the house was sold, the plaintiff would suffer an irreparable loss. It was accordingly suggested that it would be but proper if the execution proceedings were stayed. The Senior Subordinate Judge thereupon made an order staying the sale of the house and calling for a report. On 15th June 1925, the execution proceedings were consigned to the record room for want of prosecution as the decree-holders were absent. On 16th November 1925, the decree-holders instituted a suit under O. 21, R. 63, Civil P. C., in regard to the house situated in Lakar Bazar. On 4th May 1926, the suit brought by Mr. Shibo was dismissed. On 15th June 1928, the suit instituted by the decree-holders in regard to the house situated in Lakar Bazar was decreed. On 7th July 1928, the decree-holders put in another application for execution asking for the revival of the original execution application and for the attachment of the house situated in Lakar Bazar. On 9th July 1928, Bansi Lal preferred an appeal to this Court against the order of 15th June 1928, decreeing the decree-holders' suit against him. On 18th July 1928, Addison J. stayed the sale of this house, but did not disturb the attachment. On 21st September 1928, the stay of sale was made absolute on certain conditions. On 5th October 1928, the judgment-debtors were served and on 25th October 1928, the house situated in Lakar Bazar was re-attached. On 9th November 1928, an order was recorded by the executing Court staying the sale of the house but continuing the attachment. On 29th June 1934, Bansi Lal's appeal to this Court was dismissed and on 27th July 1934, a third application for revival of the previous appli-

cation was put in by the decree-holders. On 1st August 1934, the sale of the property attached was ordered. Various objections were again raised. On 12th January 1935, Bansi Lal's objections were disposed of. On 13th January 1935, the house was sold. On 9th February 1935, the judgment-debtors put in various objections and inter alia contended that the execution application was barred by time. On 12th February 1935, Kundu Mal, one of the judgment-debtors, made an application, which was signed by him and by a counsel, who was representing the decree-holders throughout these proceedings that he abandoned the plea of limitation. Proceedings went on until 14th January 1938, when the sale of one-half of the Lakar Bazar house was fixed for 1st July 1938. On 17th June 1938, the judgment-debtors once more objected to the execution application being time-barred and on 4th March 1939, the order under appeal was made.

Counsel for the appellants has contended: (1) that the application for execution which was put in on 7th July 1928, was evidently time-barred, firstly, because the execution case had been dismissed for default on 15th June 1925, and no application was made within three years of that order; secondly, the order made on 12th June 1925, staying the sale of the house related to the house situated in mohalla Rupa Mistri and not to the house which was later attached and sold; thirdly, no order for injunction had been issued to the decree-holders restraining them from executing their decree and fourthly, Mt. Shibo's suit related only to one-third of the house situated in mohalla Rupa Mistri, (2) that the decree-holders had asked for three reliefs in their first application, which was submitted on 19th December 1934, and that in spite of the orders of stay made from time to time the decree-holders were at liberty to proceed against the other properties of the judgment-debtors, both moveable and immovable, and also to apply for their arrest, and (3) that the question of limitation had not been abandoned by all the judgment-debtors; it was abandoned only by one of them, Kundu Mal; the other two judgment-debtors were not bound by what Kundu Mal had done on his own account at any rate, the question of limitation could not be abandoned and that it was the duty of the Court to have gone into this matter in spite of the fact that it had been waived by one of the judgment-debtors.

As regards point No. 1, counsel for the respondents urges that they were entitled to exclude three different periods and that consequently their application which was put in on 7th July 1928, as well as their application which was later put in on 27th July 1934, could not in any circumstances be barred by time. The deductions that they claim are (1) from 13th March 1925, when Bansilal's objections were allowed, to 15th June 1928, when the decree-holders' suit under O. 21, R. 63, Civil P. C., was decreed; (2) from 12th June 1925, when the sale proceedings in regard to the house situated in mohalla Rupa Mistri were stayed by the Senior Subordinate Judge at the request of the Junior Subordinate Judge, to 4th May 1926, when Mt. Shibo's suit was dismissed and (3) from 18th July 1928, when on the application of Bansilal this Court had stayed the sale of the house ad interim to 29th June 1934, when the appeal of Bansilal was disposed of. Counsel for the appellants, on the other hand, urges that none of these deductions is permissible under the law. S. 15, Limitation Act, says that in computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded. It is obvious, therefore, that in order to enable the decree-holders to exclude any time in computing the period of limitation, the execution of their application must have been stayed by injunction or order and unless this is so no time can be excluded. In the present case, as stated above, all that was done by the Senior Subordinate Judge on 12th June 1925 was to stay the sale of the house situated in Mohalla Rupa Mistri. Apart from the fact that Mt. Shibo's suit related only to one-third of the house situated in Mohalla Rupa Mistri and that the present application relates to the house situated in Lakar Bazar, the fact remains that it was open to the decree-holders to have the other properties of the judgment-debtors, both moveable and immovable, attached and also to have taken action for their arrest. Execution of their decree had never been stayed by any order or injunction and they themselves had claimed three different reliefs in their application of 19th December 1924. It is well settled that if execution is not com-

pletely and absolutely stayed, S. 15 does not come into play. If any authority is needed for this proposition, reference may be made to A I R 1924 All 707,¹ A I R 1924 Bom 383,² A I R 1929 Pat 597,³ A I R 1933 Mad 418⁴ and A I R 1933 P C 52.⁵

Counsel for the respondents has drawn my attention in this connexion to 50 M L J 215,⁶ 27 All 334,⁷ A I R 1935 Lah 911⁸ and 63 Cal 57.⁹ I, however, consider that none of these authorities is in point. I am further of opinion that a decree-holder cannot extend the time in his favour by merely describing his petition as one for revival of the original application and that the authorities which grant him this concession have gone beyond the statute of limitation itself. In the matter of limitation only such periods can be excluded which are expressly mentioned in the Limitation Act and if the law does not allow any exclusion, I consider that it is impossible to allow that exclusion merely on the score of authorities. It is no doubt open to the Courts to interpret the law in any manner they like and to come to the conclusion that the case contemplated by them is not provided for under the statute, but the present case is not a case of that type. I hold, therefore, that the application of 7th July 1928 was clearly time-barred having been presented more than three years after the execution application had been consigned to the record room by the Senior Subordinate Judge on account of the default of the decree-holders.

I am also of the opinion that the waiver of the question of limitation by Kundu Mal did not bind the other two judgment-debtors and that it was open to them to insist

1. Ram Bharosay v. Sohan Lal, (1924) 11 A I R All 707=82 I C 1.
2. Chanbasappa Nagappa v. Holibasappa Basappa, (1924) 11 A I R Bom 383 = 80 I C 239 = 48 Bom 485=26 Bom L R 317.
3. Kirtyanand Singh v. Pirthichand Lal, (1929) 16 A I R Pat 597=120 I C 315.
4. Tripura Sundaram v. Abdul Khadar, (1933) 20 A I R Mad 418=143 I C 1=56 Mad 490 = 64 M L J 664 (F B).
5. Kirtyanand Singh v. Prithichand Lal, (1933) 20 A I R P C 52=141 I C 760 = 60 I A 43=12 Pat 195 (P C).
6. Pattamayya v. Pattayya, (1926) 13 A I R Mad 453=92 I C 782=50 M L J 215.
7. Kamaruddin v. Jawahir Lal, (1905) 27 All 334 = 32 I A 102=2 A L J 397=8 Sar 810 (P C).
8. Hira Lal v. Punjab National Bank, (1935) 22 A I R Lah 911=157 I C 679=37 P L R 651.
9. Kristo Kamini Debi v. Girish Chandra Mondal, (1936) 23 A I R Cal 239=162 I C 654=63 Cal 57=39 C W N 1030.

on a decision on that point. Further, there is abundant authority in support of the proposition that objections regarding limitation cannot be waived and that even if they are waived they can be taken up again by the parties waiving them or by the Courts themselves. Reference in this connexion may be made to A I R 1933 Lah 404,¹⁰ 44 I C 890,¹¹ A I R 1934 All 386,¹² A I R 1932 All 108,¹³ 40 Mad 701¹⁴ and 54 All 573.¹⁵

It was further contended by the appellant's counsel that the judgment-debtors were not expected to raise all points at one time and that it was open to them to raise their objections piecemeal. In support of his contention he relied on A I R 1937 All 446,¹⁶ A I R 1936 All 21,¹⁷ A I R 1937 Lah 21¹⁸ and A I R 1937 Lah 211,¹⁹ A I R 1930 Pat 330²⁰ and 53 I C 85.²¹ The principles enunciated in these judgments are clear, but it is not necessary to discuss this matter at length as on the findings, as already recorded, I am in a position to dispose of the appeal. I hold that the application for execution was time-barred and accepting the appeal set aside the order of the Senior Subordinate Judge. The decree-holder will pay costs to the judgment-debtors in both Courts.

G.N./R.K.

Appeal allowed.

10. Desraj Hukumchand v. Lachhi Ram Prabh Dayal, (1933) 20 A I R Lah 404=147 I C 57.
11. Hukum Singh v. Shahab Din, (1918) 5 A I R Lah 374=44 I C 890.
12. Radha Mohan v. Ami Chand, (1934) 21 A I R All 386=149 I C 651=1933 A L J 1283.
13. Ram Charritar v. Suraj Teli, (1932) 19 A I R All 108=136 I C 71=53 All 738=1931 A L J 997.
14. Rama Murthy v. Gopayya, (1917) 4 AIR Mad 892=35 I C 575=40 Mad 701=31 M L J 231.
15. Gobardhan Das v. Dau Dayal, (1932) 19 A I R All 273=138 I C 583=54 All 573=1932 A L J 365 (F B).
16. Aley Rasul v. Bal Kishan, (1937) 24 AIR All 446=169 I C 997=1937 A L J 482.
17. Genda Lal v. Hazari Lal, (1936) 23 A I R All 21=160 I C 394 = 58 All 313 = 1935 A L J 1189 (F B).
18. Allahabad Bank Ltd. v. Rattan Lal, (1937) 24 A I R Lah 21=169 I C 854=39 P L R 202.
19. Raja Balbhadar Singh v. Shankar Das, (1937) 24 A I R Lah 211=172 IC 426=39 PLR 434.
20. Atul Krishna Ghosh v. Brindaban Naik, (1930) 17 A I R Pat 330=125 I C 527=9 Pat 306 = 11 P L T 739.
21. Kesheo Prasad Singh v. Harbans Lal, (1920) 7 A I R Pat 570=53 I C 85=2 P L T 22.

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BHIDE J.

Daulat Ram — Judgment-debtor —
Appellant.

v.

Sardar Pritam Singh — Decree-holder
— Respondent.

Exn. First Appeal No. 183 of 1939, Decided on 12th October 1939, from order of Senior Sub-Judge, Gurdaspur, D/- 16th December 1938.

(a) Civil P. C. (1908), O. 21 R. 57 — Order consigning case to record room held not tantamount to dismissal.

The question whether a particular order is or is not to be taken as tantamount to dismissal has to be decided on facts of each case. [P 79 C 2]

A decree-holder who had attached property made a statement to the effect that the proceedings might be consigned to the record room for the time being, the attachment being kept intact and that certain documents on the record might be returned to him and that he would present an application again within two days. The Court accordingly passed an order consigning the proceedings to the record room and directing that the attachment would continue :

Held that the order consigning the case to the record room could not be looked upon as one of dismissal : A I R 1934 Lah 395, *Disting.*; A I R 1922 All 62; A I R 1925 All 456 and A I R 1936 Lah 873, *Ref.* [P 79 C 2]

(b) Execution—Order merely consigning case to record room is irregular.

An order merely consigning a case to the record room is not one warranted by law; but unfortunately the Courts sometimes pass orders in such terms just to enable them to exclude the case from the list of pending cases for statistical purposes. This practice is irregular and must be deprecated. [P 79 C 2]

(c) Execution—Sale without attachment.

A sale without attachment is not void : A I R 1939 Lah 36 and A I R 1939 Bom 277, *Rel. on.* [P 80 C 1]

M. C. Mahajan — *for Appellant.*

Abdul Aziz Khan for Gulam Mohy-ud-Din Khan — *for Respondent.*

Judgment. — This is a first appeal from the order of the Senior Subordinate Judge, Gurdaspur, dismissing an application of the judgment-debtor for setting aside an execution sale on the ground that it was barred under Art. 181, Limitation Act. The sale in question was confirmed on 12th October 1934 while the application for setting it aside was presented on 24th May 1938. It was urged on behalf of the judgment-debtor that the period of limitation did not begin to run from the date of the sale in this case as the order confirming the sale was passed in the absence of the parties and the judgment-debtor did not come to know about it

till he was released from jail in 1937. Secondly, it was also urged that the period of limitation could only run from the date of dispossession of the judgment-debtor and this took place within three years before the application. The sole ground on which the sale was attacked was that the sale was void inasmuch as it was effected without any valid attachment. The learned counsel for the respondent on the other hand has contended that there was a valid attachment in the present case and consequently the sale was binding on the judgment-debtor. It will be convenient to take up this point first as it seems to me that this ground has no force in the circumstances of the case and it is therefore unnecessary to go into the question of limitation.

The property in question was attached in May 1932 but on 24th November 1932 the decree-holder made a statement to the effect that the proceedings may be consigned to the record room for the time being, the attachment being kept intact and that certain documents on the record may be returned to him and that he would present an application again within two days. The Court accordingly passed an order consigning the proceedings to the record room and directing that the attachment will continue. The learned counsel for the appellant contends that, according to the provisions of O. 21, R. 57, Civil P. C., the order of the executing Court consigning the case to the record room was tantamount to an order of dismissal and, in the circumstances, the attachment came to an end *ipso facto*. It was therefore urged that the subsequent sale which took place without any fresh attachment was void. In support of this contention, the learned counsel relied chiefly on a Single Bench ruling of this Court reported in A I R 1934 Lah 395.¹ The learned counsel for the respondent, on the other hand, has cited A I R 1922 All 62,² A I R 1925 All 456³ and A I R 1936 Lah 873⁴ in support of his contention that the order of the executing Court referred to above was not one of dismissal and there was no legal objection to the continuance of the attachment.

After considering the rulings cited, it seems to be that, in the circumstances of the present case, the order of the executing Court was not tantamount to 'dismissal'. The decree-holder evidently intended to go on with the execution and had merely asked for the return of certain documents to enable him to put in an application with the necessary amendments and the application was presented again the very next day. The Court had merely passed an order consigning the case to the record room and had not dismissed the application. The wording of the order in A I R 1934 Lah 395¹ was somewhat different and as costs were awarded the order may appear to be one of dismissal. The question whether a particular order is or is not to be taken as tantamount to dismissal has to be decided on the facts of each case and, in the present instance, it seems to me that the order consigning the case to the record room cannot be looked upon as one of dismissal. According to O. 21, R. 57, Civil P. C., the Court can dismiss an execution application only when there is a default on the part of the decree-holder and the Court is unable to proceed further with the application owing to such default. In the present instance, the decree-holder merely wanted return of certain documents to enable him to present an application with necessary amendments. The Court agreed to this and the application was presented the very next day. In the circumstances, it cannot be held that there was any default on the part of the decree-holder or any justification for dismissing the application. Of course the proper course would have been to adjourn the case. It has been repeatedly pointed out that an order merely consigning a case to the record room is not one warranted by law; but unfortunately the Courts sometimes pass orders in such terms just to enable them to exclude the case from the list of pending cases for statistical purposes. This practice is irregular and must be deprecated. But it seems to me clear that the irregular order passed in the above circumstances cannot be looked upon as an order of dismissal.

It follows from the above that there was no objection to the continuance of the attachment of the property as ordered by the Court. As a result, the only ground on which the appellant sought to attack the sale fails. It may be pointed out further that a Division Bench of this Court has held recently that a sale without attachment is

1. *Daim Shah v. Vir Bhan*, (1934) 21 A I R Lah 395=150 I O 1053=86 P L R 241.

2. *Mahomed Mubarak Hussain v. Sahu Bimal Prasad*, (1922) 9 A I R All 62=65 I O 91=44 All 274=20 A L J 113.

3. *Mulay v. Bal Gobind*, (1925) 12 A I R All 456=87 I O 349.

4. *Mangal Singh v. Sagar*, (1936) 23 A I R Lah 878=169 I O 255.

not void: see A I R 1939 Lah 36.⁵ To the same effect is a recent decision of the Bombay High Court in I L R (1939) Bom 420.⁶ I dismiss this appeal with costs.

D.S./R.K.

Appeal dismissed.

5. Tirkha Ram Chuni Lal v. Fakhir Ahmed, (1939) 26 A I R Lah 36=179 I C 889=I L R (1938) Lah 582=41 P L R 199.

6. Nambev Krishna v. Gobardhan Nanabhai, (1939) 26 A I R Bom 277=183 I C 457=I L R (1939) Bom 420=41 Bom L R 463.

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DIN MOHAMMAD J.

Ahmad Khan — Defendant—Appellant.
v.

Miraj Din, Plaintiff and others,
Defendants — Respondents.

Second Appeal No. 517 of 1939, Decided on 17th November 1939, from decree of Senior Sub-Judge, Lahore, D/- 11th January 1939.

(a) Minor—Decree against—Execution sale—Sale confirmed — Suit by minor challenging mortgage — Rights of bona fide auction-purchaser being not affected, sale held could not be set aside.

In execution of a mortgage decree against a Mahomedan mother and her minor son who was represented by his brother as guardian ad litem in the suit, the property was sold and purchased by a third person. Subsequently, in the suit by the minor challenging mortgage on the ground that his mother could not execute a valid mortgage on his behalf and that his brother who was guardian ad litem in the mortgage suit did not raise any such plea :

Held that the rights of the bona fide auction-purchaser were not affected and the sale could not be set aside: 10 All 166 (PC); 14 Cal 18 (PC) and 63 I C 970, *Rel. on.* [P 81 C 1, 2]

(b) Minor — Alienation for maintenance by mother as guardian though void ab initio minor cannot recover his share without restoring benefit derived by him under the alienation.

Where a Mahomedan mother executed a mortgage on her own behalf as well as on behalf of her minor son for the maintenance of the minor, the transaction is evidently for the benefit of the minor and he cannot therefore recover his share without restoring the benefit received even though the transaction on his behalf be void ab initio : A I R 1926 Lah 170; A I R 1927 Lah 722; 128 I C 308 and A I R 1931 Mad 468, *Rel. on.*

[P 81 C 2]

Amar Nath Chopra — *for Appellant.*

Sardar Gian Singh — *for Respondent (Plaintiff).*

Judgment. — This is an appeal by one Ahmad Khan against Mehraj-ud-Din and others. The facts are these. On 1st March 1932 Ghulam Haider, son of Ghulam Hussain, and Mt. Allah Rakhi, widow of Ghu-

lam Hussain, on her own behalf as well as on behalf of her minor son Mehraj-ud-Din mortgaged a shop with possession to one Allah Ditta for Rs. 1100. The consideration was made up as follows :

For expenses of execution and registration of the deed ...Rs. 50.

For paying off the previous mortgage...Rs. 700.

Cash received before the Sub-Registrar...Rs. 350.

On 24th March 1934 Allah Ditta instituted a suit against his mortgagors for recovery of Rs. 1331 made up of Rs. 1100, the principal mortgage money and Rs. 231, interest, by the sale of the mortgaged property. On 6th March 1935 the defendants put in a written statement admitting the claim. Mehraj-ud-Din was still a minor and was represented by his brother Ghulam Haider as guardian for the suit. Allah Ditta's suit was consequently decreed as lodged. The mortgaged property was ultimately sold in pursuance of Allah Ditta's decree and was purchased by Ahmad Khan for Rs. 1350. This took place on 27th December 1935. On 17th February 1936 the sale was confirmed and possession of the property delivered to Ahmad Khan. On 11th January 1938 the present suit was instituted by Mehraj-ud-Din claiming seven sixteenth share of the property sold in favour of the auction-purchaser on the ground that he being a minor at the time of Allah Ditta's mortgage his mother had no right to alienate his share of the property and that as the original transaction was void, all subsequent proceedings had no force. It was further alleged that the admission of claim made by his brother in Allah Ditta's suit was not binding on him inasmuch as his brother as his guardian failed to raise the pleas that could and should have been raised on his behalf to defeat Allah Ditta's claim as regards his share of the property. It may be stated here that though the property mortgaged was described as a shop in the mortgage deed executed in favour of Allah Ditta as well as in the suit instituted by him, parties later agreed to describe it as a house and in the present suit it has been described as a residential house. The suit was resisted by Ahmad Khan on various grounds. Both the Subordinate Judge who tried the suit and the Subordinate Judge who heard the appeal found in favour of Mehraj-ud-Din. Hence this appeal.

Counsel for the appellant concedes that the transaction entered into by Mt. Allah Rakhi on behalf of Mehraj-ud-Din at the

time of the latter's minority was void but he contends that that does not affect Ahmad Khan who was a bona fide purchaser at a court sale in execution of a decree which was valid at the time of the sale. It is also argued that for the reasons stated above, it does not matter if the guardian showed any negligence in the conduct of the minor's suit and failed to raise the necessary pleas on his behalf. It is further urged that in any circumstances both the Courts below have erred in granting Mehraj-ud-Din an absolute decree for possession inasmuch as the original mortgage had been effected for his benefit and he was, if not at law, at least in equity, bound to restore the benefit so received. In support of the first contention reliance is placed on 10 All 166,¹ 14 Cal 18² and 63 I C 970.³ In the Allahabad case it was observed by their Lordships of the Privy Council that a sale, having duly taken place in execution of a decree in force at the time, cannot afterwards be set aside as against a bona fide purchaser, not a party to the decree, on the ground that, on further proceedings, the decree has been, subsequently to the sale, reversed by an Appellate Court. Their Lordships remarked:

So in this case those bona fide purchasers, who were no parties to the decree which was then valid and in force, had nothing to do further than to look to the decree and to the order of sale.

In 14 Cal 18,² the head-note reads as follows:

If a Court ordering a sale in execution of a decree has jurisdiction, a purchaser of the property sold is not bound to inquire into the correctness of the order for execution, any more than into the correctness of the judgment upon which the execution issues. . . . Where property, sold in execution of a valid decree, under the order of a competent Court, was purchased bona fide and for fair value: held, that the mere existence of a cross-decree for a higher amount in favour of the judgment-debtor, without any question of fraud would not support a suit by the latter against the purchaser to set aside the sale.

It cannot be doubted in this case that Ahmad Khan was a bona fide purchaser and had paid an adequate price at the auction held by the Court. In 63 I C 970,³ the guardian of a minor defendant was found guilty of negligence but inasmuch as a sale had been effected in execution of the decree passed against the minor in that suit, Martineau J. following the two judgments cited above came to the conclusion that the

sale in execution could not be set aside later on the suit of the minor. This case is exactly on all fours with the case before me.

I accordingly hold that in spite of the fact that Mt. Allah Rakhi could not execute a valid mortgage on behalf of Mehraj-ud-Din and also in spite of the fact that Gulam Haidar had not raised any such plea in the previous suit instituted by Allah Ditta, Ahmad Khan is not affected in the least and the sale in his favour cannot now on any account be set aside. In this view of the case no other question arises but with a view not to leave any point arising in the case undecided, I take up the second contention raised by the appellant. The leading authority on the subject now is 7 Lah 35.⁴ In that case the headnote reads as follows:

It is settled law that a Mohamedan mother has no power to alienate the property of her minor son. This being so, the mortgage in the present case made by the plaintiffs' mother was void ab initio and the mortgagee's position was no better than that of a trespasser. 45 Cal 878⁵ followed. Held however that in setting aside the mortgage the Court had discretionary powers under S. 41, Specific Relief Act, to make it a condition that the minors should refund the amount by which their estate and themselves were benefited.

This decision was followed by Dalip Singh J. in A I R 1927 Lah 722,⁶ by another Division Bench of this Court in 31 P L R 732⁷ and by Madhavan Nair J. in A I R 1931 Mad 468.⁸ It is deplorable that these judgments were not brought to the notice of the Courts below and their decision on the point at issue consequently went against the rulings of this Court. Mt. Allah Rakhi has stated that the various mortgages of the property in suit had been effected as she had to maintain two sons and three daughters and she was too poor to find sustenance for them. The transaction was evidently for the benefit of the minor and he could not therefore recover his share without restoring the benefit received, even if the transaction on his behalf was void ab initio. Before I conclude, I may advert to another aspect of the case which has also been discussed by both the Courts below.

4. Rang Ilahi v. Mahbub Ilahi, (1926) 13 A I R Lah 170=94 I C 25=7 Lah 35=27 P L R 210.

5. Imambandi v. Mutsaddi, (1918) 5 A I R P O 11=47 I C 513=45 I A 73=45 Cal 878 (P O).

6. Khiam v. Dehru, (1927) 14 A I R Lah 722=99 I O 734.

7. Charanji Lal v. Tota Ram, (1930) 31 P L R 732=128 I C 308.

8. Abdul Majid Said v. Ramiza Bibi Sahiba, (1931) 18 A I R Mad 468=191 I O 153.

1. Zainulabdin Khan v. Mahomed Asghar Ali Khan, (1888) 10 All 166 = 15 I A 12 = 5 Sar 129 (P O).

2. Rewa Mahton v. Ram Kishen Singh, (1887) 14 Cal 18=13 I A 106=4 Sar 746 (P O).

3. Kirpa Singh v. Mula Singh, (1921) 63 I C 970. 1940 L/11 & 12

Mehraj-ud-Din had originally sued for 7/16ths of the property but it was contended that his share was only 4/16th as he had three sisters who were also heirs under the Mahomedan law. Both the Courts below agreed with this contention. The daughters being no parties to the suit, I decline to express any opinion on the question whether they had any subsisting claim against the auction-purchaser or not in view of S. 41, T. P. Act, and I accordingly leave this matter open. On the grounds stated above, I accept this appeal but in the peculiar circumstances of the case I leave the parties to bear their own costs throughout.

G.N./R.K.

*Appeal allowed.***A. I. R. 1940 Lahore 82****SPECIAL BENCH**

TEK CHAND, SKEMP AND ABDUL
RASHID JJ.

Philip William Ravanshawe Hardless
— Petitioner.

v.

Gladys Isabel Hardless and others —
Respondents.

Matrimonial Reference No. 5 and Civil Misc. No. 419 of 1939, Decided on 16th October 1939, for confirmation of decree nisi granted by District Judge, Delhi, D/- 25th May 1938.

(a) Practice—Expunging remarks from judgment—Judge when commenting on conduct of parties and others should use sober and restrained language—Unnecessary and harmful remark expunged.

Judge, when commenting on the conduct of parties and others, should be very careful to use sober restrained language. A passage which is not necessary to the conclusion of the Judge nor even necessary to his argument and is likely to militate seriously against party's earning a living in his profession should be expunged from the judgment.

[P 83 C 1]

(b) Divorce Act (1869), S. 44 — Decree passed by District Judge dissolving marriage confirmed by High Court — Jurisdiction to entertain application for custody of child is with District Judge and not High Court.

Where a decree for dissolution of marriage granted by District Judge is confirmed by High Court, the jurisdiction to entertain an application for the custody of the child or for arrears of maintenance lies with the District Judge. High Court has in such case no jurisdiction to hear the application : *A I R 1915 Bom 261, Rel. on.*

[P 83 C 2]

Kartar Singh — *for Petitioner.*

M. F. Rahman — *for Respondent 1.*

Order. — On 25th May 1939, the District Judge of Delhi granted a decree dis-

solving the marriage between Philip and Gladys Hardless. This decree was confirmed by a Full Bench of this Court on 7th July 1939. Mr. Hardless, the petitioner, alleged that his wife had committed adultery with an unknown European and also with Mohammad Habib, a cook. Mrs. Hardless confessed to the adultery with the European and the learned District Judge based his decree on this admission. He found that adultery with Mohammad Habib was not proved. Mr. Hardless has appealed seeking that the High Court should declare that it is proved that his wife committed adultery with Mohammad Habib. He also seeks that sentences in the judgment reflecting on his character should be expunged. He also prays for custody of the child of the marriage, Raymond. Mrs. Hardless has put in a petition for arrears of maintenance for the child.

The parties were married in 1932 and Raymond was born in 1933. In 1934 Mrs. Hardless went to England. Shortly before her return at the beginning of the cold weather, Mohammad Habib was engaged by Mr. Hardless as cook. The parties lived together in Delhi till April 1935, when they went to Waltair in Southern India, Mohammad Habib being dismissed at the time they left Delhi. At the end of the hot weather in 1935, the Hardlesses returned to Delhi, travelling via Calcutta where they stayed with Mrs. Gregory, aunt of Mrs. Hardless. The original intention had been to stay only for a day or so and this is what Mr. Hardless did; but Mrs. Hardless saying that Raymond was tired and peevish did not accompany her husband and stayed on in Calcutta for about three weeks. Mohammad Habib was then employed as cook by Mrs. Gregory. Shortly after Mrs. Hardless left for Delhi, he also came to Delhi and after some time obtained employment with Mr. Davidson, Manager of Messrs. Cooke and Kelvey.

In April 1936 Mrs. Hardless became seriously ill and was admitted to the Hindu Rao Hospital at Delhi. While there she confessed to her husband that she had committed adultery with an European from Rawalpindi, whose name she refused to disclose. On 26th June 1936, Mr. Hardless dined with Mr. Cannham, Manager of Manton & Co., whose premises were next door to those of Cooke and Kelvey. Mr. Davidson had meanwhile been succeeded at Cooke and Kelvey by Mr. Binns who had kept Mohammad Habib as cook. The

premises had a common staircase and Mr. Hardless saw Mohammad Habib stumbling down the stairs. Next morning he went to Cooke and Kelvey's godown where he found Mohammad Habib and took from him a bundle of letters. This was resented by Mr. Binns, there was some sort of a scuffle; and the papers were thrown to the ground. Mr. Hardless went outside to explain to Mr. Binns and on his return most of the papers had been burnt. This is the statement of Mr. Hardless, supported more or less by Mr. Gannham, Mr. Binns and one Shimbhu Lal. The same morning, according to the petitioner, Mohammad Habib left Delhi for Calcutta, sending a telegram to Mrs. Hardless on the way.

A little later, early in July, Mr. Hardless, at his wife's request, took from the hospital a suit-case which his wife had borrowed from and wished to return to a Mrs. Barrow. In the pocket of the suit-case Mr. Hardless found some other documents which will be noticed later. (After examining evidence regarding alleged adultery with Mohammad Habib, their Lordships proceeded further.) Obviously, taking all this evidence at its best, it falls very far short of establishing the charge made by the petitioner. We entirely agree with the learned District Judge that the petitioner's charge that his wife had committed adultery with Mohammad Habib is not proved. In his judgment the learned District Judge said :

Are we then to accept the statement of Mr. Hardless as gospel truth and to condemn his wife for ever? The evidence on the record and the behaviour of Mr. Hardless in Court lead me to the irresistible conclusion that he is a person of unbalanced mind, quarrelsome disposition and highly suspicious nature. He magnifies trifling incidents into serious affronts; and it is extremely unwise to accept anything from his lips unless it is fully corroborated by independent evidence.

Mr. Hardless seeks that this passage be expunged. This course is not opposed on behalf of Mrs. Hardless. The passage is not necessary to the conclusion of the learned District Judge; it is not even necessary to his argument. Mr. Hardless is a handwriting expert and this passage might be cited against him every time he appeared to give evidence in Court. The expression "unbalanced mind" would militate seriously against his earning a living in his profession. For these reasons we direct that the passage be expunged remarking that Judges, when commenting on the conduct of parties and others, should be very careful to use sober, restrained language. Mr. Hardless

also sought custody of his child. A preliminary objection was taken by Mrs. Hardless's counsel, Mr. Fazal Rahman, that we had no jurisdiction to entertain this petition. After some discussion it was practically admitted that this objection was well-founded. S. 44, Divorce Act, lays down :

The High Court after a decree absolute for dissolution of marriage or a decree of nullity of marriage, and the District Court after a decree for dissolution of marriage or of nullity of marriage has been confirmed, may upon application by petition for the purpose, make from time to time all such orders and provisions, with respect to the custody, maintenance and education of the minor children.

Section 16 of the Act lays down that every decree for a dissolution of marriage made by a High Court shall in the first instance be a decree nisi to be made absolute after a certain period. This refers to suits tried in the High Court where the decree nisi is generally made absolute after six months by the same Judge who heard the suit. On the other hand, S. 17 of the Act lays down that every decree for a dissolution of marriage made by a District Judge shall be subject to confirmation by the High Court, such confirmation being by a Bench of three Judges. Thus, the distinction is laid down : a decree by a District Judge being confirmed in the High Court : a decree nisi made by a High Court Judge being made absolute. Hence, according to the language of S. 44 we have no jurisdiction to hear this petition, the jurisdiction lying in the present case with the District Judge. This view is supported by authority: see 40 Bom 109,¹ which dealt with an application for alimony. In similar circumstances the Bombay High Court held that the Court which had heard the original suit should hear the application. The learned Chief Justice said :

The decree for dissolution was not a decree absolute under S. 16 of the Act upon a decree nisi which could only be passed by the High Court, but it was a decree confirming the Divisional Judge's decree for dissolution under S. 17. It is therefore clear we think that the Court which is empowered to make the order either for alimony or for the maintenance and education of the children is in this case the Court of the Divisional Judge and not the High Court.

For the same reasons, Mrs. Hardless's application for arrears of maintenance lies in the first instance to the District Judge. We assess the costs of these two days' hearing in the High Court at Rs. 150 to be

1. M. Wallace v. A. Wallace, (1915) 2 A I R Bom 261=31 I C 331=40 Bom 109=17 Bom L R 948.

paid into Court by Mr. Hardless within one month.

D.S./R.K.

Order accordingly.

A. I. R. 1940 Lahore 84

ABDUL RASHID J.

Bhani and others — Convicts
Petitioners.

v.

Narain Singh — Respondent.

Criminal Revn. No. 1406 of 1939, Decided on 8th November 1939, reported by Addl. Dist. Magistrate, Delhi.

(a) Criminal P. C. (1898), S. 522—Conviction by Special Bench of Honorary Magistrates — Bench abolished subsequently — Another bench has no jurisdiction to entertain application under S. 522—Orders passed by it are illegal.

Where an accused is convicted by a Special Bench of Honorary Magistrates which is subsequently abolished, another Bench, has no jurisdiction to entertain an application under S. 522 from the complainant. Any orders passed by such Bench must therefore be illegal. [P 85 C 1]

(b) Criminal P. C. (1898), S. 522—"Force" and "criminal force" contemplate criminal force to "person" and not to "matter of substance"—Remedy for criminal trespass cannot be sought under S. 522—Order under S. 522 is illegal—Remedy lies in Civil Court.

The definition of "force" and "criminal force" in Ss. 349 and 350, I. P. C., contemplate criminal force being used to any "person" and do not take into account such force being urged to a "matter of substance." A conviction for an offence of criminal trespass does not entitle the complainant to seek his remedy under S. 522, Criminal P. C., unless there is a finding that the offence with which the dispossession happened was attended with the use of criminal force on the person of the complainant. [P 84 C 2]

Therefore where the complainant's allegation is not that any "force or "show of criminal force" had been made to him the remedy of the complainant, if any, lies in a Civil Court and any order passed under S. 522 would be illegal: *A I R 1939 Lah 184 and A I R 1921 Pat 391, Rel. on.*

[P 85 C 1]

Qabul Chand — *for Petitioners.*

Shamair Chand — *for Respondent.*

Facts.—The facts of this case are as follows: This is a petition for revision of an order dated 26th July 1939, passed by a Bench of Honorary Magistrates exercising Second Class powers, Delhi, directing under S. 522, Criminal P. C., a restoration to Narain Singh of a Khaprail Chapar (a hut) situated in the part of the city known as Nabi Karaim. Briefly stated the facts are that on 19th May 1937, Narain Singh brought a complaint under S. 448, I. P. C., against Town, Bhani, Sukha and Changa of Mohalla Sikligaran with allegations that

they had taken forcible possession of the hut, the property of the complainant's nephew Dwarka Pershad. It was admitted in the complaint that the hut was on Nazul land taken on rent by Dwarka Pershad who was absent from Delhi since two and a half years. The accused in that case were convicted and fined on 29th June 1938 by a Special Bench of Honorary Magistrates consisting of Khan Sahib Sheikh Habib-ur-Rehman and Rai Sahib Manohar Lal Bhargava. That Bench was afterwards abolished. On 18th July 1938 another Bench consisting of Khan Bahadur Haji Rashid Ahmad and Dr. C. R. Jaina entertained an application under S. 522, Criminal P. C., from Narain Singh against the four accused and passed the order now in question.

Report.—That the Bench consisting of Khan Bahadur Haji Rashid Ahmad and Dr. C. R. Jaina had no jurisdiction to pass the order under S. 522, Criminal P. C., in a case in which the accused had been convicted by the Special Bench of Honorary Magistrates since abolished. (2) The Special Bench of Honorary Magistrates convicting the accused never held that "criminal force" had been used or that there had been a "show of force or criminal intimidation" against the complainant. In fact that was not his allegation in the complaint. It might also be mentioned here that Dwarka Pershad who was said to be in actual possession of the property had locked it and was not in Delhi when the occurrence took place. He has not been heard of and it is not certain that Narain Singh has anything to do with the property. The definition of "force" and "criminal force" in Ss. 349 and 350, I. P. C., contemplate criminal force being used to any "person" and do not take into account such force being urged to a "matter of substance." A conviction for an offence of criminal trespass will not necessarily entitle the complainant to seek his remedy under S. 522, Criminal P. C., unless there was finding of the Court that the offence with which the dispossession happened was attended with the use of criminal force on the person of the complainant: *see 22 Cr L J 829.*¹ That view was confirmed in a recent ruling of the Lahore High Court reported in *A I R 1939 Lah 184.*² In this case Narain Singh's allegation

1. Balram Sahu v. Chamru Saha, (1921) 8 A I R Pat 391=61 I C 57=22 Cr L J 329=2 P L T 120.

2. Ram Chand v. Emperor, (1939) 26 A I R Lah 184=183 I C 340=I L R (1939) Lah 513=41 P L R 63=40 Cr L J 781.

was not that any "force" or "show of criminal force" had been made to him. In my opinion the remedy of the complainant, if any, lies in a civil Court.

Order. — I agree with the learned Additional District Magistrate that the Bench consisting of Khan Bahadur Haji Rashid Ahmad and Dr. C. R. Jaina had no jurisdiction to pass the order dated 26th July 1939, under S. 522, Criminal P. C. This order is accordingly set aside.

G.N./R.K.

Order set aside.

A. I. R. 1940 Lahore 85

DIN MOHAMMAD J.

Lakshmi Insurance Co. Ltd., Lahore — Plaintiff — Appellant.

v.

B. K. Kaula and another — Defendants — Respondents.

First Appeal No. 39 of 1939, Decided on 16th November 1939, from order of Commercial Sub-Judge, First Class, Lahore, D/- 28th November 1938.

Jurisdiction—Insurance Company at Lahore appointing certain person working at Meerut as its chief agent for Rajputana and Bundelkhand area — Appointment made at Lahore and all payments to be made at Lahore and all accounts to be rendered at Lahore—Appointment subsequently cancelled—Suit by agent at Ajmer for damages for cancellation of appointment—Subsequent suit by Company at Lahore for recovery of certain amount due by agent—Lahore Court held had jurisdiction — S. 49, Contract Act, did not apply and suit could not be stayed under S. 151, Civil P. C.

An Insurance Company having its office at Lahore appointed certain person working at Meerut as the chief agent for Rajputana and Bundelkhand area. The appointment was made at Lahore and all the payments were to be made at Lahore and all accounts were to be rendered at Lahore. Subsequently disputes arose between the parties and the appointment was cancelled. Thereupon, the agent instituted a suit at Ajmer for damages in respect of the cancellation of the appointment. Later on the Company instituted suit at Lahore against the agent for recovery of certain sum due by the agent:

Held that cause of action arose at Lahore and the Court at Lahore had jurisdiction to try the latter suit. [P 86 C 2 ; P 87 C 1]

Held further that S. 49, Contract Act, was not applicable to the case: *AIR 1927 P C 156, Rel. on; A I R 1936 Rang 251 and A I R 1935 Bom 283, Ref.* [P 86 C 2 ; P 87 C 1]

Held also that S. 10, Civil P. C., did not apply. This being so S. 151, Civil P. C., could not be invoked to stay the suit which could not be legally stayed. [P 87 C 1]

J. N. Aggarwal and Bishan Nath —
for Appellant.

Achhru Ram — *for Respondents.*

Judgment. — This appeal has arisen in the following circumstances: Mr. B. K. Kaula was working for the Lakshmi Insurance Company, Limited, Lahore, at Meerut. Finding the work not so profitable, he approached the Company with the request that he might be granted the chief agency of the Rajputana and Bundhelkhand area. Some conversation about this matter took place at Meerut between Mr. Kaula and Mr. Santanam, the Managing Director of the Company, and, as a result of that conversation, Mr. Kaula wrote a letter to the Managing Director on 28th August 1929 reminding him of that conversation and requesting him to appoint him chief agent of the area mentioned above, (Ex. D. W. 1/1). Lala Amar Nath, Manager of the Company, acknowledged the receipt of Mr. Kaula's letter on 4th September 1929 and informed him that as the Managing Director was at Simla, no definite reply could be given to him then, but that his letter would be placed before the Managing Director on his return. In the meantime he advised Mr. Kaula to carry on his work at Meerut, (Ex. D. W. 1/2). On 1st October 1929, Lala Amar Nath wrote to Mr. Kaula that a letter of appointment was being sent to him which should be signed and of which every page should be initialled by him (Ex. D. W. 1/3). The letter of appointment Ex. P. 1 stated:

We have the pleasure to appoint you our chief agent for the States of Rajputana and Central India for one year from 1st November 1929 to 31st October 1930 on terms and conditions given below.

To this letter were appended 23 conditions, of which Nos. 2, 3, 15, 16 and 22 are relevant for the purposes of the present appeal. It is not denied that this letter of appointment was duly signed and initialled as suggested in Ex. D. W. 1/3. On 26th March 1931, Pandit Maharaj Kishan Tikun stood surety for Mr. Kaula and executed a surety bond in favour of the Company in the sum of Rs. 2,000 which sum was to be paid at Lahore. The security tendered was for the faithful performance and discharge of Mr. Kaula's duties as chief agent. In 1934, the conditions laid down in Ex. P. 1 were altered to some extent, (Ex. P. 3). Ex. P. 4, which is a letter dated 17th May 1934, addressed by Mr. Kaula to the Agency Manager of the Lakshmi Insurance Company, shows that the agreement about altering the conditions was entered into at Lahore. Disputes arose between the parties in 1937 with the result that Mr. Kaula's

appointment was cancelled on 19th October 1937 and all the commissions earned by him were forfeited. Thereupon, a suit was instituted by Mr. Kaula at Ajmer for damages in respect of the cancellation of his appointment. Later, on 26th March 1938, the Company instituted a suit against Mr. Kaula as well as his surety at Lahore for recovery of Rs. 9205-14-3. It was alleged that the Courts at Lahore had jurisdiction in the matter inasmuch as (a) the appointment of Mr. Kaula was made at Lahore, (b) the agreement to make advances was similarly made at Lahore, (c) all payments were to be made at Lahore and (d) all accounts were to be rendered at Lahore. Mr. Kaula contested the jurisdiction of the Courts at Lahore and further prayed for stay of the suit under S. 10 read with S. 151, Civil P. C. The Commercial Subordinate Judge came to the conclusion that the Courts at Lahore had no jurisdiction to entertain the suit and further observed that even if S. 10, Civil P. C., did not apply, S. 151 authorized the stay of the suit. It is from this order that the present appeal has been preferred.

Counsel for the appellant has rightly urged that the findings arrived at by the Subordinate Judge on questions affecting the jurisdiction of the Court are entirely erroneous and that the Subordinate Judge has misinterpreted and misread the documents which were relevant to the question in issue. It is clear that the initiative was taken by Mr. Kaula himself in his letter dated 28th August 1929 and it was he who had approached the Managing Director for the grant of chief agency of the Rajputana and Bundhelkhand area. It is further clear that it was the offer that was made by him in this letter that was ultimately accepted by the head office at Lahore on 1st October 1929. In the face of these facts it cannot be urged that no agreement was entered into at Lahore. Counsel for the respondent contends that inasmuch as the letter of appointment was subject to certain terms and conditions which Mr. Kaula was asked to sign, the letter of appointment was in fact an offer made to Mr. Kaula, which he accepted at Meerut as he signed it there. This position, however, is untenable. The offer of Mr. Kaula having been accepted at Lahore and the letter of appointment having been issued in consequence thereof, the terms and conditions were as a matter of course incorporated in the letter of appointment and as a mere matter of routine he was

asked to sign them. There is no doubt, therefore, that the appointment of Mr. Kaula was made at Lahore.

Further, conditions 2, 3, 15, 16 and 22 of Ex. P-1 lend support to the plaintiff's contention that the Courts at Lahore have jurisdiction in the matter. By para. 1 of condition No. 2 Mr. Kaula was authorized to collect premia from clients and by para. 2 he was required to pay all moneys received by him along with counterfoils to the Company at Lahore. By condition No. 3 payments were to be made to Mr. Kaula at Lahore for services rendered by him. By condition No. 15 commission bills were to be prepared monthly at Lahore and sent to Mr. Kaula who was required to return the same after signing them and a provision was made that on receipt of these bills the money due would be paid. By condition No. 16 he was enjoined not to deduct any commission due to him from the moneys coming into his hands and he was further informed that his account would be settled promptly by the Head Office which is undoubtedly situated at Lahore. Counsel for the respondent urges that this condition merely assured Mr. Kaula of an expeditious settlement of his account and that the words "by the Head Office" were merely for the sake of form but this contention is devoid of substance. All payments were intended to be made at Lahore and all accounts were to be rendered at Lahore. The matter is further cleared by Ex. P-3 by which certain changes were introduced in the original contract and it is admitted by Mr. Kaula himself in Ex. P-4 that that arrangement had been made at Lahore. The surety bond too is worthy of consideration in this connexion and so is the assignment of policy No. 45606. On the findings as recorded above it is obvious that it cannot be said that no cause of action arose at Lahore. The term "cause of action" has been defined in *Cooke v. Gill*.¹

Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved: (1889) 22 Q B D 128² at page 131.

Moreover, S. 49, Contract Act, does not apply to such cases, as has been laid down by their Lordships of the Privy Council in

1. (1873) 8 C P 107=42 L J C P 98=28 L T 32=21 W R 334.

2. *Read v. Brown*, (1889) 22 Q B D 128 = 58 L J Q B 120=60 L T 250=37 W R 131.

5 Rang 451.³ In that case by a contract made in Calcutta the appellants agreed to make good to the respondent defaults in payments to them in respect of sales and purchases of grain in Rangoon where the respondents had a business branch. Their Lordships of the Privy Council held that in these circumstances the appellants were under an implied obligation to pay in Rangoon. It was further observed that where there was an obligation to pay money and either from the terms of the contract or from the necessities of the case a further obligation was implied to find the creditor so as to pay him. S. 49 did not apply. In A I R 1936 Rang 251,⁴ it was held that S. 49 did not displace the ordinary rule of common law that it is the duty of a debtor to seek out his creditor in order to make payment to him.

In 37 Bom L R 357,⁵ the plaintiff lived at Surat which is in British India and he lent a sum of money at Surat to the defendant who lived in a neighbouring Indian State. The place of repayment was not expressly stipulated. The plaintiff brought a suit to recover money in the Surat Court and it was held that that Court had jurisdiction to entertain the suit. It was remarked that the obligation to pay to the creditor implied that the creditor must be paid where he was. It was further observed that even under S. 49, Contract Act, it was the duty of the debtor to apply to the creditor to appoint a reasonable place for payment and his failure to do so did not better his position. I hold, therefore, that the Courts at Lahore have jurisdiction to try the suit. The matter of stay is simple. The Subordinate Judge himself came to the conclusion that S. 10 was not applicable. This being so, S. 151, Civil P. C., could not be invoked to stay a suit which could not legally be stayed. Even otherwise, it is admitted that the reliefs claimed in the suit at Lahore are different from those claimed in the suit at Ajmer and that mutual adjustments can be made even after the decrees have been obtained. No question of balance of convenience arises in the defendant's favour nor any question of injustice. I accordingly set aside the order of the Commercial Subordinate Judge and

direct him to proceed with the trial of the suit in accordance with law.

D.S./R.K.

Order set aside.

A. I. R. 1940 Lahore 87

BLACKER J.

Arnold Monteath Mathews — Convict
Appellant

v.

Emperor.

Criminal Appeal No. 730 of 1939, Decided on 1st November 1939, from order of Sess. Judge, Lahore, D/- 12th June 1939.

(a) Criminal P. C. (1898), S. 423 (2) — Trial by jury—Misdirection — High Court can deal with case itself—It will interfere only when misdirection renders verdict erroneous and causes failure of justice—"Erroneous" explained.

In the case of a trial by jury if the High Court finds that there is a misdirection it has to examine the evidence to see whether the verdict is erroneous and has caused a failure of justice. Even if there is a misdirection, the High Court is not entitled to alter or reverse the verdict unless the verdict is erroneous by reason of such misdirection and the High Court before interfering must also find that there has been a failure of justice under S. 537, Criminal P. C. : 26 *Mad 1*; A I R 1925 *Sind 116*; A I R 1926 *Nag 53*; A I R 1933 *Bom 153* and A I R 1932 *Cal 474*, *Rel. on*; 21 *Cal 955*, *Distinguished and Commented upon.* [P 89 C 2]

In a case where if the misdirection had not occurred, the jury could not reasonably without being perverse or unduly foolish have come to any other decision, the verdict cannot be said to be erroneous within the meaning of S. 423 (2) and the High Court will not interfere. [P 89 C 2]

(b) Criminal P. C. (1898), S. 297 — Trial by jury — Misdirection — Cheating — Failure of Judge to explain to jury necessary ingredients which constitute cheating in law amounts to misdirection.

In a case where the main charges are of cheating it is the duty of the Judge to explain to the jury the necessary ingredients which the prosecution must prove before the charges can be held established, for the criminal definition of cheating is not exactly what an ordinary layman in the ordinary use of the English language would understand by the term. [P 88 C 2]

Where cheating consists of false representations the difference between a promise which is not intended to be kept at the time it is made and the promise which is intended to be kept at the time it is made but is subsequently broken must be explained to the jury, for, in the latter case the offence would not necessarily be one coming under the legal definition of cheating. Failure to explain as aforesaid amounts to misdirection. [P 88 C 2]

(c) Criminal Trial—Verdict of jury — High Court can set aside verdict on one charge and uphold conviction on rest of charges and need not send case for retrial.

Where the High Court finds the verdict by jury on one of the charges to be erroneous it can set aside that verdict and uphold conviction on other

3. Soniram Jeetmull v. R. D. Tata & Co. Ltd., (1927) 14 A I R P C 156=102 I C 610=54 I A 265=5 Rang 451 (PO).

4. Annamalai Chettyar v. Daw Hnin U, (1936) 23 AIR Rang 251=163 I C 397.

5. Nathubhai Ranchhod v. Chhabil Das Dharam Chand, (1935) 22 AIR Bom 283=157 I C 248=59 Bom 365=37 Bom L R 357.

charges on which the verdict is not found to be erroneous and need not send the case for retrial.

[P 90 C 2]

K. L. Gauba — *for Appellant.*

Nazir Hussain, Asst. Legal Remembrancer
— *for the Crown.*

Judgment. — The appellant in this case was tried by the learned Sessions Judge of Lahore with the aid of a jury on three charges. It appears to me to be necessary to set out these charges in full. They are as follows :

First. — That you, on or about 20th August 1937, at Simla, cheated Lala Sita Ram, P. W., of Rs. 1500 on false representations that you would arrange to have cooly contracts for the said Sita Ram in partnership with yourself at Railway Stations Howrah and Sealdah and that you knew that the Railway Board Officers would do you a favour as you had been Publicity Officer in the said department, and thereby committed an offence punishable under S. 420, I. P. C., and within the cognizance of Court of Session.

Secondly. — That you, on or about 5th October 1937, at Simla, cheated Lala Sita Ram, P. W., of Rs. 1500 on false representations that you would arrange to have cooly contracts for the said Sita Ram in partnership with yourself at Railway Stations Howrah and Sealdah and that you knew that the Railway Board Officers would do you a favour as you had been Publicity Officer in the said department, and thereby committed an offence punishable under S. 420, I. P. C., and within the cognizance of Court of Session.

Thirdly. — That you, on or about 5th October 1937, at Simla, fraudulently used as genuine a certain document, to wit, agreement, Exhibit P. U., which you knew or had reason to believe at the time you used it to be a forged document, and thereby committed an offence punishable under S. 471 read with S. 467, I. P. C., and within the cognizance of Court of Session.

On each of these three charges the jury returned a verdict of guilty and the learned Sessions Judge passed a sentence of one year's rigorous imprisonment on each of the two charges under S. 420, I. P. C., and two years' rigorous imprisonment on the charge under S. 467/471, I. P. C.; the sentences to run concurrently.

On appeal before me the learned counsel for the appellant has adopted three lines of argument. The first is that there has been a misdirection, the second that evidence has been improperly excluded and thirdly, that on the evidence the conviction was in fact erroneous.

Coming to the first question, the point taken by counsel is that in order to comply with S. 297, Criminal P. C., the Judge should concisely but lucidly explain to the jury the ingredients of the Section under which the accused is being charged and should also explain the meanings of any terms in the Section which are not

likely to be immediately understood by a layman. There is plenty of authority in support of the view put forward by counsel for the appellant. I think that in the present case it was clearly the duty of the Judge to explain to the jury the necessary ingredients which the prosecution had to prove before the charges could be held to be established. This is particularly necessary in a case like the present where the main charges are of cheating. The criminal definition of cheating is not exactly what an ordinary layman in the ordinary use of the English language would understand by the term. In the present case the cheating consisted mainly of representations to the complainant by the accused that he would arrange to have certain contracts obtained for himself and for the complainant and the allegation of the prosecution is clearly that at the time he made these representations they were false in the sense that he had no intention of fulfilling them. In a case of this sort, it is clearly necessary to point out to the jury the difference between a promise which is not intended to be kept at the time it is made and a promise which is intended to be kept at the time it is made but is subsequently broken. In the latter case the offence would not necessarily be one coming under the legal definition of cheating. Similarly, on the third charge he had to explain to the jury what was a forged document and what constituted a criminal use of it. The learned Sessions Judge did not point this out to the jury and to that extent therefore I am compelled to find that there has been a misdirection. It is however clear from S. 423 (2), Criminal P. C., that even if there is a misdirection, the High Court is not entitled to alter or reverse the verdict or verdicts unless these verdict or verdicts are "erroneous" by reason of such misdirection. It is further clear from S. 537, Criminal P. C., that before the High Court interferes it must also find that there has been a failure of justice.

The question therefore which arises in this case is whether the Court can itself consider the evidence and decide upon the merits of the case, whether the decision is correct in spite of the misdirection and, if so, confirm a conviction, or whether the only course open to the Court in such a contingency is to set aside the verdict and order a retrial.

For some time the view held, particularly in the Calcutta High Court, appears to

have been that the Court could not go into the case itself but could only order a fresh trial. In 21 Cal 955¹ it was held that "erroneous" was not synonymous with "wrong in fact." The Bench appear to have interpreted the word as meaning "vitiated by the error of misdirection." The principle was laid down in this and other rulings of the Calcutta High Court, on the supposed analogy of a Privy Council case from New Zealand, that to hold otherwise would be to substitute the decision of the Court for the verdict of the jury. It seems to me, however, if I may say so with all respect, that the Privy Council case dealt with a system of jurisprudence which was apparently quite different from that obtaining in India and with a statutory provision the language of which was not really similar to that of S. 423 (2), Criminal P. C. It is clear that the Criminal Procedure Code in several places does put a Judge into the position of having to substitute his decision for that of a jury and the view held by the High Court in 21 Cal 955¹ seems, if I may say so with all respect, to savour of arguing in a circle. If the question for decision is whether the meaning of the words of the Indian Statute are that a Judge can or cannot substitute his decision for that of a jury I would suggest that it is begging the question to say that he cannot do so because that would amount to his doing so.

21 Cal 955¹ was followed in some cases in Calcutta and was followed in 1917 in Allahabad in 39 All 348.² It was however very soon dissented from by the Madras High Court in 26 Mad 1³ a judgment of 1902. In 1925 the Sind Court also took the other view in A I R 1925 Sind 116⁴ and in 1926 the Nagpur Court in A I R 1926 Nag 53⁵ took the same view as Sind and Madras. Bombay has also held that the Judge has full powers to go into the case in such circumstances once he finds that there has been a misdirection, A I R 1933 Bom 153.⁶ Even the Calcutta High Court has also come round to this view in a recent

case reported in A I R 1932 Cal 474.⁷ The latter and better view therefore seems to me to be that if the Court finds there is a misdirection it has to examine the evidence to see whether the verdict was erroneous and has caused a failure of justice. If it cannot so find it cannot interfere.

It next remains to be seen what is meant by the term "erroneous." The general trend of the authorities to which I have referred appears to suggest that it is practically synonymous with "incorrect," which is the normal dictionary meaning. I would however suggest that it is possible, perhaps to go a little further and say that one meaning of S. 423 (2) would appear to be that if the Court after examining the evidence finds that, even if the misdirection had not occurred, the jury could not reasonably without being perverse or unduly foolish have come to any other decision it will not interfere. Before however I deal with the evidence there is another point which I must consider. The defence applied for the summoning as a defence witness of His Excellency Sir Henry Craik Bart, the Governor of the Punjab. It would appear that at first the Judge was inclined to call this evidence but subsequently found that he could not do so in view of the statutory provision of S. 306 of the Government of India Act of 1935. Counsel has argued that the learned Judge's interpretation of this Section is incorrect. I do not consider it is necessary to decide this point as after ascertaining from counsel what evidence Sir Henry Craik was expected to give I am very clearly of opinion that that evidence would have been quite irrelevant in the present proceedings. The mere fact that at some previous period of time the appellant may actually have been thinking of trying to get one of these contracts would raise no justifiable inference that on either of the relevant dates in this case he had any intention of doing so. In fact it is clear that this is just the type of irrelevant evidence which a Judge should not allow to come before the jury. I may also further say that one or two possibly unguarded remarks by counsel for the appellant whilst dealing with this point rather suggested that the real reason for summoning Sir Henry Craik as a defence witness may have been a desire to attempt to prejudice the jury by giving them the impression that the appellant

1. Wafadar Khan v. Queen-Empress, (1894) 21 Cal 955.

2. Emperor v. Ikram-ud-Din, (1917) 4 A I R All 173=39 I C 331=39 All 348=15 A L J 205.

3. Emperor v. Edward William Smither, (1903) 26 Mad 1=2 Weir 521.

4. Topan Das v. Emperor, (1925) 12 A I R Sind 116=81 I C 249=25 Cr L J 761.

5. Ramprasad v. Emperor, (1926) 13 A I R Nag 58=88 I C 178=26 Cr L J 1090.

6. Ramchandra v. Emperor, (1933) 20 AIR Bom 153=1933 Or O 465=148 I C 553=35 Cr L J 747=35 Bom L R 174.

7. Saroj Kumar v. Emperor, (1932) 19 AIR Cal 474=1932 Cr O 464=139 I C 873=33 Cr L J 854=59 Cal 1361=55 C L J 439.

enjoyed the support and patronage of so distinguished and important a personage.

I now come to the main point in the case and that is whether having found that there is in fact a misdirection I should or should not set aside the verdicts given by the jury. For this purpose I have been through the evidence. It is clear that in coming to the verdicts to which they did come the jury must have accepted as true the version of the transactions given by Lala Sita Ram, the complainant, and rejected those given by the appellant and his wife, who was a co-accused. (After discussing evidence his Lordship proceeded.) The Crown counsel's contention is that the tone of Ex. P-A and the language of the second paragraph of Ex. P-G showed clearly that the appellant had already formed the intention of cheating Sita Ram on this relevant date. Ex. P-A is possibly not very strong by itself, but Ex. P-G is important. The middle paragraph of this letter to the Secretary of the Railway Board states that certain members of the Railway Board had already promised to help the writer to get this contract. The evidence on the subsequent transactions leaves no real doubt that this statement was in fact false and the question arises how Mathews could send such a letter to the Railway Board knowing that it would immediately be seen to contain a completely false statement. One answer to this might be that he had had no intention of sending or actually posting this letter but was forced to do so by the fact that Sita Ram insisted to accompany him to the post office. Having posted it he made an effort, which proved successful, to get it back intact. However this may be, the question still remains whether if the jury had had it clearly put to them that with regard to the first charge they had to find that the representations were at that time false, they might or might not have drawn the inferences which are suggested by this evidence. I think that it must be conceded that, although I myself see no real doubt on this point, it is impossible to say that the jury might not have felt some such doubt. With regard to the second and third charges, however, the matter is very clear. Here there is a mass of evidence which, if the jury believed it and it is clear from their verdicts that they did believe it, they could not have failed without being completely perverse or completely foolish, to hold that on 5th October at any rate the representations were definitely false to the

knowledge of the appellant and that the document Ex. P-U was used by him at a time when he knew perfectly well that it was a forged document. The result therefore will be seen to be that with regard to the verdict on the first charge, it cannot be stated with absolute certainty that if there had not been this misdirection, the jury must have come to the same conclusion. With regard to the second and third charges it is clear that notwithstanding the misdirection the verdict of the jury cannot be held to be erroneous and that they must have come to the same verdict if they had been directed as they should have been.

Counsel for the appellant has argued that on such a finding I should set aside the whole trial and set aside all three verdicts and send the whole case back for retrial. This view, however, I am not prepared to accept as it does not seem to be supported either by the language of the statute or by the authorities. My decision therefore in this appeal is that for the reasons given I set aside the verdict and the conviction and the sentence on the first charge, but uphold the verdicts with the consequent convictions on the second and third charges. With regard to the first charge in view of the fact that the sentences were concurrent I do not consider it necessary to direct that there shall be a fresh trial. The offences committed were certainly serious, but I think that a total period of one year's imprisonment would meet the ends of justice and therefore I reduce the sentence on the third charge to one year's rigorous imprisonment. The concurrent sentence on the second charge is maintained. The appellant will surrender to his bail.

G.N./R.K.

Order accordingly.

*** A. I. R. 1940 Lahore 90**

YOUNG C. J. AND TEK CHAND J.

*Beopar Sahayak Bank Ltd., Meerut —
Defendant — Appellant.*

v.

*Mt. Killo, Plaintiff and another,
Defendant — Respondents.*

First Appeal No. 434 of 1938, Decided on 23rd November 1939, from decree of Addl. Sub-Judge, First Class, Ferozepore, D/- 1st September 1938.

(a) **Hindu Law—Joint family business—Business carried on by member in partnership with stranger is not presumed to be joint family business.**

Under Hindu law there is no presumption that a business carried on by a member of a joint family

in partnership with a stranger is joint family business. The presumption of Hindu law that where a nucleus is proved all properties standing in the name of its members, were acquired out of the family funds and belong to the family, cannot be extended to cases of partnership with strangers : *A I R 1929 All 536 ; 27 Bom 157 and A I R 1918 Mad 37, Rel. on.* [P 92 C 1]

*** (b) Hindu Law — Maintenance—Mother's right of maintenance has priority over personal debts of her sons.**

Mother has got a right of maintenance over the joint family property and it must have priority over the personal debts of her sons and step-sons. [P 92 C 2]

Durga Das Jain and Balmokand Gupta—
for Appellant.

Shamair Chand and Parkash Chand Jain
— *for Respondent (Plaintiff).*

Young C. J. — In execution of a money decree obtained by the Beopar Sahayak Bank Ltd., Meerut (defendant 1) against Rup Chand (defendant 2), bungalow No. 105, situate in Ferozepur Cantonment, was attached. Mt. Khillo (plaintiff), step-mother of the judgment-debtor objected, alleging that the bungalow was her exclusive property and that Rup Chand had no interest in it. The execution Court dismissed the objection. Mt. Khillo then instituted the present suit, under O. 21, R. 63, Civil P. C., against the Bank and Rup Chand, for a declaration that the bungalow was owned and possessed by her for her lifetime and was not liable to attachment and sale in execution of the aforesaid decree. She based her claim on two alternative grounds. Firstly, she alleged that in 1919 arbitrators were appointed to partition the family property between her sons and step-sons, Hira Lal, Rup Chand, Phool Chand, Lakshmi Chand, Mehr Chand and Dip Chand, sons of Chiranji Lal; and in the award, this bungalow was allotted to her for her lifetime, in lieu of maintenance, and it was directed that after her death it would devolve on her sons in equal shares, subject to the condition that Rup Chand could become its exclusive owner on payment of Rs. 30,000 for distribution among the various sons of Chiranji Lal. She maintained that the award had been given effect to and that she was the owner of the bungalow for her life. In the alternative, she claimed that under Hindu law she was entitled to maintenance out of the family estate, and there being no other joint property now in existence, there was a charge for her maintenance on the bungalow, and that this charge had priority over the debt in question, which had been raised by Rup

Chand from the Bank for his personal purposes and not for the benefit of the joint family.

The Bank traversed these allegations and averred that there had been no partition in 1919, nor had the bungalow been allotted to the plaintiff and that the loan had been raised by Rup Chand for the benefit of the joint Hindu family and therefore it had precedence over the plaintiff's right of maintenance. At the trial, the plaintiff attempted to prove the partition of 1919 by producing a copy of an award, alleged to have been delivered by the arbitrators on 19th September 1919. The original award was stated to have been lost. The copy showed however that the original award had not been registered and proper stamp duty had not been paid on it. The learned Judge therefore held that the copy was inadmissible in evidence, and that oral evidence could not be led to prove its terms. He accordingly rejected the plaintiff's claim based on the alleged partition.

On the alternative claim, he found that the Bank had failed to prove that the debt in question had been raised by Rup Chand for the benefit of the family and therefore the plaintiff had a charge for her maintenance on the bungalow. He held that having regard to the status of the family, Rs. 100 per mensem would be the proper maintenance payable to the plaintiff. He therefore passed a decree in favour of the plaintiff for a declaration that the bungalow carried a charge of Rupees 100 per mensem, till the plaintiff's death, on account of her claim for maintenance and that it could be sold subject to reservation of this charge in execution of the decree obtained by defendant 1 against defendant 2. From this decree the Bank has appealed, and the first contention raised on its behalf is that it had been proved that the loan in question was raised by Rup Chand from the Bank for joint Hindu family business. It appears that the family was in affluent circumstances in the lifetime of Chiranji Lal and for some years after his death, when it carried on a prosperous business at Ferozepore and Hapur in the United Provinces. Chiranji Lal died in 1911 and his sons continued to live jointly till at least 1919. During this period Rup Chand managed the ginning factory and other business at Hapur. In 1918, he entered into partnership with two strangers, Banarsi Das and Nathu Lal, to do business in Bombay under the name and style of Banarsi Das-Rup Chand. Rup Chand's

share in the capital of this firm was Rupees 10,000 half of which (i. e. Rs. 5000) he raised from the defendant Bank on 3rd July 1918.

The Bank contends that Rup Chand entered into the partnership on behalf of the joint Hindu family. It is common ground that if this fact is proved, the Bank's debt and the decree passed thereon would be binding upon all the members of the quondam joint family, including the plaintiff, and her right of maintenance would have no priority over the decree. If, however, Rup Chand had joined the Bombay firm in his personal capacity, then the other members of the family, or the joint family property, would not be liable and Mt. Khillo's right of maintenance would take precedence over it. The onus to prove that Rup Chand entered into the partnership with the strangers, on behalf of the family, is clearly on the Bank. Under Hindu law, there is no presumption that a business carried on by a member of a joint family in partnership with a stranger is joint family business. It is well-settled that the presumption of Hindu law that, where a nucleus is proved, all properties standing in the name of its members, were acquired out of the family funds and belong to the family, cannot be extended to cases of partnership with strangers: see Mulla's Hindu Law, para. 234 (4) and 51 All 827,¹ 27 Bom 157² and 41 Mad 454.³ It therefore lay on the Bank to prove that the partnership was entered into on behalf of the family or that the loan was otherwise applied for family purposes. The learned Judge has held that the Bank has failed to discharge the onus, and after hearing counsel and examining the record we agree with this conclusion. The only evidence produced by the Bank is that of its mukhtar-i-am, Raghar Dayal (D. W. 2) who deposed that at the time when the loan was raised Rup Chand told him that he was borrowing on behalf of the family firm. But the books of the Bank do not support this statement. If what this witness is now saying is true, there is no reason why the account should have been opened in Rup Chand's personal name and not that of Chiranji Lal-Rup Chand or the joint family.

Further, we find that no demand for the principal or for interest was ever made by the Bank from the other members of the family. It is admitted that interest was paid by Rup Chand alone. The pronote was renewed from time to time and all the renewals were by Rup Chand and none else. It is also significant that when the account was not adjusted, the Bank instituted the suit against Rup Chand only: no other brother was impleaded as a defendant, and the decree also was passed against him. There is, therefore, nothing to indicate that the loan had been raised for the benefit of the family.

The most valuable piece of evidence relating to this point would be the books of the joint family at Ferozepore and Hapur for the year 1918. Rup Chand stated that these books were with his elder brother Hira Lal. Hira Lal, when examined as a witness for the plaintiff, admitted that he had those books. But the Bank did not ask him to produce them. Nor was any effort made to get the books of the Bombay firm Banarsi Das-Rup Chand, from the heirs of Banarsi Das, in whose possession they were stated to be. In these circumstances, the Bank cannot be held to have discharged the onus of proving that the loan in question had been raised by Rup Chand on behalf, or for the benefit, of the joint Hindu family, or that the share in the Bombay business was ever regarded as an asset of all the brothers. This being so, there can be no doubt that the plaintiff has got a right of maintenance over whatever is now left of the joint property and that it must have priority over the personal debts of her sons or step-sons. The bungalow in question, therefore, cannot be sold in execution of the decree obtained by the Bank against Rup Chand, without reservation of her rights. The next question for consideration is what is the proper amount of maintenance for which Mt. Khillo has a charge on the bungalow. The learned Judge has fixed it at Rs. 100 per mensem. But after considering the evidence produced by the parties, and having regard to the circumstances of the family, we think that this is excessive. In our opinion Rs. 50 per mensem is the proper charge for her maintenance. We therefore reduce the amount to Rs. 50 per mensem. We, accordingly, accept this appeal in part and, in lieu of the decree of the lower Court, grant the plaintiff a declaration that she has got a charge of Rs. 50 per mensem for her maintenance on bungalow No. 105 at Ferozepore Canton-

1. *Mirzamal Bhagwan Das v. Rameshar*, (1929) 16 A I R All 536=118 I C 145=51 All 827 = 1929 A L J 641.

2. *Vadilal v. Khushal*, (1903) 27 Bom 157 = 4 Bom L R 968.

3. *Gangayya v. Venkataramiah*, (1918) 5 A I R Mad 37 = 43 I C 9 = 41 Mad 454=34 M L J 271.

ment, and that it shall be sold in execution of the decree obtained by the Bank against Rup Chand, subject to this charge. Having regard to all the circumstances, we leave the parties to bear their own costs in both Courts.

D.S./R.K. *Appeal partly allowed.*

A. I. R. 1940 Lahore 93

RAM LALL J.

R. S. Ratra — Accused — Petitioner.

v.

Ganesh Dass — Complainant —

Respondent.

Criminal Revn. No. 883 of 1939, Decided on 12th October 1939; Case reported by Sess. Judge, Amritsar, D/- 5th June 1939.

Penal Code (1860), S. 415—Deception is one element of cheating—There is no cheating unless deception induces person deceived to part with any property or to do or omit to do anything that he would not do or omit to do but for such deception—Issue of post-dated cheque with knowledge that drawer had no funds in Bank held did not amount to cheating—It is purely civil wrong.

Deception is only one element of the offence of cheating and not the only element. There can be no cheating unless by reason of the deception the person deceived is induced to part with any property or to do or to omit to do anything which he would not do or omit to do but for the deception.

[P 94 C 2]

Therefore the giving of a post-dated cheque in lieu of money due with the knowledge that the drawer had no funds in the Bank does not amount to an offence of cheating in the absence of evidence to show that the person to whom the cheque was issued parted with any property or that he did or omitted to do anything which he would not have done or omitted to do if he had known that the cheque would be dishonoured. The wrong done in such a case being purely of a civil nature the remedy lies in Civil Court: *A I R 1938 Mad 129, Rel. on.*

[P 94 C 2; P 95 C 1]

Qabul Chand — for Petitioner.

Mohammad Monir, Assistant Advocate-General — for Respondent.

Facts.—The complainant Ganesh Dass bought a motor lorry from the accused, Mr. R. S. Ratra which was admittedly returned. It appears that the complainant had paid some money in advance to the accused and disputes arose as to the complainant's right to take back the amount so paid in advance after the lorry had been returned. According to the complainant he had paid Rs. 560 on different dates and the accused promised to return this whole amount in instalments and issued a cheque for Rs. 100 on the Punjab National Bank in payment of the first instalment. As the cheque was dishonoured by the Bank the

complainant lodged a complaint of cheating against the accused, who brought a cross complaint of theft against the complainant for removing certain parts of the lorry in question. Both the complaints were lodged on the same day and the Magistrate has framed a charge of cheating under S. 420, I. P. C., against Mr. Ratra and has charged Ganesh Dass with committing criminal breach of trust under S. 406, I. P. C. The position thus is that on the complaint of a person, who is himself charged with committing criminal breach of trust for removal of lorry parts on the complaint of the accused, a charge of cheating has been framed against the latter for issuing a false cheque in payment of money already received by him. In the present petition we are concerned with the complaint of cheating only, and for the sake of argument I will assume that all the allegations made by Ganesh Dass are correct, although Mr. Ratra by no means admits them to be so.

The complaint is divided into five paragraphs. Para. 1 states that a sum of Rupees 560 was due from the accused to the complainant on account of money paid in advance for purchase of the motor lorry. Para. 2 recites that out of Rs. 560 the accused gave a cheque to the complainant for Rs. 100 on 10th November 1938, on the Punjab National Bank. In para. 3 it is stated that the cheque was dishonoured by the Bank as the complainant had no funds to his credit. Para. 4 states that the accused cheated the complainant by knowingly issuing a false cheque in payment of his debt. Para. 5 refers to a notice dated 9th November 1938 received by the complainant from the accused in which the accused is alleged to have falsely stated that the cheque was post-dated. While giving evidence in Court, the complainant gave details of the different amounts which he paid to the accused, and he referred to certain receipts which had been given to him by the accused. It would appear from the complainant's evidence that he entered into two separate transactions regarding two different lorries. The first transaction took place on 25th June 1938, but it fell through and was replaced by the second transaction which is dated 26th August 1938 and relates to a different lorry. According to the terms of the agreement of sale, the seller was to remain owner of the lorry so long as the price was not paid in full. There is a difference between the parties as to whether the complainant himself returned the

lorry or the accused seized the lorry and brought it back by force.

Report.—The accused's case seems to be that he gave the cheque for Rs. 100 to the accused on the distinct promise that he would replace the missing parts of the lorry and that as he failed to do this he stopped payment of the cheque. The full nature of the dispute between the parties and the question whether the accused removed any parts of the lorry or not, are the subject-matter of the accused's complaint, and it is unnecessary for the purpose of this petition to go into that dispute. The accused's grievance is that on the allegations contained in the complaint and in the evidence of the complainant no case of cheating is disclosed against him and the Magistrate was not justified in framing a charge against him. He therefore applies that I should move the High Court to quash the charge in the exercise of its revisional jurisdiction and to discharge him.

The question is whether the facts alleged by the complainant disclose a *prima facie* case of cheating or not. In considering this question I feel that I should refrain from saying anything regarding the merits of the dispute between the parties as this might prejudice either of them in the cross case or in the present case, if it is allowed to proceed or any civil case that might be brought later. I would therefore confine myself as far as possible to admitted facts. It is common ground that the cheque for Rs. 100 was issued by the accused after the lorry had been returned by the complainant and according to the complainant the payment was made in part refund of the price which he had paid in advance. The cheque is dated 10th November 1938 and it must have been post-dated because reference is made to it in the notice dated 9th November 1938 which the complainant received from the accused. The accused's statement is that he wrote the cheque on 2nd November, and the notice mentions that as the removed parts had not been replaced as promised, the payment of the cheque had been stopped. On the complainant's own showing the cheque was given to him in part payment of money already advanced by him and not in consideration of anything done or which he refrained from doing at the time when the cheque was issued. It was pointed out in A I R 1938 Mad 129¹ that

in the offence of cheating there are two elements—deception and dishonest inducement to do or omit to do something. Mere dishonesty is not a criminal offence. To establish an offence of cheating, the complainant would have to show not only that he was induced to do or omit to do a certain act but that this induced commission or omission on his part caused or was likely to cause him some harm or damage in body, mind, reputation or property, which are presumed to be the four cardinal assets of humanity. It was held therefore that a post-dated cheque in payment of goods already received is a mere promise to pay on a future date and a broken promise is not a criminal offence, though it may amount in certain business relations to discreditable behaviour.

In framing the charge against the accused, the Magistrate seems to have assumed that the giving of a cheque in lieu of money due with the knowledge that the drawer had no funds in Bank amounts to an offence of cheating. But this is not a correct view of the law. The essence of the offence consists in fraudulently or dishonestly inducing the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally inducing the person so deceived to do or omit to do anything that he would not do or omit if he were not so deceived. I would assume for the sake of argument that as the accused admits that he had no funds to his credit in the Bank he intended to deceive the complainant by falsely inducing in him the belief that the cheque would be honoured but deception is only one element of the offence of cheating and not the only element. There can be no cheating unless by reason of the deception the person deceived is induced to part with any property or to do or omit to do anything that he would not do or omit to do but for the deception. In the present case there is not a word in the written complaint or in his evidence in Court to show that the complainant parted with any property or that he did or omitted to do anything which he would not have done or omitted to do if he had known that the cheque would be dishonoured.

The Magistrate does not seem to have applied his mind at all to the legal aspect of the case. He probably thought it advisable to decide the two cases together and it seems to me that he framed a charge against the accused for no other reason than this that he had framed a charge against the complainant in the cross case. In my opinion, on the facts disclosed by the complainant the wrong done to him is a purely civil wrong and no case of cheating is made out. The Public Prosecutor agrees in this

1. Chidambaram Chettiar v. Shanmugham Pillai, (1938) 25 A I R Mad 129=173 I C 14=39 Cr L J 261=(1937) 2 M L J 878.

view and he does not support the charge. I therefore submit the record to the High Court with the recommendation that the charge against the accused be quashed and that he should be discharged. The record of the cross case is also forwarded as a connected file.

Order.—On the facts as narrated in the order of reference made by the learned Sessions Judge, Amritsar, it appears to me that the dispute is more or less of a civil nature and therefore can best be decided by a Civil Court. I accordingly accept the recommendation made by the learned Sessions Judge and direct that the petitioner be discharged. The learned Assistant to the Advocate-General does not object to the above order.

G.N./R.K.

Reference accepted.

*** A. I. R. 1940 Lahore 95:**

BLACKER J.

Mohammad Sharif — Petitioner. v.

Diwan Singh — Respondent.

Criminal Revn. No. 1580 of 1939, Decided on 24th January 1940, from order of Sess. Judge, Sialkot, D/- 3rd August 1939.

(a) Criminal P. C. (1898), S. 522 (3)—S. 522 (3) does not give any sort of right of appeal by itself against order passed under S. 522.

Sub-s. (3) of S. 522 only applies to the Court which is dealing with the original matter either as a Court of appeal, confirmation, reference or revision in relation to that matter. It does not give any sort of right of appeal by itself against an order passed under S. 522: *A I R 1932 Lah 210, Rel. on.* [P 95 C 2]

*(b) Criminal P. C. (1898), Ss. 522 (3), 433 and 438 — Court of reference in S. 522 (3) means Court such as is described in S. 433 — Court having power to report case under S. 438 is not Court of reference.

A Court of reference in sub-s. (3) of S. 522 can only be interpreted as meaning a Court which has the power to refer and that is only a Court empowered under S. 433, Criminal P. C. Hence, a Court which has got power to report a case to the High Court for orders is not a Court of reference: *A I R 1933 Pat 617, Expl.* [P 95 C 2; P 96 C 1]

Mohammad Aslam Khan —

for Petitioner.

S. L. Puri — *for Respondent.*

Order.—This case involves a question of law for which no direct authority has been cited before me. The learned Magistrate heard and decided a criminal case against the petitioner for criminal trespass and convicted him. He apparently held that the trespass was merely of a technical nature, as he only sentenced the petitioner to im-

prisonment till the rising of the Court and a small fine. There was no appeal against this order. The learned Magistrate was later moved under S. 522, Criminal P. C., to restore possession to the complainant in the original case. The learned Magistrate refused to restore possession as he was of opinion that the conduct of the complainant was not entirely satisfactory and that he had deliberately given wrong boundaries in his application to the Civil Court and by this means had been put in possession of the whole baithak to which he was not entitled. The learned Magistrate in view of this declined to exercise his discretion to make an order under S. 522 and left it to the complainant to get his rights by application to a Civil Court. As I have said there was no appeal to the learned Sessions Judge. A revision petition was however put in by the complainant for enhancement of sentence and whilst this was pending another petition was put in to the learned Sessions Judge to pass the order under S. 522 which the learned trial Court had declined to pass. The learned Sessions Judge entertained these petitions. He did not however report them for the orders of the High Court. He took action himself and passed orders granting this application apparently believing himself to be entitled to act under sub-s. (3) of S. 522, Criminal P. C. He dismissed the other application for enhancement.

There is one thing that I am clear about in this case and that is that sub-s. (3) of S. 522 only applies to the Court which is dealing with the original matter either as a Court of Appeal, confirmation, reference or revision in relation to that matter. It does not give any sort of right of appeal by itself against an order passed under S. 522. The learned counsel for the petitioner has drawn my attention to a case reported in *A I R 1932 Lah 210*¹ in which the same view was held by another Judge of this Court. It is clear to me therefore that as far as sub-s. (3) of S. 522 is concerned the learned Sessions Judge was neither a Court of Appeal nor a Court of confirmation nor a Court of revision. His power with regard to the revision petition before him for enhancement of sentence was limited to reporting the matter to the High Court and he could not revise the order himself. It has been contended on behalf of the respondent that he was a

1. *Ghazan v. Bhag Bhari*, (1932) 19 A I R Lah 210=1932 Cr O 254=135 I C 679=33 Cr L J 191=33 P L R 481.

Court of reference, the argument being that S. 438, Criminal P. C., gives him the power to refer the case for orders to the High Court. Reliance has been placed upon a judgment reported in 12 Pat 787.² There is one remark at the end of the judgment which might be construed as meaning that the Judges took it for granted that a Court reporting the case for orders under S. 438 was a Court with power to act under sub-s. (3) of S. 522. The matter however does not appear to have been put explicitly before the Bench and to have been definitely considered by them, as the real question which was involved in that case was whether a Court which could take action under sub-s. (3) of S. 522 had to do so within a month of its order or could do so at any time without limit.

It is true that a case reported by a Sessions Judge under S. 438 is frequently loosely described as a reference but when it comes to interpreting a statute one cannot gain any support from the mere fact that a term is habitually loosely used. One has to look at the statute itself. Looking at the statute itself I find that a Court of reference can only be a Court such as is described in S. 433 of the Code where the word 'refer' is definitely used. No such word is used in S. 438 where the word 'report' is used instead. There would have been no difficulty in using the word 'refer' in S. 438 in place of the word 'report' had it been the intention of the Legislature to include a Court acting under S. 438 in the category of Courts of reference. It was contended that the Legislature which amended the statute in 1923 by adding sub-s. (3) to S. 522 intended to include a Court acting under S. 438. If however this was their intention they have not carried it out by the language which they have used. In my opinion a Court of reference in sub-s. (3) of S. 522 can only be interpreted as meaning a Court which has the power to refer and that, as far as I can see from the Code, is only a Court empowered under S. 433, Criminal P. C.

The order of the learned Sessions Judge therefore appears to me to be without jurisdiction and I must and do set it aside. It was argued before me that I should not set it aside as substantial justice has been done. I am not however really satisfied that substantial justice would be done by the learned

Sessions Judge's order. The learned Magistrate had a discretion to pass an order under S. 522 or not and if he was of opinion, and he was the best judge of this, that the complainant had not come into Court with clean hands and had himself been guilty of some malpractice in his proceedings with relation to the case, I think that the order which he passed refusing to take action under S. 522 was not unjustified. As a result therefore I set aside the order of the learned Sessions Judge in this case and restore the original order of the learned Magistrate. In other words the petition is accepted.

D.S./R.K.

*Order set aside.***A. I. R. 1940 Lahore 96**

ADDISON J.

Tulsi Ram Narula — Defendant —
Petitioner.

v.

Firm Gian Chand-Amar Nath, Plaintiff
and others, Defendants —
Respondents.

Civil Revn. No. 309 of 1939, Decided on 2nd November 1939, from decree of Addl. Judge, Small Cause Court, Amritsar, D/- 14th February 1939.

Debtor and Creditor—Person becoming joint owner of debt by assignment to him of portion of debt—Suit by him for portion assigned and not for whole is incompetent.

A suit for a portion of a debt, jointly owned by various persons is incompetent. It makes no difference that the plaintiff becomes a joint owner of the debt by assignment, and was not originally a joint owner. [P 96 C 2]

Shamair Chand — *for Petitioner.*D. D. Kapur — *for Respondent**(Plaintiff).*

Order. — Here a part of a debt was assigned and the assignee has sued for the part assigned to him and not for the whole debt. Nor have the assignees of other portions of the debt joined. His suit has been decreed. It seems to me that this is a suit for a portion of a debt, jointly owned by various persons. Such a suit must be held to be incompetent. It makes no difference that the plaintiff became a joint owner of the debt by assignment, and was not originally a joint owner. Such a distinction is obviously superficial. For the reasons given I accept the petition and dismiss the suit, leaving parties to bear their own costs throughout.

D.S./R.K.

Petition accepted.

2. *Fida Hussain v. Sarfaraz Hussain*, (1933) 20 A I R Pat 617=1933 Cr C 1366=145 I C 327=84 Cr L J 940=12 Pat 787=14 P L T 696.

A. I. R. 1940 Lahore 97

BHIDE J.

*Lyallpur Bank Ltd. in liquidation
through Punjab Co-operative Bank,
Anarkali, Lahore — Decree-holder —
Appellant.*

v.

Jai Gopal — Judgment-debtor —

Respondent.

Execution First Appeals Nos. 15 and 127 of 1939, Decided on 28th November 1939, from order of Senior Sub-Judge, Lyallpur, D/- 1st November 1938.

(a) **Execution — Decree passed by District Judge, Dera Ismail Khan—On passing of Frontier Courts Regulation, Court of District Judge becoming Court of Senior Subordinate Judge—Application for execution based on transfer certificate granted by District Judge (new style) held incompetent.**

A decree was passed by the Court of the District Judge Dera Ismail Khan. After the passing of the decree the Frontier Courts Regulation came into force and the Court of the District Judge became the Court of the Senior Sub-Judge. Later on, the decree-holder applied to the District Judge (new style) for transfer of certificate for execution of the decree. The District Judge issued the certificate and on the basis thereof an execution application was presented:

Held that the transfer certificate was issued by a Court which was not the representative of the Court which originally passed the decree. Hence, the application for execution was not competent as the transfer certificate had not been granted by the proper Court. [P 98 C 2]

(b) **Companies Act (1913), S. 152—It is not obligatory that reference to arbitration should be made under Arbitration Act.**

It is not obligatory that any references to arbitration to which a limited company is a party should be made under the Arbitration Act: *A I R 1936 Lah 721 (F B), Foll.; A I R 1933 Pesh 66 and A I R 1934 Pesh 107, Not Foll.* [P 98 C 1]

R. L. Chawla — *for Appellant.*

Achhru Ram and N. L. Salooja —

for Respondent.

Judgment. — Execution First Appeals Nos. 15 and 127 of 1939 may be disposed of together as the points for decision and the material facts are the same in both the appeals. The material facts are these. On the basis of an award obtained without the intervention of the Court the Lyallpur Bank Ltd., obtained a decree from the Court of the District Judge, Dera Ismail Khan, for a sum of Rs. 11,000 on 2nd October 1928. After the passing of the decree, the Frontier Courts Regulation came into force and the Court of the District Judge became the Court of the Senior Subordinate Judge. The decree-holder applied for execution of the decree to the Court

of the Senior Subordinate Judge on 1st October 1931. This application was eventually dismissed as unsatisfied on 11th January 1932. Later on the decree-holder applied to the District Judge (new style) on 5th December 1934 for transfer of certificate for execution of the decree. The certificate was granted and an application was made for execution on the basis of the certificate to the Senior Subordinate Judge, Lyallpur, but the learned Judge of that Court held that the decree could not be transmitted to that Court directly but should have been transmitted through the District Judge of Lyallpur. The decree-holder then applied to the Court of the Senior Subordinate Judge, Dera Ismail Khan, for issue of a fresh certificate. The Senior Subordinate Judge held that he had no jurisdiction to grant the certificate but directed the decree-holder to apply to the District Judge, Dera Ismail Khan. Thereafter the District Judge, Dera Ismail Khan, issued a transfer certificate on 28th January 1938 and on the basis thereof an execution application was presented to the Senior Subordinate Judge, Lyallpur, on 26th March 1938. A preliminary objection was raised that the application was not competent as the transfer certificate had not been granted by the proper Court and secondly that the application was barred by time. Similar proceedings were taken on transfer certificate in the Court of the Senior Subordinate Judge, Jhang, and a question of limitation was raised in that case also. Both the Courts have decided that the applications for execution were not competent as the transfer certificates were not granted by the proper Court and were also barred by time. From this decision the present appeals have been preferred.

The sole point for decision in these appeals therefore is whether the Courts below were right in holding that the applications for execution were not maintainable. As stated above the decree was originally passed by the District Judge, Dera Ismail Khan, but owing to the coming into force of the Frontier Courts Regulations the Court of the Senior Subordinate Judge at Dera Ismail Khan now corresponds to the Court of the District Judge who passed the decree which is sought to be executed. The present applications for execution are based on transfer certificates granted by the District Judge, Dera Ismail Khan. The Court of the District Judge, Dera Ismail Khan, corresponds to the Court of the old Divisional Judge

and it seems therefore clear that the transfer certificate was issued by a Court which was not the representative of the Court which originally passed the decree.

The learned counsel for the appellant has contended that the decree was originally passed on the basis of an award given without the intervention of the Court but that as one of the parties to the arbitration was a limited company, namely Lyallpur Bank Ltd., the arbitration must be taken to have been under the Arbitration Act according to the view taken by the Judicial Commissioners of the North Western Frontier Provinces in A I R 1933 Pesh 66,¹ A I R 1934 Pesh 107² and certain other rulings. It was stated that directions had been issued by the Judicial Commissioners that decrees passed in cases of this kind although they were originally passed by the District Judge (old style) should be considered to have been passed by the Divisional Judge (old style) and therefore applications for execution of such decrees should now be made to the District Judge (new style). It was urged that applications for execution were made to the District Judge (new style) Dera Ismail Khan in 1934 and onwards on account of the instructions issued by the Judicial Commissioners. The learned counsel for the appellants was however unable to produce any copy of such instructions although he was given an adjournment specially for the production of any records that he wished to summon for the purpose.

The Judicial Commissioners of the North Western Frontier Province have no doubt taken the view that any references to arbitration to which a limited company is a party should be under the Arbitration Act. This view is opposed to that taken by a Full Bench of this Court in A I R 1936 Lah 721,³ but apart from that it seems to me to be clear that the decree in this case was passed—rightly or wrongly—by the Court of the District Judge (old style) Dera Ismail Khan and no matter what view of the law is taken by the Judicial Commissioners' Court as regards the jurisdiction of the District Judge or the Senior Subordinate Judge to pass a decree in case of this kind, the fact remains that the Court which passed the decree in the present instance was the Court of the

District Judge, Dera Ismail Khan. Even if a mistake was made by that Court in passing a decree the decree cannot, in my opinion, be now taken to have been passed by the Divisional Judge (old style) which Court corresponds to that of the District Judge (new style). It follows that the applications for a transfer certificate for execution of the decree, which were made to the District Judge (new style) Dera Ismail Khan from 1934 onwards were not made to the proper Court. The applications must therefore fail on this ground.

Secondly, the applications will fail on the ground of limitation if the Court of the District Judge (new style) is held to be the proper Court to grant a transfer certificate. The first application for execution which was made to the Court of the Senior Subordinate Judge, Dera Ismail Khan, was dismissed on 11th January 1932. If for the sake of argument, it is assumed that the Court of the District Judge (new style) was the proper Court to grant a transfer certificate, then the first application for execution was not made to the proper Court and would not serve to save limitation. The second application was made to the District Judge in December 1934, but the decree having been passed in 1928, this application would obviously be barred by time. The learned counsel for the appellants wanted the period taken up by the first application to be excluded under S. 14, Limitation Act. But even if this is done, the period to be excluded would be only about 15 months. The decree having been passed on 2nd October 1928, and the first application to the District Judge (new style) not having been made till December 1934, the exclusion of a period of 15 months will not be sufficient to save limitation. I dismiss the appeals, but in view of the peculiar circumstances of the case, leave the parties to bear their costs.

D.S./R.K.

Appeals dismissed.

A. I. R. 1940 Lahore 98

TEK CHAND AND ABDUL RASHID JJ.

Abdul Rahman — Defendant —

Appellant.

v.

*Jhanda Singh, Plaintiff, and others,
Defendants — Respondents.*

Letters Patent Appeal No. 24 of 1939,
Decided on 6th July 1939, from judgment
of Blacker J., *Reported in A I R 1939
Lahore 173.*

1. Punjab National Bank v. Kewal Krishan,
(1933) 20 A I R Pesh 66=143 I C 435.

2. Kewal Krishan v. Punjab National Bank Ltd.,
(1934) 21 A I R Pesh 107=151 I C 860.

3. Balmukand v. Punjab National Bank Ltd.,
Ambala, (1936) 23 A I R Lah 721 = 164 I C
393=17 Lah 722=39 P L R 35 (F B).

Registration Act (1908), S. 17 (1) (b) — Different mortgage deeds between same parties each relating to separate plot of land and securing amount below Rs. 100—Each deed containing concluding clause that mortgagor would redeem his land when he would pay up entire money on other mortgage deeds — Clause held did not turn each deed into one requiring registration.

There is nothing illegal in the parties splitting, what is apparently one mortgage transaction of more than Rs. 100, into several mortgages of even date, each for a sum of less than Rs. 100. In such a case, the charge on the particular plot dealt with in each instrument is below Rs. 100 and therefore none of them requires registration under S. 17 : 29 All 50, *Rel. on.* [P 100 C 1]

A person executed at one and the same time fourteen different mortgage deeds relating to fourteen separate plots of land. None of these deeds was registered. The plot mortgaged by each deed was described in detail in it, and the amount secured on it was below Rs. 100. The concluding clause of each deed was in the following terms : "When I, the mortgagor, will pay up the entire money secured on the other thirteen mortgage deeds, which have been executed today, in the month of Jeth to the mortgagee I would get my land redeemed from the mortgagee and I would not put forward any objection in that behalf."

Held that the clause in question did not make each deed, by itself, an instrument creating a right of the value of more than Rs. 100 to, or in, immovable property, but that it merely laid down a collateral agreement as to the date when the right of redemption in each mortgage was to be exercised. This did not amount to a "consolidation" of the fourteen transactions into one transaction. Such a result could follow only if the agreement between the parties was express and unequivocal. Hence, the deeds in question, though unregistered, were admissible in evidence. [P 100 C 1, 2]

Shiv Parkash Mehra for Dr. Mohammad Alam — *for Appellant.*

Jagan Nath Aggarwal—*for Respondents.*

Tek Chand J.—This is an appeal under Cl. 10 of the Letters Patent from the judgment of Blacker J. dated 7th December 1938, reversing the decree of the District Judge, Hoshiarpur, and restoring that of the Court of first instance. The facts are few and simple. On 21st June 1929 the defendant-appellant executed fourteen different mortgage deeds in favour of the plaintiff-respondent relating to fourteen separate plots of land. None of these deeds was registered. The plot mortgaged by each deed was described in detail in it, and the amount secured on it was stated to be Rs. 99.14 0 in thirteen deeds, and Rs. 72 in the fourteenth. The concluding clause of each deed was in the following terms :

When I, the mortgagor, will pay up the entire money secured on the other thirteen mortgage-deeds, which have been executed today, in the month of Jeth to the mortgagee, I would get my land redeemed from the mortgagee and I would not put forward any objection in that behalf.

On 6th April 1936, the mortgagee instituted a suit against the mortgagor for possession of the land comprised in these fourteen deeds. The defendant raised several defences, of which the only one material for the purposes of this appeal is that there was really only one mortgage transaction, which had been split up into fourteen apparently different transactions, written on fourteen separate pieces of paper, with a view to evade the law of registration. It was urged that the transaction, taken as a whole, was one, which created rights in immovable property, over Rs. 100 in value, and consequently, none of these deeds (they being unregistered) could be received in evidence. The trial Judge held that each mortgage deed created a charge for a sum below Rs. 100 on the particular plot of land mentioned in it and, as such, it did not require registration. He further held that the clause above referred to merely fixed the time for redemption and did not, in any way, limit the rights of the parties with regard to the properties other than the one mentioned in the particular deed and, consequently, it did not require registration. As he had found for the plaintiff on all other points, he granted him a decree for possession of the land.

On appeal, the learned District Judge took the contrary view. He held that the effect of the clause above-mentioned was to "consolidate all the transactions into one," by which the "mortgagee had secured to himself the right to get the entire mortgage money charged on each plot." He expressed the opinion that the fourteen instruments, though apparently separate, were inter-connected with each other and really formed part of one and the same transaction the amount secured by which was considerably over Rs. 100. For this reason, each of the deeds required compulsory registration and, being unregistered, none of them was admissible in evidence. He accordingly, accepted the defendant's appeal and dismissed the suit with costs in both Courts. From this decree, the plaintiff (mortgagee) preferred a second appeal to this Court. The learned Judge, in Single Bench, disagreeing with the District Judge, has held that the clause in question did not make each deed, by itself, an instrument creating a right of the value of more than Rs. 100 to, or in, immovable property, but that it merely laid down a collateral agreement as to the date when the right of redemption in each mortgage was to be

exercised. Following the well-settled rule of interpretation of statutes, that all restrictive enactments, like the Registration Act, should be strictly construed and that the benefit given to the person who claims that he is not bound by it, the learned Judge has held that the documents in question did not require registration. He has accordingly accepted the plaintiff's appeal and restored the judgment of the trial Court, decreeing the suit. He has however granted a certificate to the defendant for an appeal under Cl. 10 of the Letters Patent.

The question has been argued at considerable length before us and after careful consideration, we are of the opinion that the view taken by the learned Judge is correct. Counsel for the parties have cited several rulings before us, but it is not necessary to discuss them here. In a matter like this, it is not possible to lay down any hard and fast rule, which will govern all cases. In each case, the decision will depend upon the instrument embodying the terms of the particular transaction. In this case, it is true that all the deeds were executed at one and the same time, that the scribe and the attesting witnesses were the same, and that the phraseology of the various deeds is similar. But the property dealt with by each deed was separate and the charge created by it on the plot concerned was less than Rs. 100. It is settled law that there is nothing illegal in the parties splitting what is apparently one mortgage transaction of more than Rs. 100 into several mortgages of even date, each for a sum of less than Rs. 100: *see inter alia* 29 All 50.¹ In such a case, the charge on the particular plot dealt with in each instrument is below Rs. 100 and therefore none of them requires registration under S. 17. This is conceded by the learned counsel for the appellant. The sole question for consideration is whether the inclusion of the last clause in the various deeds, executed by the mortgagor, makes any difference. It is clear from the terms of this clause that no additional charge was created on the plot mentioned in a particular deed, and each plot was, and continues to be, liable to be redeemed on payment of the amount secured on it, which is below Rs. 100 in every case. The clause, as rightly pointed out by the learned Judge in Single Bench, merely contains a collateral agreement as to the date when the right of redemption in each case

is to be exercised. This by no means amounts to a "consolidation" of the fourteen transactions into one transaction, as erroneously supposed by the learned District Judge. Such a result can follow only if the agreement between the parties is express and unequivocal: *see* 1 Lah 105² at p. 107; *cf.* also S. 61, T. P. Act. We cannot find in the clause in question any words which expressly, or by necessary implication, lead to this conclusion. In our opinion, the deeds in question, though unregistered, are admissible in evidence and the suit has been rightly decreed. The appeal fails, and is dismissed with costs.

D.S./R.K.

Appeal dismissed.

2. *Jiwan Das v. Tharaj*, (1920) 7 A I R Lah 387
=55 I C 509=1 Lah 105=14 P L R 1920.

A. I. R. 1940 Lahore 100

TEK CHAND AND DALIP SINGH JJ.

Mt. Nazir-ul-Nisa and others —

Plaintiffs — Appellants.

v.

Mohammad Ishaq — Defendant —

Respondent.

First Appeal No. 290 of 1938, Decided on 15th June 1939, from decree of Sub-Judge, First Class, Delhi, D/- 28th June 1938.

(a) **Landlord and Tenant—Attachment of private property of inhabitants of Delhi and its neighbourhood in 1857 and 1858 and its subsequent release — Nature of effect explained — Government had become full owner of attached property and could create tenancy on it—Tenancy in respect of this site held to be permanent and created by proclamation of 29th September 1858.**

The "attachment" of the private property of the inhabitants of Delhi and its neighbourhood in 1857 and 1858 was nothing less than appropriation by the (British) Government who became the *de jure* as well as *de facto* owner thereof and the subsequent restoration of the seized property to the original owners was a re-grant to them on certain conditions, and conferred a new title on them. The Government therefore had full power to create a tenancy of whatever nature on it: *Case law referred.* [P 102 C 2]

The grant of tenancy in respect of this site was created under the proclamation of 29th September 1858 and not under the later proclamation of 10th February 1859: *Civil Appeal No. 1379 of 1866 and A I R 1937 Lah 370, Ref.* [P 104 C 1]

(b) **Act (Confiscation, etc. for Rebellion) (10 of 1858), S. 10 — Attachment and confiscation of land in Delhi and its neighbourhood was not made under S. 10.**

Section 10 extended the provision of the Act relating to the "imposition and assessment of fines on inhabitants" to "a mohalla or division of a city or town." This Section however did not authorize the confiscation of immovable property

1. *Ramji Mal v. Chotte Lal*, (1906) 29 All 50=3 A L J 661=1906 A W N 281.

in any urban area. Hence the attachment or confiscation of the land in Delhi and its neighbourhood was not and could not have been made under this Section. [P 103 C 1]

(c) **Landlord and Tenant—Permanent tenancy created by Government in respect of land attached by them in 1857 and 1858 in Delhi and its neighbourhood — Land subsequently released to original owner—Original owner not objecting to transfers by tenant on footing that tenancy was permanent and continuing to receive rent at rate paid in past — He is estopped from alleging that tenancy is tenancy-at-will.**

The Government which had attached properties in 1857 and 1858 in Delhi and its neighbourhood created permanent tenancy in respect of the attached land. The attached land was subsequently released to the original owner. The original owner did not object to the transfers made by the tenant on the footing that the tenancy was permanent and continued to receive rent at a fixed rate which had been paid at that rate for several years in the past :

Held that the original owner was estopped from contending that the tenancy was tenancy-at-will.

[P 104 C 1]

M. C. Mahajan and Bhagwat Dyal —
for Appellants.

Wahid-ud-Din Ahmad —
for Respondent.

Tek Chand J. — This appeal arises out of a suit brought by the plaintiffs against the defendant for declaration of title, ejectment and recovery of arrears of rent. It is common ground between the parties that the plaintiffs are the owners of the site in dispute and the defendant owns the superstructure of a shop and a bala-khana standing on the site. The plaintiffs allege that the defendant holds the site as a tenant-at-will under them while the defendant claims to be a permanent tenant, liable to pay to the plaintiffs a fixed ground rent of 6 annas per lunar month. Admittedly, the plaintiffs and their ancestors had been receiving rent at this rate from the defendant and his predecessors-in-interest continuously from 1860 to the beginning of 1936 and during this period the tenancy has passed by succession and transfer to various persons. Early in 1936 the plaintiffs intimated to the defendant their intention to terminate the lease on the old terms offering to grant a fresh lease at a considerably enhanced rental. They further stated that if the defendant was not willing to avail himself of this offer he should vacate the site within a specified time. The defendant denied the plaintiffs' right to enhance the rent alleging that he was holding the site on a permanent tenure at a fixed rent. The plaintiffs then served a notice on the defendant to remove the superstructure and restore

the site to them. On the defendant's refusal to do so, the plaintiffs on 21st August 1936 instituted this suit claiming a decree for (1) declaration that they were the owners of the site and the defendant was a tenant-at-will under them, (2) ejectment of the defendant from the site by removal of the superstructure and (3) recovery of Rupees 21-10-0 as arrears of rent.

The defendant admitted that the plaintiffs were the owners of the site, but averred that he was holding it under them as a permanent tenant and that the plaintiffs were not entitled to eject him or to enhance the rent. He admitted his liability to pay rent at 6 annas per mensem for some months which had been offered to the plaintiffs but they had wrongfully refused to accept and which he (defendant) offered again to pay. The trial Judge found that the defendant was a permanent tenant under the plaintiffs, that he had not contravened any of the terms of the tenancy and was not liable to ejectment. He further held that the plaintiffs were, in any case, estopped by their acts and conduct from claiming that they had a right to eject the defendant. He accordingly dismissed the suit for declaration and ejectment, but granted the plaintiffs a decree for Rs. 19-2-9 as arrears of rent at the rate admitted by the defendant. From this decision the plaintiffs have preferred a first appeal to this Court.

Most of the facts relating to the previous history of the site in question are no longer in dispute. It is admitted that it was a part of a big area of 20 bighas and 14 biswas in Jahan Numa (outside the city walls of Delhi), which originally belonged to Karim Bakhsh and Khuda Bakhsh, ancestors of the plaintiffs. The whole of this land, along with various other properties in and around Delhi, was "attached" by the British Government soon after the Mutiny. Government then established a Military Camp in this locality and decided to have a Sadar bazar near it. For this purpose the "attached" properties were divided into small plots, which were granted to various persons, who undertook to construct shops at their own expense. The site, now in dispute, was taken by one Bakhtawar Singh, and on it he built a shop. After several shops had been built by the grantees, (including Bakhtawar Singh), and when peace and order had been restored, Government decided to release the "attached" properties to those of the original owners, who could

"establish their innocence" during the Mutiny. Karim Bakhsh and Khuda Bakhsh applied to the authorities that they were innocent, and after a lengthy enquiry, this land, 20 bighas and 14 biswas in area, was "released" to them in June 1860, and the persons who had constructed the shops on this land were directed to pay in future the rent to Karim Bakhsh and Khuda Bakhsh. Bakhtawar Singh accordingly continued in possession of the shop during his lifetime. On his death, the shop was inherited by his son Umrao Singh; and on Umrao Singh's death it devolved on his son Lal Chand. On 2nd March 1885, Lal Chand sold it to Mohammad Ismail by a registered sale deed (Ex. D-7); and several years later, when Mohammad Ismail died, it was inherited by his son Mohammad Usman. Mohammad Usman then mortgaged it to Dr. Ram Parshad by a registered deed, describing himself as a permanent tenant under the plaintiffs paying a fixed monthly rent of 6 annas. As the mortgage money was not paid within the stipulated time, Dr. Ram Parshad instituted a suit against Mohammad Usman for sale of the shop and obtained a decree. Before the auction sale however Mohammad Usman by a sale deed executed and registered on 27th August 1931 (Ex. D-14), sold the equity of redemption to Dr. Ram Parshad, who thus became the full owner of the shop. Subsequently, on 22nd November 1931, Dr. Ram Parshad sold the shop to Mohammad Ishaq, defendant, for Rs. 3300 by a registered deed (Ex. D-4). In this deed also it was stated that the shop had been constructed on a site belonging to the plaintiffs which the vendor held on a permanent tenure. After the purchase, Mohammad Ishaq rebuilt the shop and the bala khana and let it to a tenant at a monthly rental of Rs. 26.

All these facts have been duly proved on the record and their correctness has not been disputed before us by the learned counsel for the appellants. It is also conceded by him that there is no proof of any objection having been raised by the plaintiffs, or their predecessors-in-interest to any of these transfers or successions; on the other hand, it appears that they had continued to receive rent at the fixed rate of 6 annas per mensem from the successors of the original tenant or their transferees. He however contends that it has not been established that the tenancy was permanent at its inception, or that the plaintiffs or their ancestors ever led Bakhtawar Singh

or his successors or transferees to believe that it was so. In support of this contention he raised a three-fold argument before us: (1) that the "attachment" by the British Government of the property of Karim Bakhsh and Khuda Bakhsh in 1858 did not amount to "confiscation" and therefore Government did not become its owner and it had no legal right to create a permanent tenancy over it; (2) that the tenancy in favour of Bakhtawar Singh was not created under the proclamation of 29th September 1858 (Ex. D-2, printed at p. 114 of the paper-book), but it was under a later proclamation, issued on 10th February 1859 (Ex. P-8, printed at page 80) the terms of which show that the tenancy was not permanent; and (3) that the decision of the lower Court holding that, in any case, the plaintiffs by their acts and conduct were estopped from denying the permanent nature of the tenancy, is erroneous.

After hearing counsel at length and examining the record I have no doubt that all these arguments are without substance. The exact nature and effect of the "attachment" of the private property of the inhabitants of Delhi and its neighbourhood in 1857 and 1858 and its subsequent "release" has been the subject of consideration by Courts on numerous occasions since 1866 and it has been uniformly held that the "attachment" was "nothing less than appropriation by the (British) Government who became the de jure as well as de facto owner thereof," and that the subsequent restoration of the seized property to the original owners was a re-grant to them on certain conditions, and conferred a new title on them. Reference may in this connexion be made to 6 P R 1867,¹ Civil Appeal No. 1379 of 1866,² 12 P R 1874,³ 52 P R 1881,⁴ 112 P R 1886⁵ and the recent decision of this Court (Civil Appeal No. 1283 of 1930 = A I R 1937 Lah 370,⁶) in which the question was discussed at length and the previous decisions reviewed. It may be stated that some of these cases related to plots which formed part of the area of 24 bighas and

1. Secy. of State v. Wagentrieber, (1867) 6 P R 1867.

2. Karim Bakhsh v. Shadee Ram, Civil Appeal No. 1379 of 1866.

3. Hakim Saaduddin v. Secy. of State, (1874) 12 P R 1874.

4. Rai Bal Kishen v. Jasram, (1881) 52 P R 1881.

5. Karim Bakhsh v. Balakram, (1886) 112 P R 1886.

6. Muhammad Suleman v. Hari Ram, (1937) 24 A I R Lah 370 = 176 I C 65 = 39 P L R 602.

14 biswas in Jahan Numa, referred to above, of which the site now in dispute is also a part, and to those cases the present plaintiffs or their ancestor Karim Bakhsh himself was a party. The learned counsel for the appellants frankly admitted that his clients have not brought forward any fresh materials in this case, nor was he able to urge any new argument which might justify a different conclusion being reached on this point. He merely referred us to Act 10 of 1858 which, he urged, had not been considered in any of the previous cases. A reference to that Act shows, however, that none of its provisions has any bearing on the "attachment" of Karim Bakhsh's land and the creation of tenancies thereon by Government. The Act authorized the "confiscation of villages, imposition of fines on, and forfeiture of certain offices held by inhabitants of villages or members of tribes" who had been "guilty of rebellion" during the Mutiny and other crimes connected therewith. It did not in terms apply to the town of Delhi and to the property situate on its outskirts, except that S. 10 extended the provision of the Act relating to the "imposition and assessment of fines on inhabitants" to "a mohalla or division of a city or town." This Section, however, did not authorize the confiscation of immovable property in any urban area. It is, therefore, clear that the "attachment" or confiscation of the land of Karim Bakhsh in Jahan Numa was not, and could not have been, made under this Section. Counsel next referred to S. 13, but that Section is equally inapplicable. It empowered the Governor-General in Council or the Executive Government to remit any confiscation made under the Act and directed that all persons affected by such confiscation were to be restored to their rights as if no such confiscation had ever taken place.

In the case before us, however the "confiscation" had not been made under the Act, nor was the "remission" made by the Governor-General in Council or the Executive Government. These provisions of the Act, therefore, are not relevant. As already shown, the seizure by Government of the land of the ancestors of the plaintiffs was an "Act of State" by which Government had become absolute owner of the land, and had full power to create a tenancy of whatever nature on it. The first contention is, therefore, devoid of force and must be rejected.

The next question is whether the tenancy in favour of Bakhtawar Singh was created

under proclamation of 29th September 1858 (Ex. D.2) as alleged by the defendant and found by the lower Court, or under the later proclamation of 10th February 1859 (Ex. P.8) as contended for by the plaintiffs. It is conceded that in the numerous cases that have come before the Courts in respect to other shops built on sites parcelled out of this area of 20 bighas, 14 biswas, commencing with Civil Appeal No. 1379 of 1866³ and ending with A I R 1937 Lah 370,⁶ Karim Bakhsh or his successors never urged that the grant of any of the sites was under the second proclamation (Ex. P.8). In all these cases it had invariably been held that the sites in question had been granted under the proclamation of 29th September 1858 and that the tenancies created were permanent. In the present case it has been urged for the first time that the grant was under the second proclamation (Ex. P.8). The materials on the record, however, do not substantiate this contention. Indeed, the terms of this proclamation (Ex. P.8) itself show that it did not relate to sites which formed part of lands, which had been "attached" in 1857 or 1858 and were subsequently released on the original owners "proving his innocence"; but it referred to shops which had been built on the land of persons, which had apparently been encroached upon and of which they "proved their ownership." This is clear from the opening sentence of the proclamation which speaks of the nature of "the abadi being irregular and not of uniform description," and the penultimate sentence of para. 1, which expressly states that if a "person proves his ownership of the land and for this reason it is released in his favour." In the application (Ex. P.32 at p. 73) made by Karim Bakhsh and Khuda Bakhsh they based their claim for release of their land not merely on their ownership, but upon their "innocence of the offence of rebellion." This application and the enquiry which followed clearly show that grants of sites on this land had been made under the first proclamation (Ex. D.2) and not under the second (Ex. P.8). This is further supported by Ex. D-3 (printed at pages 127 to 131), which is a list containing an account of the rent of shops in Sadar Bazar, including that built by Bakhtawar Singh, the robkar of the Cantonment Joint Magistrate, dated 7th January 1860 (Ex. P.39 at page 86) the report of the peshkar dated 21st May 1860 (Ex. P.38 at p. 88); and the order dated 3rd October 1860 (Ex. P.13 at p. 90) directing

that in future the rent be realized by Karim Bakhsh. All these documents, taken together, unmistakably lead to the same conclusion.

After carefully considering all the available materials and giving due weight to the arguments of counsel, I agree with the finding of the lower Court that the grant of the site in dispute to Bakhtawar Singh was made under the first proclamation of 29th September 1858 and that by this grant he acquired a permanent, heritable and transferable tenure. It is not alleged that the defendant has committed breach of any of the terms of the tenancy. On these findings, therefore, the claim for ejectment cannot be sustained. I also uphold the decision of the lower Court on the question of estoppel. The conduct of the plaintiffs and their predecessors-in-interest, extending over a period of 76 years, unmistakably shows that they had admitted Bakhtawar Singh, his successors and transferees, as permanent tenants, and they are now estopped from alleging that the defendant is a tenant-at-will under them. The appeal fails and I would dismiss it with costs.

Dalip Singh J. — I agree.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1940 Lahore 104

ABDUL RASHID J.

Chan Pir — Plaintiff — Appellant.

v.

Fakar Shah — Defendant —

Respondent.

Second Appeal No. 1124 of 1938, Decided on 27th November 1939, from decree of Dist. Judge, Attock at Campbellpur, D/- 6th June 1938.

(a) Mahomedan Law—Dower—Husband can fix or increase dower at any time during continuance of marriage—For purposes of increasing dower declaration by husband is sufficient.

In the case of a Mahomedan woman it is open to the husband to fix the dower at any time before or after the marriage. It is further open to the husband to increase the amount of the dower at any time during the continuance of the marriage. For the purposes of increasing the dower a declaration by the husband is quite sufficient under the Mahomedan law: *A I R 1935 Lah 816, Rel. on.*

[P 105 C 1, 2]

(b) Custom (Punjab)—Attock District—Gift of land by husband in favour of his wife on account of dower is valid provided it is not made for purpose of defrauding rightful heirs.

There is nothing in the Customary law of the Attock District which prevents a husband from increasing the dower of his wife during the subsistence of the marriage. The customary right of the husband to make gifts of land in favour of his

wife on account of dower cannot be disputed. Custom would obviously not sanction a gift of this kind made for the purpose of defrauding the rightful heirs and the amount of land so gifted together with the circumstances of the giver are doubtless considerations of some weight in the eye of custom.

[P 105 C 2]

(c) Custom (Punjab) — Alienation — Village Dhok Fateh Shah in Tahsil Talagang—Sonless Sayyad has unlimited powers regarding gift of ancestral land.

A sonless Sayyad of Village Dhok Fateh Shah, in Tahsil Talagang, Attock District, possesses unlimited powers with regard to gifts concerning ancestral land.

[P 105 C 2; P 106 C 1, 2]

Ghulam Mohy-ud-Din — for Appellant.

Shabbir Ahmed — for Respondent.

Judgment.—On 10th July 1937 Qutab Shah sold 145 kanals, 2 marlas of land to Fakar Shah, defendant 1, for Rs. 4000 by means of a registered sale deed. On the same day Qutab Shah transferred 209 kanals, 3 marlas of land in favour of his wife Mt. Gahar Bano, defendant 2, for Rs. 1500 in lieu of dower by means of a registered deed. On 20th August 1937, Chan Pir instituted the present suit for a declaration to the effect that the alienations in favour of Fakar Shah and Mt. Gahar Bano shall not affect his reversionary rights, as the alienations were without consideration and legal necessity. The trial Court held that the land in dispute was ancestral and that Qutab Shah, who was a Sayyad of Dhok Fateh Shah in tahsil Talagang, Attock district, had restricted powers of alienation as regards ancestral property. The sale in favour of Fakar Shah was held to be for consideration and necessity to the extent of Rs. 1470 and the sale in favour of Mt. Gahar Bano to the extent of Rs. 32 only. The plaintiff was, accordingly, granted the declaration prayed for on payment of Rs. 1470 and Rs. 32 respectively regarding the two sales in question. On appeal, the learned District Judge held that Qutab Shah had unrestricted powers of alienation. He further held that the sale in favour of Fakar Shah was for consideration and necessity in its entirety. The plaintiff's suit was accordingly dismissed so far as the sale in favour of Fakar Shah is concerned. In Mt. Gahar Bano's appeal, it was held that the alienation in her favour was binding on the plaintiff Chan Pir to the extent of Rs. 120. The plaintiff was given a declaration that the alienation in favour of Mt. Gahar Bano shall not be binding on him after her death or re-marriage except to the extent of Rs. 120. Against this decision Chan Pir has preferred an appeal (Regular Second Appeal

No. 1124 of 1938) challenging the decision of the learned District Judge so far as the sale in favour of Fakar Shah is concerned. Mt. Gahar Bano has also come up in appeal (Regular Second Appeal No. 1033 of 1938), praying that the alienation in her favour may be declared to be valid and that the plaintiff's suit may be dismissed as against her.

So far as the appeal of Chan Pir is concerned, I am of the opinion that it must be dismissed. The sale in favour of Fakar Shah was for a sum of Rs. 4000. The learned District Judge has held that there was valid consideration to the extent of Rs. 4000 for this sale. He has further held that out of the consideration, Rs. 2660 have already been paid by the vendee to the vendor or his creditors and that the sum of about Rs. 1340 is still with the vendee for payment to Harbans Lal and Gurmani Shah. For these reasons, the sale has been held to be for consideration and necessity. The above finding of fact given by the learned District Judge cannot be interfered with in second appeal. Mr. Ghulam Mohyud-Din who represented Chan Pir has failed to show how this finding of fact is vitiated by any error in law. I accordingly affirm the decision of the learned District Judge so far as the sale in favour of Fakar Shah is concerned.

Regarding the case of Mt. Gahar Bano the learned District Judge has held that Rs. 120 only was fixed as her dower at the time of the marriage. He has not relied upon the statements of Inayat Shah (D. W. 8) and Mohammad Shah (D. W. 9) to the effect that the sum of Rs. 1500 was fixed as the dower of Mt. Gahar Bano. Mr. Shabbir Ahmad contended on behalf of Mt. Gahar Bano that the learned District Judge had erred in not taking into account the registered deed executed by Qutab Shah in favour of his wife. In this deed, it is recited that Rs. 1500 had been fixed as the dower of Mt. Gahar Bano at the time of the marriage. After considering the deed and the statements of the two witnesses referred to above, I hold that it has not been established that Rs. 1500 was fixed as the dower of Mt. Gahar Bano at the time of her marriage. In the case of a Mahomedan woman, however, it is open to the husband to fix the dower at any time before or after the marriage. It is further open to the husband to increase the amount of the dower at any time during the continuance of the marriage. The declaration of Qutab

Shah in the registered deed, dated 10th July 1937, that the dower of his wife had been fixed at Rs. 1500 amounts to an increase by the husband of the dower of his wife to Rs. 1500. For the purposes of increasing the dower a declaration by the husband is quite sufficient under the Mahomedan law. I have, therefore, reached the conclusion that in the present case the dower of Mt. Gahar Bano was increased to the sum of Rs. 1500 by her husband Qutab Shah on 10th July 1937, or shortly before. Reference may be made in this connexion to a Division Bench ruling of this Court reported in A I R 1935 Lah 816.¹

It was contended by Mr. Ghulam Mohyud-Din on behalf of Chan Pir that Mt. Gahar Bano and Qutab Shah were governed by Customary law and that under the Customary law Qutab Shah had no power to alienate 209 kanals 3 marlas of land in favour of his wife for an alleged dower of Rs. 1500: *vide* 12 P R 1912.² Reliance was placed by the other party on question 46 of the Customary Law of the Attock District prepared by Khan Sahib Chaudhri Sardar Khan in the year 1928. It is stated in the answer to question 46 that :

The customary right of the husband to make gifts of land in favour of his wife on account of dower cannot be disputed as such gifts, whenever disputed in Court have, so far as is ascertainable, been upheld.

It is further mentioned that :

Custom would obviously not sanction a gift of this kind made for the purpose of defrauding the rightful heirs and the amount of land so gifted together with the circumstances of the giver are doubtless considerations of some weight in the eye of custom.

In the present case, Qutab Shah gave away about one-third of his estate to his wife. He had been ailing for a couple of years before his death and his wife had been serving him throughout. The present gift of one-third of his estate by Qutab Shah cannot therefore be held to have been made with a view to defraud his heirs. There is nothing in the Customary law of the Attock District which prevents a husband from increasing the dower of his wife from Rs. 120 to Rs. 1500 during the subsistence of the marriage. I would, therefore, uphold the sale in favour of Mt. Gahar Bano also.

The learned District Judge has granted certificates both to Chan Pir and Mt. Gahar Bano on the question "whether a sonless

1. *Nasiban Bi v. Iqbal Begum*, (1935) 22 A I R Lah 816=160 I O 805.

2. *Hamid Ullah v. Sahibji*, (1912) 12 P R 1912=14 I O 624=76 P L R 1912.

Sayyad of village Dhok Fateh Shah, in Tahsil Talagang, possesses unlimited powers with regard to gifts concerning ancestral land." This question of custom does not arise in the present appeals in view of the findings given above. As the case may, however, go before a Division Bench under the Letters Patent, I proceed to decide the question of custom also. The answer to question 47-B in the *Riwaj-i-am* of the Attock District 1928, lays down that a sonless proprietor among Awans of Talagang has full powers of alienation of ancestral property, the implication being that the other tribes have only restricted powers of alienation. The initial onus, therefore, is on the vendees to prove that Qutab Shah had unrestricted powers of alienation. I agree, however, with the learned District Judge that this onus is a light one in view of the fact that the parties are Sayyads. Sayyads claim to be descended from Hazrat Ali, the son-in-law of the Prophet Muhammad. In several matters they continue to be governed by Mahomedan law. They also live in the Western Punjab where the powers of sonless proprietors to make alienations are not so rigidly restricted as in the central districts. The plaintiff Chan Pir has sold several small portions of his ancestral land. His son has not challenged any of these alienations though some of these alienations took place ten or fifteen years ago. Mehdi Shah, one of the collaterals of the plaintiff, sold his ancestral land to Hayat, Nur Muhammad and others at various times. No one has attacked these sales up to now. One Mohammad Shah Sayyad sold his ancestral property 20 years ago, but his collaterals have not brought any suit so far to challenge the alienation. The plaintiff's own father sold some land to Haidar Shah for Rs. 500. The plaintiff challenged this alienation but his suit was dismissed. Muzamal Shah, the nephew of the plaintiff, sold four bighas of land to the plaintiff. Muzamal Shah's collaterals have not challenged this alienation so far. Qutab Shah, the husband of Mt. Gahar Bano, sold some of his ancestral land 12 years ago to Inayat Shah for Rs. 1000 but no suit was brought by the plaintiff to challenge this alienation in spite of the fact that according to him Qutab Shah had no necessity to sell the land. In my opinion, these four or five instances from the family of the plaintiff are much more valuable than a number of instances relating to other villages or other tribes. Having regard to the instances

enumerated above, I cannot hold that the learned District Judge is wrong in deciding that Qutab Shah had unrestricted powers of alienation.

For the reasons given above, I dismiss the appeal brought by Chan Pir against Faqir Shah (Regular Second Appeal No. 1124 of 1938). I accept the appeal preferred by Mt. Gahar Bano (Regular Second Appeal No. 1033 of 1938), set aside the judgments and the decrees of the Courts below and dismiss the plaintiff's suit as against Mt. Gahar Bano. Having regard to all the circumstances, I order that all the parties will bear their own costs throughout.

D.S./R.K.

*Order accordingly.***A. I. R. 1940 Lahore 106**

TEK CHAND AND BHIDE JJ.

Bur Singh — Defendant — Appellant.

v.

*Sikri Brothers, Coal Merchants through
Lala Gokul Chand Seth — Plaintiffs
— Respondents.*

Letters Patent Appeal No. 117 of 1939, Decided on 13th December 1939, from judgment passed by Dalip Singh J., in S. A. No. 449 of 1939, D/- 1st May 1939.

Limitation Act (1908), Ss. 19 and 20 — Payment by debtor with his endorsement on back of pro-note without specification — Creditor appropriating it towards principal — Period is extended both under S. 19 and S. 20.

Where the debtor makes a payment with an endorsement on the back of the pro-note in his own handwriting to the effect that the payment will be adjusted in the promissory note account without specifying whether the amount was paid as interest as such or as part payment of the principal and the creditor appropriates it towards the principal, the payment along with the endorsement extends limitation under both S. 19 as well as S. 20 : *AIR 1940 Pat 6 and A I R 1935 All 946, Rel. on; AIR 1937 Lah 820, Disting.* [P 107 C 1, 2]

Shamair Chand — *for Appellant.*S. M. Sikri — *for Respondents.*

Tek Chand J.—This is an appeal under Cl. 10 of the Letters Patent, from the judgment of Dalip Singh J., dismissing the defendant-appellant's second appeal on 1st May 1939. The facts are few and simple. On 6th May 1931 Bur Singh, appellant borrowed Rs. 475 from the plaintiff-respondent on foot of a promissory note. Within three years from that date, on 27th April 1934, the defendant paid Rs. 100 in cash to the plaintiff and made an endorsement on the back of the promissory note in his own handwriting. The endorsement did not specify whether this amount was paid as interest

as such, or it was a part payment of the principal. On 27th April 1937 the plaintiff brought the present suit for recovery of the balance due. He alleged that the suit was within limitation by reason of the endorsement of 27th April 1934, both under S. 19 and S. 20, Limitation Act.

The defendant contested the suit on various grounds, but the trial Court passed a decree for the sum claimed against him. On appeal the only point urged was that neither S. 19 nor S. 20 was applicable and the suit was barred by time. The learned District Judge repelled the contention and dismissed the appeal. A second appeal to this Court was dismissed by a Single Bench. Subsequently an application was made by the appellant and the learned Judge granted a certificate for appeal under Cl. 10 of the Letters Patent. After hearing Mr. Shamair Chand and examining the record, we have no doubt that the suit is within limitation. The endorsement made by Bur Singh on 27th April 1934 at the time when he paid Rs. 100 is in the following terms :

Aj waqia 27th April 1934 ko mubligh yak sad rupiya Seth Gokal Chand manager firm Sikri Brothers Coal Merchants, Jullundur Shahr ko diya giya, jo is pronote men mujra ho ga.

Bur Singh Baqalam Khud.

On the same date the plaintiff appropriated this amount towards the principal in his account. The endorsement is clearly an acknowledgment of subsisting liability under the promissory note. It says in so many words that Rs. 100 will be adjusted in the promissory note account. This implies that the writer is liable on the promissory note account and that he is paying Rs. 100 towards it and after adjusting it, a balance still remains due. The endorsement is signed by the defendant in his own hand. It, therefore, extends limitation under S. 19 for a further period of three years: *vide* 18 Pat 715.¹

It seems to us that time is extended by S. 20 also. It is no doubt true that the endorsement does not say in so many words whether the payment was made towards interest as such or in part payment of the principal. But it was appropriated by the plaintiff towards the principal on the same day on which it was made. It seems to us that this will save limitation even according to the restricted view of the scope of the Section taken by the majority of the Full

1. *Ramjan Ali v. Meer Ahmad Sethi*, (1940) 27 A I R Pat 6=186 I C 225= 18 Pat 715 = 20 P L T 927.

Bench of the Allahabad High Court in 58 All 261² at page 272. The case falls under (vi) (b) of the categories enumerated by Sulaiman C. J. at page 272 of the report, and is, according to the decision of the majority covered by S. 20. The learned counsel for the appellant referred to A I R 1937 Lah 820,³ but the facts of that case were entirely different. There the creditor had first appropriated the amount towards interest, but finding that that would not save limitation he subsequently attempted to ignore this appropriation and to re-appropriate the same amount towards the principal, and it was held that this he could not do. The case is, therefore, distinguishable. On the facts found, the suit is clearly within time and has been rightly decreed. The appeal fails and is dismissed with costs.

G.N./R.K.

Appeal dismissed.

2. *Udeypal Singh v. Lakshmi Chand*, (1935) 22 A I R All 946=159 I C 387=1935 A L J 1029 =58 All 261.

3. *Lal Chand v. Raman Shah*, (1937) 24 AIR Lah 820=172 I C 455=39 P L R 622.

A. I. R. 1940 Lahore 107

BHIDE J.

Hans Raj — Defendant — Appellant.

v.

Amar Chand and others, Plaintiffs and another, Defendant — Respondents.

Second Appeals Nos. 235 and 236 of 1938, Decided on 7th November 1939, from decree of the Dist. Judge, Ferozepore, D/. 18th December 1937.

(a) Registration Act (1908), S. 17 — Decree referring to award on basis of which it was passed—Terms of award must be deemed to be embodied in decree — Award is exempt from registration and is admissible in evidence to understand decree.

The proper course in passing a decree on an award is to recite the terms of the award in the decree itself or to attach the award as a schedule to it. Where however it does not reproduce the terms of the award but only makes a reference to the award, the terms of the award must be looked upon as having been embodied in the decree, and it is certainly permissible to refer to the record to see what the award was. The award, though unregistered, having been acted upon in the judicial proceedings must be deemed to have become part of the judicial proceedings and the award or a copy thereof is admissible: *A I R 1932 Lah 24; A I R 1930 Lah 855; 37 P L R 238 and 22 Mad 508, Rel. on.* [P 108 C 2; P 109 C 1]

(b) Civil P. C. (1908), S. 11 and Sch. 2, Para. 20 — Decree on award is as binding on parties as any other decree in suit.

A decree passed in proceedings under Sch. 2 and giving effect to an award must be held to be as binding on the parties as any other decree passed in a suit, whether with or without contest.

[P 109 C 1, 2]

Mukand Lal Puri—*for Appellant.*

Jiwan Lal Kapur — *for Respondents*
(*Plaintiffs.*)

Judgment. — Regular Second Appeals Nos. 235 and 236 of 1939 arise out of two suits of a similar character and may be disposed of together. The plaintiffs in these suits claimed certain lands on the basis of a gift in their favour made by their father Gopi Ram on 20th November 1934. Defendant Hans Raj, on the other hand, (who is now dead and is represented by his son) claimed one-fourth share in the same lands on the basis of an award made on a reference to arbitration, to which Gopi Ram was a party. The award was given on 10th October 1934, that is, prior to the gift and hence it was contended by the defendant that the subsequent gift by Gopi Ram could not affect his rights.

An application for filing the award was made on 8th December 1934. The parties accepted the award, with a slight modification regarding a house, with which we are not concerned in this case. The Court then proceeded to pass a decree in terms of the award as modified compromise, on 31st March 1936. The decree however did not reproduce the terms of the award, but merely made a reference to it. The Courts below have held that the decree as it stood did not show that the defendant was entitled to one-fourth share in the property. The learned District Judge has also held that the decree was really passed on the basis of a compromise between the parties which embodied their statements made in Court on 31st March 1936 and hence the rights created thereby must be held to have come into existence on that date. The defendant's claim has accordingly been rejected and he has preferred the present appeals.

The point for decision in both these appeals is whether the award relied on has been proved and what is its effect on the plaintiffs' rights. It is not disputed now that the award was not duly stamped nor registered, and was therefore not admissible in evidence. It appears that the fact that the award was not duly stamped was noticed by the learned Subordinate Judge who passed the decree in terms of the award but it does not appear at what stage he did so. Perhaps it was noticed after passing the decree. The objection as regards want of registration was apparently not noticed by him. In any case he seems to have acted on the award and passed a decree, without any

reference to the objections as to its admissibility in evidence for want of proper stamp and registration.

The learned counsel for the appellant has contended that although the award was not admissible in evidence, the decree based on the award on which the appellant has relied in the present proceedings is admissible in evidence and this decree establishes the defendant's case as the decree makes a reference to the award and the latter must therefore be deemed to be embodied in the decree. This contention is supported by several rulings of this Court, see A I R 1932 Lah 24,¹ 37 P L R 238² and A I R 1930 Lah 855.³ The decree as it stands, however does not reproduce the terms of the award and the main question which requires consideration is whether the award or a copy thereof can now be looked at in order to understand the decree. In my opinion, there is no valid objection to this being done. The decree makes a reference to the award and the terms of the award must be looked upon as having been embodied in the decree according to the above rulings. The proper course in passing the decree would have been either to recite the terms of the award in the decree itself or to attach the award as a schedule to it. But as this was not done, it would be, I think, certainly permissible to refer to the record to see what the award was. The award having been acted upon in the judicial proceedings, it must now be deemed to have become a part of the judicial proceedings and on the principle laid down in 22 Mad 508⁴ a copy thereof would seem to be admissible. It appears that a copy of the award was sought to be produced in the trial Court, but was rejected by that Court on the ground that the original was inadmissible in evidence. For reasons stated above it seems to me that the copy should have been admitted in evidence. The learned counsel for the appellant has now produced the award itself duly stamped. (It appears that the award was impounded and sent to the Collector and thereafter the necessary stamp duty and penalty was paid.) The award has not been yet registered. But as it is not disputed that the award produced is the award which

1. *Mahbub v. Munshi*, (1932) 19 A I R Lah 24 = 135 I C 203 = 32 P L R 761.

2. *Kalu v. Ran Singh*, (1934) 37 P L R 238.

3. *Mt. Jai Lagi v. Alliance Bank of Simla Ltd.*, (1930) 17 A I R Lah 855 = 128 I C 300.

4. *Pranal Anni v. Lakshmi Anni*, (1899) 22 Mad 508 = 26 I A 101 = 7 Sar 516 (P O).

was relied on in the judicial proceedings on which the decree was passed, I hold it to be admissible for understanding the terms of the decree passed on its basis. As the copy of the award was not allowed to be produced in the trial and as it is necessary to refer to the award to understand the terms of the decree, I allow it to be produced as additional evidence in this Court as prayed for.

The learned District Judge has held that the decree was really passed not on the basis of the award but on the basis of the statements of the parties. I do not consider this view to be correct. The proceedings were initiated on an application for filing the award and the parties accepted it with a slight modification. No objection as to the admissibility of the document owing to deficiency in stamp or registration appears to have been taken by the parties. The objection as to deficiency in stamp seems to have been raised by the auditor. The parties referred to the award in their statements and the learned Subordinate Judge passed an order accordingly as both parties accepted the award though with a slight modification. It is true that the learned Subordinate Judge did not pass a distinct order filing the award as he should have done. But I do not think he meant to pass a decree on the basis of a compromise independently of the award. The question whether it was open to the parties to modify the award by a compromise in the proceedings under Para. 20, Sch. 2, Civil P. C., may be open to doubt. But I feel little doubt that the learned Subordinate Judge intended to act under that Para. and not to pass any decree on the basis of a compromise alone.

The decree passed on the basis of the award seems to me to be sufficient to establish that Hans Raj had been given one-fourth share in the properties in these suits prior to the gift by Gopi Ram. The award being binding on Gopi Ram, he could not make the gift in contravention of the terms of the award. Consequently, the gift must be held to be invalid to the extent of one-fourth share of Hans Raj. The learned counsel for the respondent has urged that the decree was passed not in a suit but in proceedings under Sch. 2, Civil P. C., and does not operate as *res judicata*, as the only question in such a case is whether the award was duly made and the rights of the parties are not determined on merits. This contention seems to me to have no force. The decree

gave effect to the award and must be held to be as binding on the parties as any other decree passed in a suit, whether with or without contest. I accordingly accept these appeals and setting aside the decree of the Courts below grant the plaintiffs a decree to the extent of three-fourths share only in the properties in suit. The plaintiffs will get proportionate costs throughout.

G.N./R.K.

Appeals accepted.

A. I. R. 1940 Lahore 109

ABDUL RASHID J.

Abdul Majid and another—Defendants
—Appellants.

v.

Suba Khan and others, Plaintiffs and Defendants — Respondents.

Second Appeal No. 58 of 1939, Decided on 11th December 1939, from decree of District Judge, Rawalpindi, D/- 22nd October 1937.

(a) Punjab Courts Act (6 of 1918), S. 41 (3) — Application for grant of certificate dismissed by District Judge—On revision to High Court case remanded to District Judge for re-hearing and re-decision of application for grant of certificate under S. 41 (3) — Certificate ultimately granted—Total period to be excluded stated.

A judgment under appeal was pronounced on 22nd October 1937. On 20th November an application was made by the contesting defendants for the grant of a certificate under S. 41 (3), Punjab Courts Act. This application was dismissed by the District Judge on 16th December 1937. A petition for revision was preferred against this order to High Court on 7th February 1938. This petition was accepted by High Court on 5th May 1938, and the case was remanded to the District Judge for re-hearing and re-decision of the application for the grant of a certificate under S. 41 (3), Punjab Courts Act. The certificate was ultimately granted by the District Judge on 1st November 1938 :

Held that the application must be deemed to be pending from 20th November 1937 to 1st November 1938. Hence, this period must be excluded in computing period for appeal under S. 41 (1) : 12 *Mad* 434 and *A I R* 1929 *P C* 103, *Applied* ; *A I R* 1930 *Lah* 863 and *A I R* 1915 *Mad* 405, *Distig.*

[P 110 C 2]

(b) Custom (Punjab) — *Riwaj-i-am* — Value of, is not destroyed by remarks made by Settlement Officer which merely embody his private opinion.

The value attaching to the answers to questions in a *riwaj-i-am* cannot be said to be destroyed by the remarks of the Settlement Officer who has compiled the *riwaj-i-am* as such remarks merely embody his private opinion : *A I R* 1936 *Lah* 804, *Rel. on* ; *A I R* 1933 *Lah* 434 and *A I R* 1935 *Lah* 419, *Expl.*

[P 111 C 2]

(c) Custom — Rule that custom once established can be altered only by legislation has no universal application.

It cannot be laid down as a rule of universal application that once a custom is established it

can only be altered by legislation and not by modern judicial decisions: *A I R 1937 Lah 451 (F B), Expl.*; *1 Cal 186*; *A I R 1928 Mad 299*; *12 M I A 81 and 4 Bom 545, Rel. on.* [P 111 C 2]

(d) Custom (Punjab) — Mughals of Chakrali Choolo, Tehsil Gujarkhan, can make wills of ancestral property.

The Mughals of village Chakrali Choolo, Tehsil Gujarkhan, Rawalpindi District can make valid wills of ancestral property within the tribe.

[P 112 C 1]

Shamair Chand — *for Appellants.*

Dr. Nand Lal — *for Respondents.*

Judgment. — On 25th May 1934, Amir Ali Mughal, resident of village Chakrali Choolo, Tahsil Gujarkhan, Rawalpindi District, made a will in favour of his daughter's sons, namely Abdul Majid, defendant 2 and Mohammad Yusuf, defendant 3. On 7th March 1935, the present suit was instituted by Suba Khan, Mohammad Azam and Lal Hussain for a declaration to the effect that the will executed by Amir Ali shall not affect their reversionary rights after the death of Mt. Nur Begum, defendant 1, the wife of Amir Ali. The trial Court decreed the plaintiffs' claim. The appeal of Abdul Majid and Mohammad Yusuf, defendants, having been dismissed by the learned District Judge, they have preferred a second appeal to this Court. A certificate has been granted by the learned District Judge on the question of custom involved in this case, that is, whether the Mughals of Chakrali Choolo, Tehsil Gujarkhan, can make valid wills under custom, of ancestral property within the tribe or not.

A preliminary objection was taken by Dr. Nand Lal on behalf of the respondents to the effect that the appeal was barred by limitation. The judgment under appeal was pronounced on 22nd October 1937. On 20th November an application was made by the contesting defendants for the grant of a certificate under S. 41 (3), Punjab Courts Act. This application was dismissed by the learned District Judge on 16th December 1937. A petition for revision was preferred against this order to this Court on 7th February 1938. This petition was accepted by Tek Chand J. on 5th May 1938, and the case was remanded to the learned District Judge for re-hearing and re-decision of the application for the grant of a certificate under S. 41 (3), Punjab Courts Act. The certificate was ultimately granted by the learned District Judge on 1st November 1938.

It was strenuously contended by Dr.

Nand Lal that as the proviso to S. 41 (3), Punjab Courts Act, lays down that in computing the period for an appeal under sub-s. (1) the time during which the application under this sub-section has been pending shall be excluded therefore only 27 days can be excluded, that is, from 20th November 1937 to 16th December. It was also contended by the learned counsel that the period from 16th December 1937, to 7th February 1938, cannot be excluded under any circumstances as the application for the grant of a certificate had been dismissed by the District Judge on 16th December and no petition for revision against this order was filed till 7th February 1938. Mr. Shamair Chand on the other hand contended that the application for the grant of a certificate must be taken to be pending from 16th December 1937 to 1st November 1938. The order of Tek Chand J., dated 5th May 1938, makes it clear that he remanded the case to the learned District Judge for re-hearing and re-decision of the application for the grant of a certificate under S. 41 (3), Punjab Courts Act. There was only one application made to the learned District Judge and that was on 20th November 1937, and only this application was the subject-matter of his decision ultimately on 1st November 1938. By accepting the revision on 5th May 1938, the learned Judge of this Court ordered re-hearing of the application and the order of dismissal of this application therefore had no existence in the eye of law. In my opinion, the view put forward by Mr. Shamair Chand is sound and must be given effect to. Reference in this connexion may be made to *12 Mad 434*¹ and *56 Cal 1048*.² These rulings deal with S. 14, Limitation Act, and are not directly applicable. The reasoning underlying these judgments however is applicable to the facts of the present case. Dr. Nand Lal relied on *A I R 1930 Lah 863*³ and *39 Mad 62*⁴ in this connexion. Both of these rulings are inapplicable to the facts of the present case. I accordingly overrule the preliminary objection. Question 37 of the *riwaj-i-am* of the Rawalpindi District compiled in the year 1910 is in the following terms:

1. *Sankaran v. Parvathi*, (1889) 12 Mad 434.

2. *Ramdutt Ram Kishen v. E. D. Sassoon & Co.*, (1929) 16 A I R P C 103=115 I C 713=56 I A 128=56 Cal 1048 (P C).

3. *Jamna Devi v. Utami Bai*, (1930) 17 A I R Lah 863=126 I C 798=11 Lah 720=32 P L R 224.

4. *Bajinath Lala v. Ramadoss*, (1915) 2 A I R Mad 405=26 I C 219=39 Mad 62=27 M L J 640.

Can a proprietor make a disposition of his property to take effect after his death and is there any rule limiting such power?

Answer. — Mughals reply that a will is good if within the tribe.

On p. 63, Customary law of the Rawalpindi District two instances are given of wills having been made by Mughals of the Gujarkhan Tehsil in favour of a daughter's son and son-in-law. As the plaintiffs came into Court it was incumbent on them to prove that by the Customary law governing the parties Amir Ali was not competent to make a will in favour of his daughter's sons. The initial onus, which lay on the plaintiffs, was all the heavier in view of the provisions of the latest *riwaj-i-am*. The compiler of the *riwaj-i-am* after giving the replies of the different tribes has made certain observations on which reliance was placed by Dr. Nand Lal, and which according to the learned counsel destroyed the value of the most recent *riwaj-i-am*. The compiler made the following observations:

The examples which I have been able to collect certainly do not prove for any tribe that a proprietor can make a testamentary disposition of the whole of his property to take effect after his death. If any such disposition were made and the property was not trifling in amount or the reversioners not restrained by affectionate or other motives, the will would certainly be contested. The probability however is that in all tribes a will of a small portion of the estate to a relative not entitled to succeed would be respected.

Dr. Nand Lal supported his argument by relying on two rulings of this Court reported in A I R 1935 Lah 434⁵ and A I R 1935 Lah 419.⁶ It was held in these rulings that the entries in the *riwaj-i-am* owe their weight to the principle originally laid down in English law which received statutory recognition in S. 35, Evidence Act. The principle is that statements made by a public officer should be received in evidence because it is his duty to satisfy himself of the truth of the statements made. If the officer himself is not satisfied of the truth of the statements made, such statements have less weight than they otherwise would.

The observations of the Settlement Officer reproduced above however do not cast any aspersions on the statements of the persons who gave answers to the various questions put to them. It was the opinion of the Settlement Officer that the examples which he had been able to collect did not prove satisfactorily that a proprietor could make a testamentary disposition of the whole of

his property to take effect after his death. It has been laid down in 17 Lah 296⁷ that all that has ever been held heretofore is that it is the statements recorded in the *riwaj-i-am* which are of value, and with all respect I am not prepared to endorse the view to the effect that the opinion of an individual Settlement Officer is entitled to weight in discrediting those statements. It might be different if this opinion was based on instances, but none were quoted.

I am therefore of the opinion that the value attaching to the answers to questions 37 and 38 in the *riwaj-i-am* of the Rawalpindi District compiled in 1910 cannot be said to have been destroyed by the remarks made by the Settlement Officer as they merely embody his private opinion. It was contended by Dr. Nand Lal that in the *riwaj-i-am*, compiled in the year 1887, it was stated that Mughals and several other tribes repudiated all power of testamentary disposition. It was urged by the learned counsel that the *riwaj-i-am* of 1887 established beyond doubt that at one time the custom was to the effect that a Mughal could not dispose of his ancestral property by means of a will and that once a custom to that effect is established, it could only be altered by legislation. Dr. Nand Lal laid particular stress on the following passage occurring in the Full Bench decision reported in 18 Lah 594⁸:

We sympathise with the effort made by the various tribes and persons concerned to modernize this ancient custom, but a custom once established, as this custom undoubtedly appears to have been, can only at this time be altered by legislation and not by modern judicial decisions.

In my opinion, the observation quoted above must be confined to the peculiar facts of the case that was before the Full Bench. In that case the three *riwaj-i-ams* of 1865, 1896 and 1916 recorded a custom in one way and the other party sought to disprove the existence of the custom by very modern instances, that is, dating from the year 1928. These instances were not considered sufficient by the Full Bench to rebut the presumption raised by the entries in the three *riwaj-i-ams*. The observations of the Full Bench cannot be taken to lay down a rule of universal application, as in that case they will be contrary to numerous decisions of their Lordships of the Privy Council and the various High Courts. The following observations may be reproduced in extenso

5. *Mt. Sukh Devi v. Faqir Singh*, (1935) 22 A I R Lah 434.

6. *Narain Singh v. Mt. Basant Kaur*, (1935) 22 A I R Lah 419=158 I O 976=37 P L R 229.

7. *Kartar Singh v. Banto*, (1936) 23 A I R Lah 804=168 I O 979=17 Lah 296=38 P L R 300.

8. *Bahadur v. Nihal Kaur*, (1937) 24 A I R Lah 451=169 I O 909=1 L R (1937) 18 Lah 594=39 P L R 349 (F B).

from a Full Bench decision of the Madras High Court reported in 51 Mad 1⁹ :

Indian Courts are Courts of law as well as of equity, and they ought not to give effect to a custom which the growing consciousness of the community in which it is said to have prevailed is prepared to treat as unsuited to modern conditions and from which it has allowed a departure in several cases. When a custom which is not in accordance with the ordinary law governing the Hindu community is giving way to enlightenment in order to bring it in line with other communities Courts would not be justified in giving effect to it and thereby compelling the unwilling community to be bound by the custom which it has practically abandoned. The judicial recognition of a custom which a community is prepared to jettison is neither necessary nor just. Even if such a custom as that set up had prevailed at some time, I am not prepared to hold that the custom has been considered to be a binding one during the last 20 or 25 years.

It was held by their Lordships of the Privy Council in 1 Cal 186¹⁰ that there appears to be no principle or authority for holding that a manner of descent of an ordinary estate, depending solely on family usage, may not be discontinued either accidentally or intentionally so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom, which is the *lex loci* binding all persons within the local limits in which it prevails.

In the present case also we are dealing with a tribal custom and not a custom binding all persons within the local limits in which it prevails. Other decisions dealing with this point are reported in 12 M I A 81¹¹ and 4 Bom 545.¹² The whole question has been considered at length at page 82 of Rattigan's Digest of Customary Law, 12th Edn. As it has been laid down in a number of recent decisions that there is no such thing as general customary law, it was for the plaintiff-respondents to prove that Amir Ali had no power of testamentary disposition. They cannot be said to have discharged this onus by producing the *riwaj-i-am* of 1887 as this *riwaj-i-am* is in direct conflict with the most recent *riwaj-i-am* of the year 1910. I therefore hold that the plaintiffs' suit must be dismissed on the sole ground that they have failed to prove a custom restraining the Mughals of the Gujarkhan tahsil from alienating their ancestral property by means of a will. For

the reasons given above I accept this appeal, set aside the judgments and decrees of the Courts below and dismiss the plaintiffs' suit. Having regard to all the circumstances I leave the parties to bear their own costs throughout.

D.S./R.K.

Appeal allowed.

A. I. R. 1940 Lahore 112

BLACKER J.

Dhanpat Rai — Convict — Appellant
v.

Emperor.

Criminal Appeal No. 407 of 1939, Decided on 15th July 1939, from order of Special Magistrate, Punjab and Delhi, D/- 28th March 1939.

Criminal P. C. (1898), S. 238 (2)—Accused charged with being principal in manufacturing of counterfeit coin cannot be convicted as abettor when facts constituting these offences are different.

Where an accused is actually charged with being principal in the manufacture of counterfeit coin the Magistrate is not justified in convicting him of being abettor when the facts which would constitute the offence of abetment are quite different from the facts which would constitute the offence of manufacturing counterfeit coin. [P 113 C 1]

Bakhshi Bhagat Ram — for Appellant.

Mohammad Monir, Assistant Advocate General — for the Crown.

Judgment.—Fazal Ahmad, Tej Ram and Dhanpat Rai appeal from their convictions by a Special Magistrate at Lahore. Fazal Ahmad was convicted under S. 232, I. P. C., and sentenced to seven years' rigorous imprisonment. The other two appellants were convicted of abetting this offence and sentenced to five years' rigorous imprisonment each. The case for the prosecution which was accepted by the learned trial Magistrate appears to be as follows :

Tej Ram and Fazal Ahmad entered into a conspiracy to manufacture counterfeit coins. Not having sufficient capital they induced one Balmokand Khera to put up the capital for the necessary machinery and materials under the pretext of starting a factory for the manufacture of buttons. When the necessary machinery and the material had been obtained these two conspirators revealed their plans to Balmokand Khera and invited him to join. He was horrified and refused, whereupon Dhanpat Rai appellant, who was a partner with Tej Ram in the firm of Dhanpat Rai and Company, Limited was approached and asked to join the conspiracy. In pursuance of this conspiracy counterfeit coins were actually

9. *Mookha Kone v. Amma Kutti*, (1928) 15 A I R Mad 299=108 I C 760 = 54 M L J 174 = 51 Mad 1 (F B).

10. *Raj Kishen Singh v. Ram Joy Surma*, (1875) 1 Cal 186=19 W R 8 (P C).

11. *Surendra Nath Roy v. Hiramani Barmani*, (1867-69) 12 M I A 81 = 1 Beng L R 26 = 2 Suther 147=10 W R 35=2 Sar 372 (P C).

12. *Mathura Naikin v. Esu Naikin*, (1880) 4 Bom 545.

manufactured in the shape of false rupees and four anna pieces. As regards Fazal Ahmad there appears to be no doubt whatever. He was not only caught red-handed which fact has been proved by evidence which there appears to be no reason to doubt, but he has made a long and detailed confession in which he has fully implicated himself. His offence is serious and the sentence inflicted cannot be said to be excessive. His appeal is accordingly dismissed.

With regard to Tej Ram and Dhanpat Rai, however, a legal objection has been raised on behalf of Tej Ram which also applies to Dhanpat Rai. It was not raised by Dhanpat Rai's counsel on his behalf as the counsel argued that he was entitled to a full acquittal. This is that these two appellants were actually charged with being principals in the manufacture of this counterfeit coin and that, in the circumstances of this case, the Magistrate was not justified in convicting them of being abettors, presumably by conspiracy.

I think that this objection is well founded. The learned Magistrate has argued that abetment is only a minor offence as compared with the substantive offence and has attempted to justify the conviction under sub-s. 2 of S. 238, Criminal P. C. There would no doubt be cases in which this would be applicable to a case of abetment but I do not think that the present case is one of them as, in my opinion, the facts which would constitute the offence of abetment in this case are quite different from the facts which would constitute the offence of manufacturing counterfeit coin. The matter however does not end there as under S. 225 before I can regard the error in stating the offence in the charge to be material I have to find as a question of fact that the accused was in fact misled by such error or omission and that it has in fact occasioned a failure of justice. In this case it is not difficult to find that the accused have been misled. After the charge had been framed the accused through their counsel protested against it. His objection was however overruled by the Court who held that the charge, as framed, was perfectly good. It seems to me to be impossible to draw any other inference from this that the Court's action must have led the accused to the definite opinion that what they had to answer and what they had to rebut was the charge of committing the offence as principals. The learned counsel for the Crown has argued that all the circum-

stances from which inferences of the abetment could be raised were put to the accused in their examination before the charge. This may be so, but when the charge was afterwards framed and specifically related to the substantive offence and the Court on the matter being brought to its notice persisted in this attitude, namely that it was as principals the accused were being charged, I think it is only a natural inference that they would not in such a case think it necessary to defend themselves against a charge of being only abettors. For this reason therefore it is clear that the refusal of the Court to alter the charge when requested to do so must be deemed to have occasioned a failure of justice.

For these reasons therefore I find myself compelled in the case of Tej Ram and Dhanpat Rai to set aside the conviction and to order a fresh trial. This trial however will only start at the stage where the error took place, namely from the amended charge against these two persons. It has been represented to me that these proceedings are likely to be protracted and that the two appellants, Tej Ram and Dhanpat Rai, have already been for considerable time in custody. A prayer is therefore made for bail. On considering the case, I find the seriousness of the offence is such that I do not think that I would be justified in this case in releasing them on bail, especially as they have been found guilty in this trial by a competent Court, even though I have had to set aside that conviction on a technical legal point. This remark of mine however must not be construed by the Magistrate as any indication of their guilt and he should try the case with a fresh mind on the facts before him. He will, no doubt, if he finds the appellants guilty in this new trial, in assessing their sentence, take into consideration the fact that the proceedings had been protracted for no fault of their own.

D.S./R.K.

Order accordingly.

A. I. R. 1940 Lahore 113

SPECIAL BENCH

**YOUNG C. J., DALIP SINGH AND
BLACKER JJ.**

*Commissioner of Income-tax, Lahore —
Petitioner.*

v.

Krishan Kishore — Respondent.

Civil Ref. No. 16 of 1938, Decided on 18th April 1939; reference by Commissioner of Income-tax, Punjab, N.-W. F. and Delhi Provinces, Lahore, D/- 8.9.1938.

(a) Income-tax Act (1922), Ss. 55 and 9 — Impartible estate — Hindu joint family consisting of assessee and sons — Assessee succeeding by rule of primogeniture — Income in his hands is not chargeable in status of 'individual' — Incumbent is not 'owner' for purposes of S. 9 (Per Special Bench).

The income of impartible estate of a joint Hindu family consisting of the assessee and his sons and to which the assessee has succeeded by rule of primogeniture prevailing in his family governed by the Mitakshara, is not chargeable in the hands of the assessee in the status of "individual". The reason is that the income of the impartible estate cannot be said to be the income solely of the incumbent of the impartible estate there being vested in the junior members of the family a right to maintenance out of that income arising by reason of their right in the property and not imposed by custom upon one member of the joint Hindu family, namely the incumbent of the impartible estate: *A I R 1933 Lah 284, Foll.*; *A I R 1937 Mad 515 (F B), Disting.*; *A I R 1932 P C 216, held conflicting with A I R 1934 P C 157 Not foll.*; *A I R 1934 P C 157, Rel. on.*; *A I R 1924 Pat 679, Not foll.* [P 117 C 1]

The incumbent of the impartible estate therefore does not become for the purposes of S. 9 the owner of the property. Since the corpus of the property belongs to the joint Hindu family, an individual member of the family cannot be held to be the owner simply because by custom in that particular property the major portion of the income is used entirely for his benefit: *A I R 1934 P C 116, Expl. and Disting.*; *A I R 1939 Bom 195 and A I R 1921 Low Bur 9, Not foll.* [P 118 C 1]

(b) Income-tax Act (1922), S. 9 — Construction — "Owner of property" — Meaning.

On a plain construction of S. 9, the assessee must be the owner of the property assessed. The words "owner of the property" therefore cannot be construed as meaning owner of the annual value of the property assessed: *A I R 1934 P C 116, Expl. and Disting.*; *A I R 1939 Bom 195 and A I R 1921 Low Bur 9, Not foll.* [P 117 C 2]

J. N. Aggarwal — for Petitioner.

Badri Das and Kirpa Ram Bajaj —
for Respondent.

Dalip Singh J. — The facts of this reference under S. 66 (1), Income-tax Act, are stated at p. 2 of the printed paper book by the learned Commissioner of Income-tax and may, briefly, be recapitulated here. The assessee, Diwan Bahadur Krishan Kishore, is the present holder of an impartible estate to which he succeeded under the rule of primogeniture prevailing in his family. The income of that impartible estate consists mainly of rent of property and interest. This latter source is however small and the income consists mainly of rent from house property. It appears that up to 1923-24 the liability to super-tax of this income was determined as if it were the income of an individual. In a revision petition in that year however the assessee contended that

he formed a joint Hindu family with his sons and that he should get exemption from super-tax up to the limit provided in the case of a Hindu undivided family and not as if the income were that of an individual. This contention was conceded. In 1929-30 the Commissioner however cancelled the assessment of the income from the impartible estate as being the income of a Hindu undivided family and directed the income of the impartible estate and the personal income of the Diwan Bahadur should be assessed in a combined assessment as if the income of the impartible estate were the income of an individual. A reference was made to the High Court and the result is reported in 6 I T C 345 = 14 Lah 255.¹ One of the questions in that reference was:

Whether in view of the fact that the rule of primogeniture prevails in the petitioner's family and of the terms of the award of Mr. Atkins, the petitioner can be said to be the sole owner of the impartible estate the taxable income of which has been assessed on him as an individual?

The learned Judges held that an impartible estate could belong to an undivided Hindu family and was not the sole property of the person who had succeeded to it by the rule of primogeniture. They therefore, answered the question referred to above in the negative. In other words, they allowed the assessee's claim to be assessed to super-tax on the income from the impartible estate as if the same were the income belonging to a joint Hindu family. Certain other disputes arose on the question of the income of the assessee but they do not concern us here, the question of law referred in this case for the decision of the Hon'ble High Court being:

(1) Whether the income of the impartible estate, to which the assessee has succeeded by rule of primogeniture prevailing in his family governed by the Mitakshara, is chargeable in his hand in the status of 'individual,' the assessee being the head of the family consisting of himself and his sons?

The second question is unimportant, for the answer to the first question would, as rightly pointed out by the learned Commissioner, determine the answer to the second question. The reason for the reference in the face of the Division Bench ruling reported in 14 Lah 255¹ is given in the opinion of the Commissioner at pages 4 and 5. The learned Commissioner there pointed out, relying on the ruling of their Lordships of the Privy Council in 1937

1. Kishan Kishore v. Commr. of Income-tax, (1933) 20 A I R Lah 284 = 141 I C 415 = 14 Lah 255 = 6 I T C 345 = 34 P L R 560.

I T R 90 (at p. 95)=I L R (1937) 1 Cal 653,² that though certain property might be described as family property yet the income from the property might be regarded as the income of an individual and therefore chargeable to income-tax as the income of an individual. He also pointed that the Patna High Court in the case reported in 1 I T C 384³ at page 389 had held that the income of an impartible estate was the income of the incumbent for the time being, nor did the fact that he is bound to maintain his sons entitle him to treat the income as that of the undivided family. Similarly, the Madras High Court in a case reported in 1937 I T R 78⁴ held that the impartible estate though ancestral is clothed with the incidents of self-acquired and separate property. The corpus might belong to the undivided family and the assessee might be a member of a Hindu undivided family but nonetheless the income received was his absolute property and differed in no way from that gained by personal exertions or other self-acquisitions. He distinguished the Lahore case on the ground that in the Lahore case it was only held that the corpus of the property might belong to the undivided family. In the view of their Lordships of the Madras High Court the fact that the corpus belonged to the Hindu joint family did not affect the question of the income, and the income from an impartible estate not being joint family income was not the income of the joint Hindu family but clearly was the income of an individual. Similarly, the Patna High Court had in another case followed the Madras judgment and its own earlier judgment and held that the income of the impartible Raj in the hands of the holder was to be assessed on the footing that the income was the income of the individual and not of an undivided family. The learned Commissioner contended that in view of these authorities the answer to the first question referred should be in the affirmative.

It would appear from the opinion of the Commissioner that the learned Commis-

sioner conceded the point that the corpus of the property did belong to a Hindu joint family consisting of Dewan Krishan Kishore and his sons, but, according to the learned Commissioner, this fact did not affect the question of the ownership of the income. Before us however the learned counsel for the Income-tax Commissioner has contested both the question of the ownership of the corpus and the ownership of the income. A number of rulings of their Lordships of the Privy Council have been cited but the main reliance of the learned counsel has been on a case reported in 59 Cal 1399⁵ where their Lordships of the Privy Council reviewed a good many of the previous decisions of the Privy Council on the subject of impartible estates. In that case at p. 1413 their Lordships summarized the discussion as follows:

Impartibility is essentially a creature of custom. In the case of ordinary joint family property, the members of the family have (1) the right of partition, (2) the right to restrain alienations by the head of the family except for necessity, (3) the right of maintenance, and (4) the right of survivorship. The first of these rights cannot exist in the case of an impartible estate, though ancestral, from the very nature of the estate. The second is incompatible with the custom of impartibility as laid down in 10 All 272⁶ and the first Pittapur case 22 Mad 383⁷ and so also the third as held in the second Pittapur case 41 Mad 778.⁸

As regards (4) their Lordships remarked that they still maintained that the right of survivorship was inconsistent with the custom of impartibility. From the propositions laid down the learned counsel contended that the income arising from the impartible estate must be held to be the absolute income of the incumbent for the time being and therefore assessable as the income of an individual. It should here be pointed out that the ruling of their Lordships of the Privy Council referred to by the learned Commissioner, namely I L R (1937) 1 Cal 653² did not deal with the question of the income arising from an impartible estate at all. Their Lordships took special care to note that they were not dealing with the case of an impartible estate held by the senior of several male members of the family as to which there had been conflict.

2. Kalyanji Vithal Das v. Commissioner of Income-tax, Bengal, (1937) 24 A I R P C 86 = 166 I O 445 = 64 I A 28 = I L R (1937) 1 Cal 653 = 1937 I T R 90 (P O).

3. Shiva Prasad Singh v. Emperor, (1924) 11 A I R Pat 679 = 82 I O 653 = 4 Pat 73 = 5 P L T 497 = 1 I T O 384.

4. Raja of Bobbili v. Commissioner of Income-tax, Madras, (1937) 24 A I R Mad 515 = 168 I O 168 = I L R (1937) Mad 797 = 1937 I T R 78 (F B).

5. Shibaprasad Singh v. Prayag Kumari Debee, (1932) 19 A I R P C 216 = 138 I O 861 = 59 I A 331 = 59 Cal 1399 (P O).

6. Sartaj Kuari v. Deoraj Kuari, (1888) 10 All 272 = 15 I A 51 = 5 Sar 189 (P O).

7. Venkata Surya Mahipati Rama Krishna Rao v. Court of Wards, (1899) 22 Mad 383 = 26 I A 83 = 9 M L J (Sup) 1 = 7 Sar 481 (P O).

8. Venkata Mahipati Gangadara Rama Rao v. Raja of Pittapur, (1918) 5 A I R P C 81 = 47 I O 354 = 45 I A 148 = 41 Mad 778 (P O).

ing decisions in India, referring to the Patna case and the Lahore case mentioned above. The passage which is quoted by the learned Commissioner referred to their Lordships' decision that the words "Hindu undivided family" in the Income-tax Act were wider than the words "Hindu coparcenary." A female might be a member of the Hindu undivided family though she might not be a member of the Hindu coparcenary, and the question there being discussed by their Lordships was whether the existence of a wife or a wife and a daughter could be held to make the income which went to the sole male member of the family, the income of a Hindu undivided family and it was with reference to this question that their Lordships' remarks must be read. That matter, it appears to me, is perfectly distinct from the question whether, where admittedly a Hindu coparcenary is existing, the income arising from the corpus of property owned by that coparcenary can be said to be the absolute income of the head of the family. Normally speaking of course it could not be held to be the income of the individual head of the family but would be held to be the income of the Hindu joint family, but the contention of the learned counsel for the Income-tax Commissioner is that in the case of an impartible estate the income must be treated as that of the incumbent of the impartible estate.

Speaking entirely for myself and with the greatest deference to the decision of their Lordships of the Privy Council in 10 All 272⁶ and the first Pittapur case⁷ I find it difficult to understand why the right to control alienations should be incompatible with the absence of the right to partition. As pointed out in the Lahore case, in the Punjab Hindu Mitakshara Law has been modified by custom so that sons have no right to demand partition of ancestral property or joint family property as against their father. It has never however been doubted that the sons in the Punjab retain their right to control alienations made by the father except for necessity. Without in the least wishing to detract from the authority of the Privy Council ruling, for it is undoubtedly binding on any Court in this country, I merely state the difficulty that I find it difficult to understand why their Lordships of the Privy Council held that the right to restrain alienations was inextricably involved with the right to partition. Assuming however that this is so, the second Pittapur case⁸ appears to have laid down

that the right to maintenance was also incompatible with the existence of an impartible estate. There are certainly words in that case which would tend to show that this is so. It would appear as if that case had held that there was no right of maintenance held by the junior members of the Hindu joint family in an impartible estate except such as might have been imposed by custom. Their Lordships of the Privy Council have however themselves in a later case, as far as I can understand it, negatived this view. That case is reported in 56 All 468.⁹ Their Lordships were there dealing with the succession by survivorship to an impartible estate but in the course of that decision they examined a number of previous rulings of the Privy Council and summarized the result of that discussion of the previous rulings at p. 485 as follows:

1. The decisions of the Board in 10 All 272⁶ and the first Pittapur case,⁷ appeared to be destructive of the doctrine that an impartible zamindari could be in any sense joint family property.

2. This view apparently implied in these cases was definitely negatived by Lord Dunedin when delivering the judgment of the Board in 1921, in 43 All 228.¹⁰

3. One result is at length clearly shown to be that there is now no reason why the earlier judgments of the Board should not be followed, such as for instance the Chellapalli case, 24 Mad 147,¹¹ which regarded their right to maintenance, however limited, out of an impartible estate as being based upon the joint ownership of the junior members of the family, with the result that these members holding zamindari lands for maintenance could still be considered as joint in estate with the zamindar in possession.

The right to maintenance therefore of the junior members of the family in an impartible estate was here referred not to custom but to the right arising out of the joint ownership of the estate by the junior members of the family with the present incumbent. Speaking again with the greatest deference and with all proper respect to the decision of their Lordships of the Privy Council, I find it very difficult to reconcile the words quoted in the judgment of the Board with reference to maintenance in 59 Cal 1399⁵ with the latest judgment of their Lordships of the Privy Council in 56 All 468⁹ at p. 485. In the circumstances it appears to me that the most recent judgment

9. Collector of Gorakhpur v. Ram Sundar Mal, (1934) 21 A I R P C 157=150 I C 545=61 I A 286=56 All 468 (P C).

10. Baijnath Prasad Singh v. Tej Bali Singh, (1921) 8 A I R P C 62=60 I C 534=48 I A 195=43 All 228 (P C).

11. Mallikarjuna v. Durga Prasada, (1901) 24 Mad 147=27 I A 151=10 M L J 294=7 Sar 761 (P C).

of their Lordships of the Privy Council reviewing the previous decisions must be held to be binding on this Court and the result of all the Privy Council decisions must be taken to be summarized by their Lordships of the Privy Council themselves in 56 All 468.⁹ From that decision it seems to me that it would follow (1) that in an impartible estate a Hindu joint family does own the corpus of the property, (2) that the members of this joint family have no right to partition the estate, (3) that the members of the family have no right to control the alienations made by the incumbent of the impartible estate and (4) that the members of the joint family have the right to receive maintenance from the estate and this right arises because they are owners of the estate and is not a right to maintenance from the joint family, though not from the property, as is the case of female members of a joint family. The distinction is really quite clear: in the one case the female member has a right to maintenance from the joint Hindu family but this right does not confer any right in the estate or property of the joint family; in the other case the members of the coparcenary have a right to maintenance arising from their right in the property of the joint Hindu family of which they are co-owners. It follows from this again that the income of the impartible estate cannot be said to be the income solely of the incumbent of the impartible estate there being vested in the junior members of the family a right to maintenance out of that income arising by reason of their right in the property and not imposed by custom upon one member of the joint Hindu family namely the incumbent of the impartible estate.

This would suffice to dispose of the reference, but in case the matter goes further I must refer also to another argument which was raised by the learned counsel for the assessee Diwan Bahadur Krishan Kishore. The learned counsel in this part of the argument conceded that it would not affect the question of the income arising as interest from security, if any, appertaining to the impartible estate but it did affect the income arising from property which, according to him, was the main source of income of the impartible estate. The contention was that under S. 9, Income-tax Act, the income arising from property could only be assessed on an assessee who was the owner of the property. Therefore according to the learned counsel as the Commissioner for

Income-tax conceded that the corpus of the property belonged not to the incumbent but to the joint Hindu family, it followed that qua the property the owner was the Hindu undivided joint family and not the incumbent. On a plain construction of the words of S. 9 which runs,

the tax shall be payable by an assessee under the head "property" in respect of the bona fide annual value of property consisting of any buildings or lands appurtenant thereto of which he is the owner. . . .

it necessarily follows that the assessee must be the owner of the property assessed. In reply to this contention however the learned counsel for the Commissioner cited 7 I T R 139,¹² a Bombay ruling of 1939. In construing this Section the learned Judges of the Bombay High Court held that the words 'owner of the property' must be construed as meaning owner of the annual value of the property. The judgment of one of the learned Judges concedes that this interpretation does violence to the plain grammatical meaning of the words of the Section, but the learned Judges felt that this was the only construction which was reconcilable with the general scheme of the Act. The judgment of the Chief Justice in that case was based upon the ruling of their Lordships of the Privy Council reported in 58 Bom 317¹³ at p. 324. With all deference again to the learned Judges of the Bombay High Court I must admit that I am unable to follow how the judgment of their Lordships of the Privy Council in 58 Bom 317¹³ supports this construction. I do not think I need analyze the matter in any great detail. It is sufficient to say that I am quite unable to see that the judgment of their Lordships of the Privy Council had anything to do with any such forced construction. All that their Lordships of the Privy Council were there concerned with was the question whether in a particular case the word 'owner' should mean the legal owner or the beneficial owner and whether a particular beneficiary could be said to be the owner. Another ruling relied on was 1 I T C 140,¹⁴ a Burma

12. Commissioner of Income-tax, Bombay v. Abubakar Abdul Rehman, (1939) 26 A I R Bom 195=182 I C 712=I L R (1939) Bom 284=41 Bom L R 232=(1939) 7 I T R 139.

13. Currimbhoy Ebrahim Baronetcy Trust v. Commissioner of Income-tax, Bombay, (1934) 21 A I R P C 116=148 I C 855=61 I A 209=58 Bom 317 (P C).

14. Burma Railways Co. v. Secretary of State, (1921) 8 A I R L B 9=64 I C 801=11 L B R 33=1 I T C 140.

ruling, but again with all deference to the learned Judges of the Burma Court I am unable to follow why a person in the control and management of certain property should for the purposes of the Income-tax Act be regarded as the owner of the property. The very illustration given in the case of a man handing over property to his sons would appear to me not to be a very happy illustration for I do not know if the income-tax authorities would welcome a man with several sons handing over the control of different parts of his property to different sons, thereby escaping assessment himself for the income with the possible result that the sons might not be assessable to income at all, for their divided shares might be less than the taxable minimum.

Be that as it may however I am unable to see that any such forced construction is called for in the circumstances of this case. I agree that the word 'owner' is not defined in the Income-tax Act and that the word 'owner' might very well cover the legal owner, the equitable owner or even the owner of a limited estate carved out of a larger estate. But from all this it would not follow that the incumbent of an impartible estate becomes for the purposes of S. 9 the owner of the property. If, as held by their Lordships of the Privy Council and conceded by the learned Commissioner, the corpus of the property belongs to the joint Hindu family, I am unable to see that the individual member of that family can be held to be the owner simply because by custom in that particular property the major portion of the income is used entirely for his benefit. In the circumstances therefore I would uphold the contention of the learned counsel for the assessee on this point also. The result is that I would answer the first question referred by the learned Commissioner in the negative and as a corollary thereto I would also answer the second question in the negative. As regards costs I consider that the assessee is entitled to his costs which are assessed at Rs. 300.

Young C. J.—I concur.

Blacker J.—I concur.

G.N./R.K.

Answered in negative.

A. I. R. 1940 Lahore 118

RAM LALL J.

Nizam-Ud-Din and others — Plaintiffs
— Appellants.

v.

Fateh Din, Defendant and others,
Plaintiffs — Respondents.

Second Appeal No. 1003 of 1938, Decided on 14th February 1939, from decree of Senior Sub-Judge, Ludhiana, D/- 4th May 1938.

(a) Punjab Land Revenue Act (17 of 1887), S. 44 — Mutation carries presumption of truth — Entries in mutation proceedings are admissible per se—Officials making them need not be produced.

What is stated in a mutation carries with it the presumption of truth and as all official acts are to be presumed to have been regularly performed it is not necessary to produce every official who made an entry in the mutation proceedings. Hence, all entries in the mutation proceedings are admissible per se without the necessity of producing the official or officials who made them : *A I R 1934 P C 40 ; A I R 1929 Lah 93 and A I R 1936 Lah 864, Rel. on.* [P 119 C 2]

(b) Civil P. C. (1908), S. 100—Finding based on evidence that party has not proved his case is finding of fact.

Judgment of the lower Appellate Court based on evidence, that a party has not been able to prove his case amounts to a finding of fact and therefore even if the finding is not in fact correct it is not liable to be interfered with on second appeal.

[P 119 C 2]

Vishnu Datta — *for Appellants.*

Shamair Chand — *for Respondent*

(*Defendant.*)

Judgment.—The plaintiffs sued for possession of land alleged to have been taken possession of illegally by the defendant a few months before suit. The main defence was one of adverse possession and limitation. The Court of first instance decreed the suit largely on the basis of the statement of the patwari who proved report in his roznamcha which showed that the defendant had agreed with the plaintiffs to exchange a certain piece of agricultural land with the land in dispute. It held that this was an admission made on 19th July 1932, that on that date at least this land was in the possession of the plaintiffs and therefore the suit was within time.

In appeal the learned Senior Subordinate Judge reversed this finding and dismissed the suit on the ground that in the same mutation relied on by the plaintiffs, in which the statement referred to above is recorded by the patwari, on a subsequent date, that is, on 30th July 1932 the Gir-dawar Qanungo made a report that on the

statement recorded by the patwari the signature of the lambardar had not been taken as a witness. In the certified copy, Ex. P-1 the seal of this lambardar Anokh Singh purports to have been affixed. The defendant on the other hand totally denied having made the report and the lower Appellate Court being of the opinion that the signature or rather the mark of the seal of Anokh Singh as an attesting witness was obtained subsequently and that this Anokh Singh was interested in one of the plaintiffs, disregarded the statement on which the trial Court had based its judgment. It held therefore that there was not sufficient proof of the title of the plaintiffs in the land in suit and in accepting the appeal dismissed the suit as I have said above.

A further appeal has been brought to this Court by the plaintiffs-appellants through Mr. Vishnu Datta whose main contention is that the report of the Girdawar Qanungo dated 30th July 1932 incorporated in the mutation Ex. P-1 had not been proved and therefore was inadmissible in evidence. His contention was that before that statement could be taken into consideration, it was necessary to produce the Girdwar Qanungo as a witness in the case. Mr. Shamair Chand for the defendant-respondent on the other hand contends that what is stated in a mutation carries with it the presumption of truth and that as all official acts are to be presumed to have been regularly performed it was not necessary to produce every official who made an entry in the mutation proceedings, and that all entries in the mutation proceedings were admissible *per se* without the necessity of producing the official or officials who made them. In this connexion he relied on A I R 1934 P C 40,¹ but a more direct authority in his favour is A I R 1929 Lah 93² where Bhide J. observed as follows :

The plaintiff produced certain copies of mutations and the entries in the mutations had been incorporated in the jamabandis also. There was a presumption of correctness of the latter entries under S. 44, Punjab Land Revenue Act. . . . The mutations show that in one case the defendant himself and in the other his son were present and admitted transfers at the time the mutations were sanctioned. The learned District Judge apparently thinks that the Revenue Officer who sanctioned the mutations or the Girdawar should have been produced as witnesses to prove the mutations, but no authority in support of this view has been cited

It appears thus that in that case what was recorded by revenue officials in mutation proceedings was accepted as evidence without those officials being produced. In 38 P L R 225³ again Bhide J. laid down that mutation proceedings should have been taken into consideration even when the revenue official who sanctioned them was not produced as a witness. In my opinion therefore what was stated by the Girdawar Qanungo in his report was properly taken into consideration as evidence by the lower Appellate Court. Mr. Shamair Chand contends further that if the report of the Girdawar Qanungo can be treated as evidence then the judgment of the lower Appellate Court amounts to a finding of fact based on evidence that the plaintiffs-appellants have not been able to prove their case, and that in this aspect even if the finding is in fact not correct, it is not liable to be interfered with on second appeal. It seems to me that there is force in this contention, and therefore I would reject this appeal but as I am not sure that I would have come to the same finding on the question of fact as is done by the lower Appellate Court I would leave the parties to bear their own costs throughout.

G.N./R.K.

Appeal rejected.

3. Atri v. Rodhal, (1936) 23 A I R Lah 864=167 I C 651=38 P L R 225.

A. I. R. 1940 Lahore 119

BHIDE J.

Arur Singh and others — Plaintiffs — Appellants.

v.

Badar Din and others — Defendants — Respondents.

Second Appeal No. 51 of 1939, Decided on 10th October 1939, from decree of Dist. Judge, Sialkot, D/- 19th October 1938.

(a) Mahomedan Law — Wakf—Land used as grave yard, supported by revenue entries — Mere fact that in recent years it is not so used does not deprive it of its character as wakf.

When a certain land was used as a Mahomedan graveyard and it is amply supported by the entries in the revenue records, the mere fact that in recent years it was not so used does not deprive it of its character as a 'wakf': A I R 1936 Oudh 207 and A I R 1930 Oudh 245, *Rel. on.* [P 120 C 1]

(b) Mahomedan Law—Wakf—Dedication by non-Muslim is not invalid.

The dedication of land by a Hindu for the purpose of a Muslim graveyard is not invalid either according to Hindu or Muslim law : 16 C W N 114, *Disting.* [P 120 C 1]

J. L. Kapur — *for Appellants.*

Mohammad Amin — *for Respondents.*

1. Nizam Din v. Godar, (1934) 21 A I R P C 40 =146 I C 506 (P C).

2. Bhagwan Das v. Mangal Sain, (1929) 16 A I R Lah 93=111 I C 357.

Judgment. — The finding of the Court below that the land in dispute was used as a Mahomedan graveyard is amply supported by the entries in the revenue records and the mere fact that in recent years it has not been so used does not deprive it of its character as a 'wakf': see A I R 1936 Oudh 207¹ and A I R 1930 Oudh 245.² The land is still lying vacant and no question of any adverse possession is involved. It was contended on behalf of the appellants that no inference as to dedication could be drawn in this case as the original proprietors of the land were non-Muslims. There is however no evidence to show when the land was first used as a graveyard. It was described as such in the earliest revenue records; but it is possible the land may have been used as a graveyard from a time when the owners of the land were Muslims and not Hindus. Secondly, there seems to be no clear authority to show that dedication of land by a Hindu for the purpose of a Muslim graveyard would be invalid either according to Hindu or Muslim law. 16 C W N 114³ cited by the learned counsel on this point does not support him. According to the authority cited in that ruling, it would appear that dedication by a non-Muslim for the purpose of a mosque is not valid—but that is apparently the only exception recognized. I see no good ground for interference in second appeal and dismiss it; but in view of all the circumstances leave the parties to bear their costs.

D.B./R.K.

Appeal dismissed.

1. Ramzan v. Muhammad Ahmad Khan, (1936) 23 A I R Oudh 207 = 165 I C 104 = 1935 O W N 96.

2. Abdul Ghafoor v. Rahmat Ali, (1930) 17 A I R Oudh 245 = 122 I C 326 = 7 O W N 382.

3. Fazle Rahman v. Anath Bandhu, (1912) 16 C W N 114 = 11 I C 436.

A. I. R. 1940 Lahore 120

BHIDE J.

Panna Lal and others — Defendants
— Appellants.

v.

Ram Richhpal and others — Plaintiffs
— Respondents.

Second Appeal No. 363 of 1939, Decided on 23rd October 1939, from order of Addl. Dist. Judge, Delhi, D/- 7th March 1939.

(a) **Hindu Law — Partition — Agreement to refer question of partition to arbitration held not clear and unambiguous expression of intention to separate as to effect severance of joint status.**

An agreement to refer question of partition to arbitration only stated that disputes had arisen

between the parties about the partition of family property and dissolution of the joint business and an arbitrator was appointed to settle the dispute. The arbitrator was not definitely required to effect a partition:

Held that the agreement was not such a clear and unambiguous expression of intention to separate as could effect a severance of the joint status: 32 All 415 and A I R 1925 P C 49, *Rel. on.*

[P 121 C 2]

(b) **Res Judicata—Interests of member of joint Hindu family represented by manager of his branch — Decision in suit is binding on that member.**

Where the interests of a member of joint Hindu family in respect of the matters raised in the suit are represented by the manager of his branch, the decision in the suit would be binding on that member: A I R 1927 P C 56, *Rel. on.* [P 122 C 2]

(c) **Accounts—Suit for rendition of accounts — Relief when can be granted stated — Relief held could be granted.**

A right to claim a statement of accounts is an unusual form of relief only granted in certain specific case and is only to be claimed when the relationship between the parties is such that this is the only relief which will enable the claimant to satisfactorily assert his rights: 60 P R 1899, *Rel. on.* [P 122 C 2]

According to the terms of a lease the lessees were liable to pay rent at the rate of Rs. 10 per month; but if the lessees were to sub-let and recover more than Rs. 60 per month, they were also liable to pay $\frac{1}{4}$ th of the excess to the lessors. The lessor alleged that the lessees had failed to pay rent according to the terms of this lease and sued to recover certain sum as rent and also claimed rendition of accounts, alleging that the lessees were realizing more than Rs. 60 per month, from their sub-tenants:

Held that claim for rendition of accounts could be granted: A I R 1933 Lah 483, *Rel. on.*

[P 123 C 1]

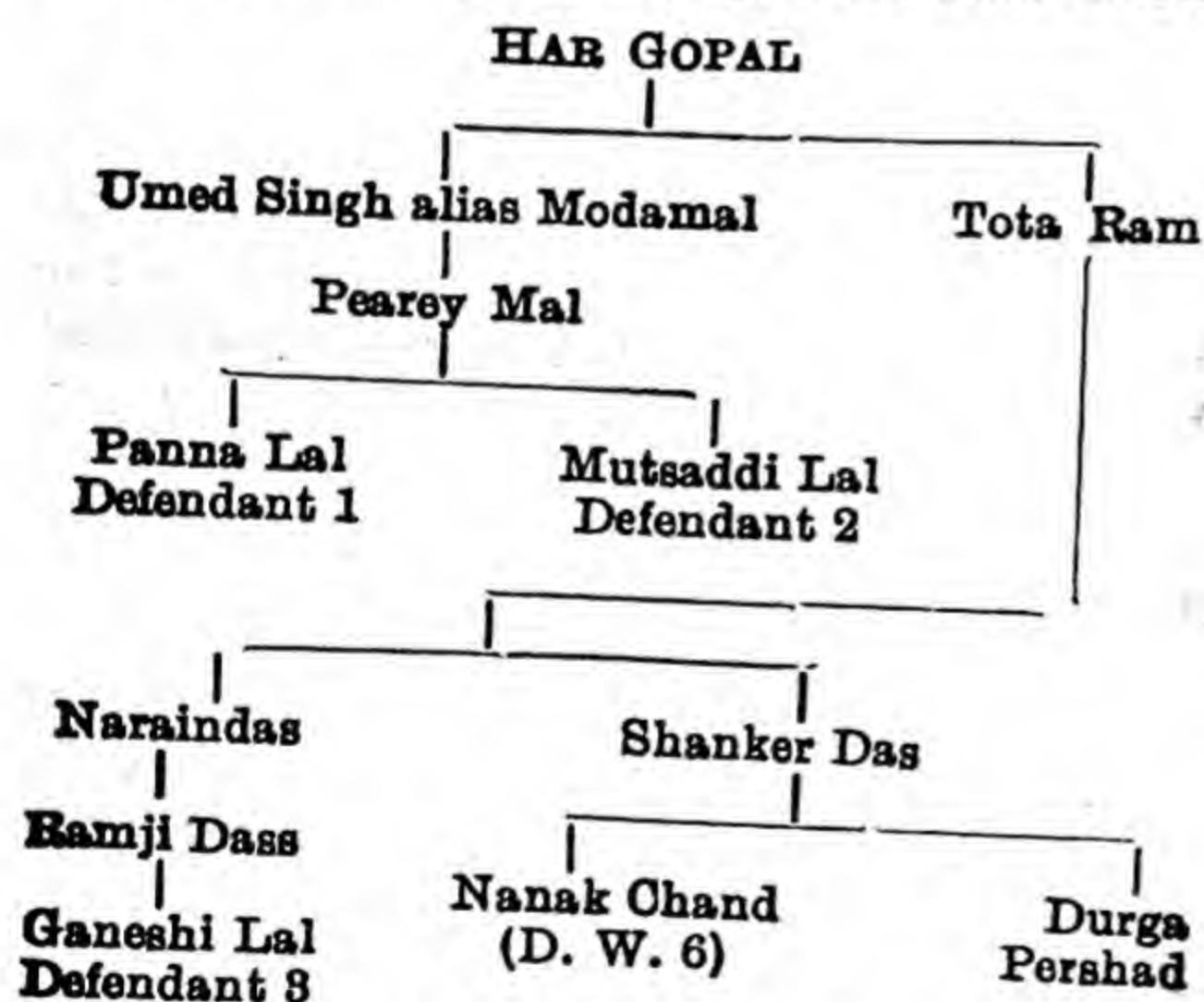
Mehr Chand Mahajan — *for Appellants.*

Bishen Narain and Bishember Dayal

— *for Respondents.*

Judgment. — This is a second appeal arising out of a suit for recovery of rent in respect of a site situated in Delhi City. The site belonged originally to certain persons from whom it was purchased by the plaintiffs' ancestors. It is alleged that Umed Singh, an ancestor of the defendants, took the site on lease from the original owners by a deed dated 12th June 1882. According to the terms of the lease the lessees were liable to pay rent at the rate of Rs. 10 per month, but if the lessees were to sub-let and recover more than Rs. 60 per month, they were also liable to pay $\frac{1}{4}$ th of the excess to the lessors. The plaintiff alleged that the defendants had failed to pay rent according to the terms of this lease and sued to recover a sum of Rs. 230 as rent for the period from 18th June 1931 to 26th April 1933. They also claimed rendition of accounts, alleging that the defendants were realizing more than Rs. 60 per month from

their sub-tenants and that they were entitled to claim $\frac{1}{4}$ th of the excess. The defendants denied the plaintiffs' claim and asserted themselves to be permanent tenants. The trial Court decreed the claim for Rs. 230 as rent, but held that the plaintiffs were not entitled to sue for rendition of accounts. The learned Additional District Judge, however, held on appeal that they were entitled to the latter relief also and therefore remanded the case for accounts being taken and a decree being passed in favour of the plaintiffs for such amount as they may be found to be entitled to. From this decision, the present appeal has been preferred on behalf of the defendants. The main points argued on behalf of the appellants were: (1) the lease executed by Umed Singh was not binding on the appellants, as there had been a severance of the joint family and Umed Singh was therefore not competent to execute the lease as manager of the family; (2) that the decisions in the previous suits instituted by the plaintiffs do not operate as *res judicata* as held by the learned Additional District Judge; (3) that the learned Additional District Judge has erred in law in holding that a suit for accounts was competent in the circumstances of the case. As regards the first point the following pedigree-table will show the relationship of the parties concerned:



It is alleged on behalf of the appellants that the members of the family had decided to separate and the question of partition was referred to arbitration by a written agreement dated 16th September 1880. The lease relied on by the plaintiffs was admittedly executed on 12th January 1882. It is therefore contended on behalf of the appellants that Umed Singh was no longer the 'karta' of the family on 12th January

1882 and the lease executed by him does not bind the other members of the family. On the other hand, it is contended on behalf of the respondents that the agreement of reference to arbitration dated 16th September 1880 does not express any clear and unequivocal intention to separate, that as a matter of fact it was never acted upon, and the intention to separate, if any, was abandoned, that a fresh reference to arbitration as regards the partition of the joint property was made on 19th March 1882 and till then the family remained joint. After carefully considering the two agreements to refer to arbitration in the light of the circumstances of the case, the contentions of the learned counsel for the respondents appear to me to be correct. The agreement dated 16th September 1880 only stated that disputes had arisen between the parties about the partition of family property and dissolution of the joint business and an arbitrator was appointed to settle the dispute. The arbitrator was not definitely required to effect a partition and the possibility of a settlement in some other manner does not appear to be clearly excluded by the terms of the agreement. In the circumstances I do not think the agreement was such a clear and unambiguous expression of intention to separate as could effect a severance of the joint status. I further find that the document was not even completed. There are some blanks left in it which were meant to be filled up, but were never filled up and it was not even signed by one of the coparceners, for whose signature a blank space was left. The arbitrator gave no award and no partition took place at the time. On 19th March 1882 a fresh agreement of reference to arbitration with regard to the same matter was drawn up and the terms thereof indicate that the family still continued to be joint till then. This agreement, unlike the previous one definitely requires the arbitrator to carry out the partition. In view of all these facts, I hold that there was no severance of the joint status of the family till 19th March 1882, and the lease executed by Umed Singh on 12th January 1882 was therefore binding on the appellants. The above view receives support from 32 All 415¹ wherein a member of a joint Hindu family had filed a plaint claiming partition but had withdrawn it afterwards. In the circumstances it was held by their Lordships of the Privy

1. *Kedar Nath v. Ratan Singh*, (1910) 32 All 415 = 7 I O 648 = 37 I A 161 = 13 O O 332 (PC).

Council that no severance of the joint status was effected and this view was again affirmed by them in 48 Mad 254² at p. 258.

As regards the second point raised on behalf of the appellants, it may be mentioned that the plaintiff had instituted two suits on the basis of this very lease in 1914 and 1920, but the defendants had not raised the above defence, viz. that Umed Singh was not competent to execute the lease on behalf of the other members of the family, in these suits. This was a defence, which might and ought to have been raised in the previous suits and in the circumstances Expl. 4 to S. 11, Civil P. C., would seem to bar the plea in the present case. It was urged that the suit of 1914 was eventually decided in favour of the appellants and hence they had no opportunity of appealing from the finding as regards the binding nature of the lease given in the course of the judgment of the High Court. But it was stated in that judgment that

so far as plot A is concerned (and this is the site with which we are concerned in the present suit) the correctness of the decision regarding the period of the lease and the nature of the occupation has not been questioned : see Ex. P/5.

This is clear evidence of an admission on behalf of the appellant and in the absence of any reasonable explanation as to why it should have been made erroneously, I do not see why it should not now be held to be binding on the appellants. A similar admission seems to have been made before the District Judge in the second suit of the year 1920 (see Ex. P/15) and that suit was decreed. There was no further appeal and the decision became final. I do not see why the decision in that suit should not operate as *res judicata* as held by the Courts below. It was urged that although Ganeshi Lal appellant was a party to the previous suits the appellant Mutsaddi Lal was not a party and he is therefore not bound by the decisions in the previous suits. There is, I think, no force whatever in this contention. In the first place, Mutsaddi Lal being a grandson of Umed Singh and there being no allegation of his separation from his grandfather the lease executed by Umed Singh must be held to be binding on him in any case. Secondly, as the learned Judge of the trial Court has pointed out by reference to the evidence on the record Panna Lal, the elder brother of Mutsaddi Lal, was impleaded in the previous suits and he being the mana-

ger of his branch of the family represented him in these suits. It is true that the suits were against the firm Panna Lal Ganeshi Lal, but the evidence leaves no doubt that Panna Lal did represent the interests of Mutsaddi Lal as well in respect of the matters raised in those suits. In the circumstances the decision in the previous suits would bind Mutsaddi Lal as well: cf. 51 Bom 450.³

The last point which requires consideration is whether the plaintiffs were entitled to ask for rendition of accounts. The learned counsel for the appellants contends that there was no duty cast on the appellants to render any accounts to the plaintiffs and they should have sued for a specific amount as they did in the previous suits. On behalf of the respondents, on the other hand, it was urged that this duty was impliedly cast on them by their agreement to share in the rent in excess of Rs. 60 in certain proportion. It is true that the lease does not contain any specific provision for rendition of accounts and it is merely stated therein that the lessors will be entitled to claim one-fourth of the excess over Rs. 60 per mensem and that the lessees will also execute a lease with respect to the same. But I do not think the latter provision necessarily excludes a relief for accounts such as is claimed by the plaintiffs. As pointed out in 60 P R 1899,⁴ a right to claim a statement of accounts is an unusual form of relief only granted in certain specific cases and is only to be claimed when the relationship between the parties is such that this is the only relief which will enable the claimant to satisfactorily assert his rights. In my opinion, the present case will fall within this category. The circumstances which would entitle the plaintiffs to claim a share of the excess rent and the amount thereof are facts peculiarly within the knowledge of the defendants and it would be very difficult for the plaintiffs to ascertain the exact amount which they could claim without the assistance of the defendants. It was argued for the appellants that the plaintiffs could inquire from the tenants, but the tenants are under no obligation to disclose the accounts to the plaintiffs. The mere fact that the plaintiffs sued for specific sums on two previous occasions would not neces-

3. *Lingangowda v. Basangowda*, (1927) 14 A I R P C 56 = 101 I C 44 = 54 I A 122 = 51 Bom 450 (P C).

4. *Jowahar Singh v. Haria Mal*, (1899) 60 P R 1899.

2. *Palani Ammal v. Muthu Venkatachala*, (1925) 12 A I R P C 49 = 87 I C 333 = 52 I A 83 = 48 Mad 254 (P C).

sarily show that they are not entitled to claim this relief. It is explained on behalf of the plaintiffs that previously there were few tenants and they were able to make inquiries. But now there are many; that there are also frequent changes of tenancies and it is not possible for them to ascertain the terms thereof from the tenants. On the other hand, it is perfectly easy for the defendants to render an account of the rent realized.

The facts of this case seem to be of a nature similar to those in 144 I C 505⁵ on which the learned Additional District Judge relied. In my opinion the relief as to rendition of accounts granted by him was justified in the circumstances of this case. I accordingly decline to interfere and dismiss the appeal with costs.

D.S./R.K.

Appeal dismissed.

5. Ram Lal Kapur v. Asian Commercial Assurance Co., Ltd., (1933) 20 A I R Lah 483 = 144 I C 505.

A. I. R. 1940 Lahore 123

BHIDE J.

Fazal Rahman and others—Defendants
— Petitioners.

v.

Mt. Zainab Bibi — Plaintiff —

Respondent.

Civil Revn. No. 1077 of 1938, Decided on 4th October 1939, from order of Senior Sub-Judge, Amritsar, D/- 22nd June 1938.

(a) Civil P. C. (1908), Sch. 2, Para. 21 — Arbitration—Decree in accordance with award — No appeal lies on ground that reference to arbitration is invalid — Appellate Court cannot invoke powers under S. 151.

Where a decree has been passed in accordance with the award, the objection that the reference to arbitration was invalid could only be decided by the trial Court and no appeal would be maintainable on that ground. The Appellate Court is not justified in invoking inherent powers to set the decree aside when the appeal before him is not competent: *A I R 1932 Lah 239 and A I R 1933 Lah 426, Rel. on.* [P 123 C 2; P 124 C 1]

(b) Arbitration—Validity—Mutwali—Declaratory suit by — Reference is not invalid.

In a suit for a declaration that the plaintiff is the mutwali of a mosque, reference to arbitration is not illegal and the decree passed in accordance with the award is not invalid: *35 All 459, Rel. on; 32 All 508, Disting.* [P 124 C 1]

Dr. Shuja-ud-Din — for Petitioners.

Ghulam Mustafa and J. N. Malhotra —
for Respondent.

Judgment. — This was a suit instituted by one Mt. Zainab Bibi for a declaration that she was the mutwali of a mosque, known as Mian Mohammad Sharif's mosque

and also for a permanent injunction restraining the defendants from interfering with her rights in a vacant site and for preventing them from constructing a roof over it and placing girders on the northern wall of her house. The dispute between the parties was referred to an arbitrator who gave an award to the effect that the plaintiff Mt. Zainab Bibi was not the mutwali of the mosque but that she was entitled to the injunction prayed for as regards the placing of the girders on the northern wall of her house. A decree was passed in terms of the award. From this decree an appeal was preferred to the Senior Subordinate Judge, Amritsar. A preliminary objection was raised that the appeal was not competent. The learned Senior Subordinate Judge held that *prima facie* an appeal is not competent when a decree is passed in accordance with the award, but in the present case the dispute between the parties was, in his opinion, such that it could not properly be referred to arbitration at all, and therefore the award was invalid. He therefore set aside the decree based on the award, purporting to act in the exercise of inherent powers under S. 151, Civil P. C. From this decision the present appeal has been preferred on behalf of the defendants. A preliminary objection is raised that no appeal is competent inasmuch as the order of the learned Senior Subordinate Judge was passed in the exercise of the inherent powers under S. 151, Civil P. C. This contention appears to be correct; but I see no objection in treating the memorandum of appeal as a petition for revision as prayed for by the learned counsel for the appellants. The learned counsel for the petitioners has urged that the learned Senior Subordinate Judge was not justified in invoking inherent powers when the appeal before him was not competent. It was contended that even if the reference to arbitration was invalid for any reason the objection could only be decided by the trial Court and no appeal was maintainable on that ground. This contention is supported by 13 Lah 528¹ and 14 Lah 165.²

The learned counsel for the respondent merely urged that the appeal was competent because in the present instance the

1. Rala Ram Walaiti Ram v. Bansi Lal Jagannath, (1932) 19 A I R Lah 239=136 I C 11=18 Lah 528=33 P L R 163.

2. Sat Bharai v. Jamiat Rai, (1933) 20 A I R Lah 426 = 143 I C 585 = 14 Lah 165=34 P L R 393.

reference to arbitration itself was not permissible according to law. But it would appear from the above-mentioned rulings that an objection of this kind can only be decided by the trial Court and no appeal would be competent even if the reference to arbitration was invalid as alleged on behalf of the respondent. I may however add that the contention that the reference to arbitration was invalid does not appear to me to be sustainable. The only ruling in point on which reliance has been placed in this respect is 32 All 503.³ That ruling, however, appears to be clearly distinguishable as the dispute in that case related to succession to the office of a mutwali. It was pointed out that the appointment of a mutwali is a relief which would fall within the scope of S. 92, Civil P. C., and consequently was not a matter which could be decided by a private arbitrator. This distinction was drawn in 35 All 459,⁴ which was a suit similar to the present one, in which reference to arbitration and the decree based thereon was held to be valid. I accordingly set aside the order of the learned Senior Subordinate Judge and restore that of the trial Court. In view of all the circumstances I leave the parties to bear their costs in this Court and in the Court of the Senior Subordinate Judge.

G.N./R.K.

Order set aside.

3. Mahomed Ibrahim Khan v. Ahmad Said Khan, (1910) 32 All 503=6 I C 219=7 A L J 761.

4. Mahomed Abdul Majid Khan v. Ahmad Saeed Khan, (1913) 35 All 459 = 20 I C 37 = 11 A L J 673.

A. I. R. 1940 Lahore 124

BHIDE J.

Darbari Ram and another

— Appellants.

v.

Official Receiver, Lyallpur, and others

— Respondents.

Second Appeal No. 7 of 1939, Decided on 3rd October 1939, from order of Dist. Judge, Lyallpur, D/- 21st November 1938.

(a) Provincial Insolvency Act (1920), S. 4 — Insolvency Court has wide powers to try questions of title, priority etc. — If it uses its discretion in the matter High Court will not interfere — Fact that party is deprived of right of first appeal to High Court is immaterial.

Section 4 confers very wide powers on the insolvency Court to try all questions of title, priority etc. It has the discretion to try the matter under S. 4 and if the discretion is so exercised, High Court will not interfere in second appeal or revision. The mere fact that the party will be deprived of the

right of a first appeal to the High Court, is not in itself so material when jurisdiction to try the matter has been conferred on the insolvency Court: (1882) 21 Ch D 553 and (1892) 66 L T 121, *Distinguishing*. [P 124 C 2; P 125 C 1]

(b) Provincial Insolvency Act (1920), Ss. 4, 53 — If former transfer by insolvent is void subsequent transfers are also void.

If the former transfer by the insolvent is found to be void the subsequent transfers also fall along with it: *A I R 1935 Lah 368, Rel. on.* [P 125 C 1]

Jiwan Lal Kapur — for Appellants.

S. Iqbal Singh — for Respondents.

Judgment. — This is an appeal from the order of the learned District Judge, Lyallpur, directing that the Official Receiver's application for setting aside a certain sale by an insolvent be disposed of under S. 4, Provincial Insolvency Act, and that the matter should not be left to be tried by a separate suit as ordered by the Insolvency Judge. The learned counsel for the respondent has raised a preliminary objection that neither a second appeal nor revision is competent and secondly he has urged that the order passed by the learned District Judge was a proper one in the circumstances of the case. As regards the preliminary objection, there can be no doubt that S. 4, Provincial Insolvency Act, 1920, confers very wide powers on the Insolvency Court to try all questions of title, priority etc., like those arising in the present case. The Insolvency Court had the discretion to try the matter under S. 4 and the discretion having been so exercised, I do not think there is any adequate ground for interference in second appeal or revision. All that the learned counsel for the appellants has urged is that there have been several successive transfers after the first sale by the insolvent, that the receiver has applied for the setting aside of the transfer after a long time, that complicated questions of law and fact will arise, and that if the matter is tried by the Insolvency Judge the appellants would be deprived of the right of first appeal to the High Court, which they would otherwise have as the consideration for the sale was over Rupees 5000. The learned counsel for the appellants has referred to (1882) 21 Ch D 553¹ and (1892) 66 L T 121 in support of his contention that the question in issue should have been left to be decided by a regular suit. These rulings, however, seem to be distinguishable. In the first ruling, it was held that certain important issues were

1. *Ex parte Price; In re Roberts*, (1882) 21 Ch D 553=52 L J Ch 131=47 L T 402=31 W R 104.

raised which were not within the ordinary jurisdiction of the County Court and hence those issues should not be tried by that Court. In the present case it was admitted before me that the learned Insolvency Judge has powers of a Subordinate Judge First Class and would have power to try all the issues arising in this case even in his ordinary jurisdiction. The second ruling is based upon S. 102, Bankruptcy Act, 1882, the provisions of which differ in material particulars from those of S. 4, Provincial Insolvency Act.

On merits, it is true that the application of the receiver was unduly delayed. But on the other hand the transfer was made during the pendency of the insolvency proceedings and the mutation proceedings relating to the sale by the insolvent, which make this perfectly clear, should have put the subsequent alienees on guard. The rapid successive transfers are suspicious and it seems not unlikely that the transferees were aware of their defective title. It has been held in this Court that if the transfer by the insolvent is found to be void, the subsequent transfers also fall along with it: see 16 Lah 1013.² Prima facie, I do not think any very complicated questions are likely to arise, so far as the setting aside of the insolvent's sale is concerned. The mere fact that the appellants will be deprived of the right of a first appeal to the High Court, does not in itself seem to be so material when jurisdiction to try the matter has been conferred on the Insolvency Court. On the whole, I am unable to find any adequate grounds for interference either in appeal or revision. I therefore dismiss the appeal with costs.

D.B./R.K.

Appeal dismissed.

2. *Ata Mahomed v. Mehrchand*, (1935) 22 A I R Lah 368=156 I C 1018=16 Lah 1013.

A. I. R. 1940 Lahore 125**BHIDE J.**

Mt. Mahmudi Begum and another —
Defendants — Appellants.

v.

Sultan Ahmad and others, Plaintiffs
and others, Defendants and another,
Official Receiver — Respondents.

First Appeal No. 185 of 1939, Decided
on 1st November 1939.

Civil P. C. (1908), O. 40, R. 1 — Receiver
may be appointed after passing of mortgage
decree — Especially so where judgment-debtor
delays execution of decree by sale.

Under O. 40, R. 1 a receiver may be appointed
before as well as after the passing of a decree. A
mortgage decree was passed after compromise and

the judgment-debtor placed various obstacles in
the way of sale; the Court appointed receiver to
take charge of the mortgaged properties:

Held that considering all the circumstances of
the case, the appointment of receiver was amply
justified and that the contention, that proper
course for decree-holder was to proceed to get the
mortgaged property sold, had no force: *A I R 1935*
Lah 17, Rel. on; A I R 1933 Lah 687, Expl.

[P 126 C 1]

Dr. Shuja-ud-din — *for Appellants.*

M. C. Mahajan, Asadullah Khan and
Mohsin Shah — *for Respondents.*

Judgment. — This is an appeal from the
order of the Subordinate Judge, First Class,
Delhi, appointing a receiver of certain
mortgaged properties. The suit was decreed
on the basis of a compromise on 28th
March 1938. According to the terms of the
decree the judgment-debtors were liable to
pay Rs. 2,48,742-2-0 on or before 20th June
1939, together with future interest. They
were, however, allowed to pay Rs. 2,27,500
only in full satisfaction of the decree if that
amount was paid within fifteen months.
The judgment-debtors, however, failed to
pay anything in satisfaction of the decree.
Thereafter an application was made for the
appointment of a receiver on the ground
that the judgment-debtors were delaying
execution by various tactics and the appli-
cation was granted on 24th July 1939.

The learned counsel for the judgment-
debtors who have come up in appeal to this
Court has urged that the value of the mort-
gaged property considerably exceeded the
amount of the decree, that no receiver
could be appointed after a decree had been
passed, that the proper course for the decree-
holders was to bring the mortgaged property
to sale and the appointment of a receiver
in the circumstances was not justifiable. In
support of his contention the learned coun-
sel has referred to 14 Lah 457,¹ 150 I C
1035,² A I R 1938 Cal 93,³ etc. The ques-
tion whether a receiver can be appointed
in a mortgage suit was considered recently
by a Division Bench of this Court in a case
reported in 16 Lah 366.⁴ It was held there-
in, after a consideration of a number of
rulings of the various High Courts, that the
Court has jurisdiction to take the mortgaged
property in custodia legis by the appoint-

1. *Girdhari Lal v. Parsram*, (1933) 20 A I R Lah
687=143 I C 574=14 Lah 457=34 PLR 815.

2. *Ram Prasad v. Bishambhar Nath*, (1934) 21
A I R All 772=150 I C 1035=1934 A L J 561.

3. *Kameshwar Singh v. Anath Nath Bose*, (1938)
25 A I R Cal 93=175 I C 908=42 O W N 266.

4. *Gobind Singh v. Punjab National Bank Ltd.*
Sheikhupura, (1935) 22 A I R Lah 17=157 I C
474=16 Lah 366=37 P L R 529.

ment of a receiver to take possession of the mortgaged property and collect the rents and profits pending the disposal of the suit. In the present instance it was no doubt passed after the decree, but it would appear from the provisions of O. 40, R 1, that a receiver may be appointed before as well as after the passing of a decree. 14 Lah 457,¹ on which some stress was laid by the learned counsel for the appellants appears to have been decided on its peculiar facts, as pointed out in 16 Lah 366.⁴ The contention that the proper course for the decree-holders was to proceed to get the mortgaged property sold might have had some force if the judgment-debtors had not placed obstacles in the way of sale, as they appear to have done in this case. I have noted above that although the judgment-debtors were given 15 months for payment of the reduced amount, they paid nothing whatever to the decree-holders during that period. Thereafter they delayed execution by putting an application for cancellation of the decree which was eventually dismissed. Now, they have admittedly instituted a suit for the cancellation of the decree and application has also been made to the Court of Wards in the United Provinces to take charge of the properties. In the meantime the decretal amount with interest has swelled to an amount larger than the market-value found by the Court below. As matters stand, it is clear that the decree-holders will not be able to bring the property to sale for a considerable time. The learned counsel for the appellants was asked by me if he was prepared to withdraw all objections about the sale of the property but he said that he was unable to give any such undertaking on behalf of the appellants. The question as regards the appointment of a receiver has to be decided on the facts of each case and taking into consideration all the circumstances which have been referred to above and those detailed in the judgment of the learned Subordinate Judge I feel no hesitation in holding that the appointment of receiver was amply justified. In the end, I may note that according to the terms of the mortgage deed itself the decree-holders were entitled to the rent of the mortgaged properties. They are therefore receiving by the appointment of a receiver nothing over and above what they were entitled to. I dismiss the appeal with costs.

G.N./R.K.

Appeal dismissed.

A. I. R. 1940 Lahore 126

BHIDE J.

*Lala Khazanchi Shah — Decree-holder
— Appellant.*

v.

*Haji Niaz Ali — Judgment-debtor —
Respondent.*

Exn. First Appeals Nos. 121 and 191 of 1939, Decided on 28th October 1939, from order of Senior Sub-Judge, Sialkot, D/- 10th January 1939.

(a) Punjab Alienation of Land Act (13 of 1900), S. 16—Land belonging to member of notified tribe cannot be sold even if decree on mortgage has been previously passed against him.

The prohibition in S. 16 of the Act is absolute and land belonging to a member of a notified tribe cannot be sold even if a decree on the footing of a mortgage has been previously obtained against him: *A I R 1933 Lah 397*; *A I R 1936 Lah 845*; *A I R 1937 Lah 194* and *A I R 1930 All 856, Rel. on*; *A I R 1931 Lah 545*; *Disting.*

[P 127 C 1]

(b) Punjab Alienation of Land Act (13 of 1900), S. 2 (3)—Land continuously used for brick-kiln from long time does not fall within definition of land in S. 2 (3).

Land should not be considered to fall within the definition under S. 2 (3) unless it is occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture or falls under the categories (a) to (g). Land cannot be held to fall within the definition if it has been continuously used for a brick-kiln from a long time.

[P 127 C 2; P 128 C 2]

(c) Civil P. C. (1908), S. 60 — Agriculturist mortgaging his house—S. 60 does not apply.

Where an agriculturist himself mortgages his house, S. 60 does not apply: *A I R 1935 Lah 164, Rel. on.*

[P 128 C 2]

Achhru Ram — for Appellant.

Madan Mohan Lal — for Respondent.

Judgment.—E. F. A. Nos. 121 and 191 of 1939 are cross-appeals arising out of execution proceedings relating to a decree obtained by one Khazanchi Shah against Haji Niaz Ali. The decree was based on a compromise and directed that a sum of Rs. 28,500 should be paid by the judgment-debtor to the decree-holder on 20th December 1935. In default the judgment-debtor was liable to pay a sum of Rupees 32,000. The judgment-debtor having made a default, the decree-holder applied for execution claiming a sum of Rs. 32,000. The judgment-debtor contended that the terms of the compromise decree making him liable to pay Rs. 32,000 in case of default was a penal one and secondly that his land was not liable to be sold inasmuch as his tribe, namely Kakezai, had been notified under the Punjab Alienation of

Land Act. The first contention was repelled by the executing Court and the decision of the execution Court has not been challenged before me. As regards the second contention the learned Judge held that the land of the judgment-debtor was not liable to sale according to S. 16, Punjab Alienation of Land Act, but that there were certain areas which did not fall within the definition of "land" as given in that Act. He therefore held that those areas were liable to be sold. From this decision both parties have appealed.

I shall first take up the appeal on behalf of the decree-holder (E. F. A. No. 121 of 1939). The learned counsel for the decree-holder contended in this appeal that the Kakezai tribe having been notified under the Punjab Alienation of Land Act after the passing of the decree, the judgment-debtor could not claim any benefit of the notification. It was urged that the mortgagee had already acquired an interest in the mortgaged property prior to the date of the notification and therefore the mortgagee's rights could not be affected by the notification. In support of this contention reliance was placed upon A I R 1931 Lah 545¹ but the facts of that case appear to me to be distinguishable. There are several recent rulings of this Court in which it has been held that the prohibition in S. 16, Punjab Alienation of Land Act, is absolute and land belonging to a member of a notified tribe cannot be sold even if a decree on the footing of the mortgage has been previously obtained against him, see for example A I R 1933 Lah 397,² A I R 1936 Lah 845³ and A I R 1937 Lah 194.⁴ The principle laid down in these rulings will apply to the present case. There is no doubt that the judgment-debtor was a member of a notified tribe at the date on which the land was sought to be sold by the decree-holder and in the circumstances he was in my opinion entitled to the benefit of S. 16 of the Act. A similar view was taken by the Allahabad High Court in A I R 1930 All 856⁵ on which the Court below has relied. I therefore uphold the

decision of the Court below on this point. The next point for consideration is which of the land belonging to the judgment-debtor falls within the definition of that term as given in the Punjab Alienation of Land Act. That definition runs as follows (Section 2 (3)):

The expression "land" means land which is not occupied as the site of any building in a town or village and is occupied or let for agricultural purpose or for purposes subservient to agriculture or for pasture, and includes—(a) the sites of buildings and other structures on such land; (b) a share in the profits of an estate or holding; (c) any dues or any fixed percentage of the land revenue payable by an inferior landowner to a superior landowner; (d) a right to receive rent; (e) any right to water enjoyed by the owner or occupier of land as such; (f) any right of occupancy; and (g) all trees standing on such land.

It would appear from the above definition that land should not be considered to fall within the definition unless it is occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture or falls under the categories (a) to (g). The learned counsel for the appellant contends that certain khasra numbers, which the learned Judge of the Court below has held to be within this definition, were really liable to sale because the area included in these khasra numbers was not occupied for agricultural purposes or any purposes subservient to agriculture. These khasra numbers are:

Khasra No.	Area	Description
884	2 kanals 16 marlas	chhappar
591/378	5 marlas	banjar kadim
592/378	6 marlas	banjar kadim
879	11 marlas	banjar kadim
593/378	6 marlas	abadi

It appears from the entries in the revenue records which have been placed on the record, that these khasra numbers have been described as shown in the third column above ever since the year 1914-15. In other words they have not been under cultivation for a period of over 20 years. There is no evidence on the record to show that they have been used for any purposes subservient to agriculture or for pasture. On the other hand, there is evidence to the effect that these areas are within municipal limits and houses are being built in the neighbourhood. The learned counsel for the judgment-debtor has referred to two documents which have been marked as O. 4. One of these documents is a judgment of the year 1924, which shows that the present decree-holder sued the mortgagor for recovery of Rupees 800 as rent for four years. The claim was

1. Surjan v. Tegh Bahadur Singh, (1931) 18 A I R Lah 545=131 I C 229.
2. Thakor Das v. Roshan Din, (1933) 20 A I R Lah 397=141 I C 634=34 P L R 523.
3. Chhajju Ram v. Muzaffar Ahmad, (1936) 23 A I R Lah 845=165 I C 243=38 P L R 1065.
4. Sahib Dayal v. Jamaluddin, (1937) 24 A I R Lah 194=164 I C 752=38 P L R 926.
5. Mahabir Parshad v. Mahesh Prasad, (1930) 17 A I R All 856=128 I C 825=1931 A L J 45.

decreed only for one year, it being held that the relationship of landlord and tenant had not been shown to subsist after the first year. It appears from the judgment that the mortgagor had taken on lease the whole of the area mortgaged; but this judgment cannot show that the whole of the land included in the lease was actually used for agricultural purposes or for purposes subservient to agriculture within the meaning of S. 2, Punjab Alienation of Land Act, at the time it was sought to be sold. As stated already the entries in the revenue records show that the above khasra numbers at any rate have not been used for any agricultural purpose for a period of over 20 years.

The second document marked O. 4 is a lease in favour of one Imam Din by Mt. Fatma who is said to be the wife of the judgment-debtor. It is not explained why the lease was given by the wife of the judgment-debtor. The lease appears to have been given in 1936; but there is no documentary evidence from the revenue records to show that the land was actually cultivated. Imam Din has gone into the witness-box and has stated that some land in the neighbourhood of the brick-kiln on khasra No. 169, to which the lease refers, had been cultivated; but his statement is not supported by any entries in the revenue records. It seems to me that this lease was probably manufactured in anticipation of the execution proceedings and is not reliable. In view of the long series of entries in the revenue records dating from the year 1914-15 with reference to the khasra numbers referred to above, I hold that the land included in these khasra numbers is not occupied for agricultural purposes or for purposes subservient to agriculture within the meaning of the definition of "land" as given in S. 2, Punjab Alienation of Land Act, and the land is therefore liable to be sold in execution of the decree.

I now proceed to the appeal of the judgment-debtor. The learned counsel for the judgment-debtor contended that out of an area of 59 kanals, 13 marlas in Usman Mahal, 44 kanals 14 marlas, which are shown as banjar kadim, should not have been ordered to be sold. An examination of the entries in the revenue records with respect to this area shows that the cultivation of this area has varied from time to time. A portion of the area was at one time occupied for the purposes of a brick-kiln but subsequently the area seems to have been used for other purposes. In 1931-32 the

whole area of 58 kanals was shown as banjar kadim but in 1935-36, 14 kanals were cultivated and shown as barani. This land is not alleged to be in the abadi. It cannot therefore be inferred from the revenue records that this land has ceased to be occupied for agricultural purposes. I therefore hold that this land is not liable to be sold.

The next point urged on behalf of the judgment-debtor was that an area of 9 kanals, 15 marlas of land in Puran Heran under a brick-kiln which the learned Judge of the Court below has held to be liable to be sold should also have been exempted. This contention appears to me to have no force in view of the definition of 'land' as given in the Punjab Alienation of Land Act. According to the definition, the land must have been occupied for agricultural purposes or purposes subservient to agriculture and when the revenue records show definitely that this was not so used for years, it cannot be held to fall within the definition. The entries in the revenue records show that this land (khasra No. 169) has been continuously used for a brick-kiln from 1914-15.

Lastly, it was contended on behalf of the judgment-debtor that his house was also not liable to be sold in view of the provisions of S. 60, Civil P. C.; but this point was apparently not raised or put in issue in the Court below and, in view of the fact that the house was mortgaged, the contention appears to have no force: *vide* A I R 1935 Lah 164.⁶ I accordingly accept the appeal of the decree-holder with reference to khasra Nos. 384,591/378, 592/378, 379 and 593/378 and direct the area comprised in these numbers be sold in execution of the decree. I also accept the appeal of the judgment-debtor and hold that the area of 44 kanals 14 marlas in Usman Mahal, which the Court below has directed to be sold, is not liable to be sold. I leave the parties to bear their costs. In the end, I may note that the question as regards the possibility of leasing of the land which has been held to be not saleable has not been considered in this appeal and it is open to the decree-holder to apply for a lease of that land, if so advised.

D.S./R.K.

Appeal allowed.

6. Chittar Mal v. Mt. Ram Devi, (1935) 22 A I R Lah 164.

* * A. I. R. 1940 Lahore 129

FULL BENCH

YOUNG C. J., TEK CHAND, DALIP SINGH,
MONROE, BHIDE, DIN MOHAMMAD AND
RAM LALL JJ.

Hakam Khuda Yar — Convict
Appellant

v.

Emperor.

Criminal Appeal No. 476 and Cri. Revn. Nos. 769 and 1126 of 1939, Decided on 8th March 1940, from order of Sess. Judge, Sialkot, D/- 20th April 1939.

(a) Precedent — Privy Council — Value of obiter dicta. (Per *Abdul Rashid J. in Order of Reference.*)

Even the obiter dicta of the Privy Council are entitled to the greatest respect. [P 130 C 1]

(b) Interpretation of Statutes — Judge has no power to defeat plain intention of Legislature.

The Legislature may have unconsciously done a thing deemed injurious. It may have acted with improvidence or without sufficient forethought; but if so, it must be left to correct its own error and Judge has no power to defeat its plain intention because of the results which it may or may not have contemplated: (1878) 3 A C 944, *Rel. on.* [P 132 C 2]

(c) Criminal P. C. (1898), Ss. 1 (2) and 162 — S. 162 is specific provision to the contrary. (Per *Young C. J., and Tek Chand and Din Mohammad JJ.; Dalip Singh and Bhide JJ.* contra.)

Section 162 is a "specific provision to the contrary" within the meaning of S. 1 (2) of the Code. [P 133 C 1]

* * (d) Evidence Act (1872), S. 27 — S. 27 is pro tanto repealed by S. 162, Criminal P. C. (Per *Young C. J., Tek Chand, Din Mohammad, Monroe and Ram Lall JJ.; Dalip Singh and Bhide JJ.*, dissenting.)

Section 27, Evidence Act, is pro tanto repealed by S. 162, Criminal P. C., and evidence of information, whether it amounts to a confession or not, which relates to the fact discovered in consequence of such information must not be considered admissible in evidence. [P 133 C 1; P 135 C 1]

(e) Evidence Act (1872), S. 27 — "Custody" — Meaning.

(Per *Young C. J.*) — The question whether an accused person is in custody or not is a question of fact and not law. [P 133 C 1]

(Per *Bhide and Din Mohammad JJ.*) — "Police custody" does not necessarily mean custody after formal arrest and it also includes "some form of police surveillance and restriction on the movements of the person concerned by the police." It is open to an accused person to prove in every case that arises that he was actually in the custody of a police officer, although in the police diaries he was not shown to have been formally arrested. [P 146 C 2; P 154 C 1]

* (f) Criminal P. C. (1898), S. 162 — Statement made by accused to third person in presence of police, whether is statement to police is question of fact.

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Where an accused person makes a statement to another person in presence of the police, whether that statement is made to the other person or to the police is a question of fact, and not of law. If it is found on the facts of any case, that a statement made to a third person, was in reality intended to be made to the police and was represented as having been made to a third person, merely as a colourable pretence in order to evade the provisions of S. 162, the Court will hold it to be excluded by the Section. But it cannot be laid down that every statement made to a person assisting the police during an investigation should be treated as a statement made to the police and as such excluded by S. 162. The question is thus one of fact. [P 133 C 1, 2; P 147 C 1]

(g) Criminal P. C. (1898), S. 1 (2) — Evidence Act is special law. (Per *Tek Chand and Bhide JJ.; Din Mohammad J.*, contra.)

Section 27 contains the "law on a particular subject" and is, therefore a "special law" as so defined. [P 133 C 2]

(h) Interpretation of Statutes — Repeal of earlier enactment.

It is no doubt true that it is one of the canons of the interpretation of statutes that repeal by implication of an earlier enactment is not to be favoured, especially when the earlier enactment dealt with a particular subject. But if the later statute is so worded that the repeal flows from it as a necessary consequence, it is the duty of the Courts to give effect to it. [P 134 C 2]

(i) Penal Code (1860), Ss. 40 and 41 — Special law — Meaning of.

(Per *Bhide J.*) — The expression "special law" as defined in S. 40 cannot be taken to mean only enactments which create fresh offences not made punishable under the Penal Code. [P 139 C 1]

(Per *Din Mohammad J.*) — The term "special law" refers only to a law dealing with those matters which had not been dealt with in that Code, i. e. a law creating offences not contemplated by the Penal Code. [P 148 C 2]

(j) Evidence Act (1872), S. 26 — Applicability.

Section 26 has always been taken to apply to confessions made to some person other than a police officer. [P 142 C 1]

Mukand Lal Puri, Bishan Narain and
M. L. Chawla — for Appellant.

M. Sleem, Advocate-General —

for the Crown.

ORDER OF REFERENCE BY SINGLE BENCH.

Abdul Rashid J. — The question for consideration in this case is whether the statement of the accused person during the course of the investigation to the effect "I have buried the dead body of Mehr Din near the canal" is admissible in evidence by virtue of S. 27, Evidence Act, as the dead body was dug out from a place near the canal at his instance. This question was fully considered by a Full Bench of this Court consisting of seven Judges in 10 Lah 283.¹ According to this ruling the above

1. *Sukhan v. Emperor*, (1929) 16 A I R Lah 344 = 115 I C 6 = 30 Cr L J 414 = 10 Lah 283 = 30 P L R 197 (F B).

mentioned statement would be admissible in evidence. In a case reported in A I R 1939 P C 47,² their Lordships of the Privy Council have held that the words of S. 162, Criminal P. C., are plainly wide enough to exclude any confession made to a police officer in the course of investigation whether a discovery is made or not. The attention of their Lordships was invited to S. 27, Evidence Act, and it seems to have been contended that certain statements which fall within the purview of S. 162, Criminal P. C., would become admissible by virtue of S. 27, Evidence Act.

Their Lordships were however of the opinion that the words of S. 162 were wide enough to exclude any confession made to a police officer in the course of investigation whether it leads to a discovery or not. S. 27, Evidence Act, may therefore be held *pro tanto* to have been repealed by the provisions of S. 162, Criminal P. C. The only way in their Lordships' opinion to save S. 27, Evidence Act, was to hold that S. 27 was a special law within the meaning of S. 1 (2), Criminal P. C., and that S. 162 was not a specific provision to the contrary. On the point whether S. 27 still remained operative in spite of the provisions of S. 162, Criminal P. C., by virtue of S. 1 (2), Criminal P. C., their Lordships expressed no opinion. After making these observations, it was again repeated that whatever be the right view it was necessary to give S. 162 the full meaning indicated above.

It has been contended by Mr. Puri that in their Lordships' opinion S. 162 has the effect of repealing S. 27, Evidence Act, so far as confessions made to a police officer in the course of investigation are concerned, even if such confessions lead to recovery. The learned counsel has contended that in view of the pronouncement of their Lordships of the Privy Council referred to above the Full Bench ruling reported in 10 Lah 283¹ cannot be said to lay down the law correctly. The observations of the Judicial Committee were obiter dicta, but even the obiter dicta of the Privy Council are entitled to the greatest respect. The point involved in this case arises in a very large number of criminal cases and is one of great importance. I therefore suggest that the learned Chief Justice may be pleased to constitute a Division Bench or a larger Bench for the decision of the point involved in this case.

2. *Narayanaswami v. Emperor*, (1939) 26 A I R P O 47=180 I C 1=66 I A 66=18 Pat 234=(1939) 1 M L J 756=I L R (1939) Kar 123 (P C).

ORDER OF REFERENCE BY DIVISION BENCH

Din Mohammad and Ram Lall JJ. —

This case was referred to a Division Bench by order of the Hon'ble Chief Justice on the recommendation of a Single Judge. The question involved is one of considerable importance and difficulty and we consider that it should be dealt with by a much larger Bench and the law stated more authoritatively than we can do. The single Judge, who referred the case, apparently considered that the authority of a Full Bench decision reported in 10 Lah 283¹ was shaken by a decision of their Lordships of the Privy Council reported in A I R 1939 P C 47.² There are certain obiter dicta in the Privy Council case which support the view that as the result of the amendment of S. 162, Criminal P. C., in 1923, S. 27, Evidence Act, has been virtually repealed. If this be so, the legal position should, in our opinion, be reviewed by a much larger Bench and placed beyond doubt. This Privy Council decision was considered in two recent decisions of the Madras High Court reported in 50 M L W 318³ and 50 M L W 423.⁴ The same Bench decided this point in both the Madras cases and held that the question whether S. 162, Criminal P. C., has repealed S. 27, Evidence Act, so far as statements made to a police officer are concerned has not been decided by the Privy Council and they were of the opinion that the matter could still be decided independently of the views expressed by their Lordships in the case cited above. The Madras Court held that the Evidence Act was a special law which was not derogated from by the general rule enacted in S. 162, Criminal Procedure Code.

In the present case, it is contended that at the time Hakam, appellant, made a statement, which is alleged to have led to the discovery of the body of the deceased, the appellant was not in custody inasmuch as he was not formally arrested and therefore S. 27 did not apply and so could not be used. We are of the opinion that it is not necessary that a formal order of arrest should be made before S. 27, Evidence Act, comes into play and that for the purposes of that Section any restraint in the course of investigation is sufficient. The fact that

3. *In re Subbiah Tevar*, (1939) 26 A I R Mad 856=184 I C 593=I L R (1939) Mad 947=(1939) 2 M L J 455=41 Cr L J 41=50 M L W 318.

4. *In re Kapa Moranna*, (1939) 26 A I R Mad 840=50 M L W 423=(1939) 2 M L J 635.

a suspect is sent for and kept with the police till the investigation is sufficient restraint to bring S. 27 into operation. As the point however has been raised it will, in our opinion, be as well for a larger Bench to consider this matter also, namely what kind or class of custody is necessary before S. 27 comes into operation.

It has been argued by Rai Bahadur Mukand Lal Puri that, though S. 27, Evidence Act, does not come into play, the alleged statement of Hakam, appellant, is covered by S. 25, Evidence Act, since it was made in the immediate presence of the police and therefore was virtually made to the police. That may be so if S. 27 was not a kind of proviso to S. 25 and saved certain statements in stated circumstances. His contention however is that this statement cannot be used for any purpose because it was made in the course of an investigation and in spite of S. 27, Evidence Act, it was rendered inadmissible by S. 162, Criminal P. C. There was doubt at one time as to whether statements made by accused persons were covered by S. 162, but that doubt has now been laid at rest. The question however still remains whether statements directly leading to a recovery are not outside the scope of this rule. As the decision reported in 10 Lah 283¹ was given by seven Judges of this Court and as the authority of that decision may be called in question we direct that these papers be laid before the Hon'ble the Chief Justice with a recommendation that the whole case be sent for decision to a much larger Bench.

OPINION

Young C. J.—One criminal appeal and two revisions have been referred to this Full Bench in order that the effect of the observations of their Lordships of the Privy Council in (1939) 1 M L J 756² should be determined. Their Lordships decided that the words "by any person" in S. 162, Criminal P. C., included an accused person. This decision overruled the view held by the majority of the Indian High Courts on this point. Their Lordships observed further as follows :

The words of S. 162 are in their Lordships' view plainly wide enough to exclude any confession made to a police officer in course of investigation whether a discovery is made or not. They may, therefore, pro tanto repeal the provisions of the Section which would otherwise apply. If they do not, presumably it would be on the ground that S. 27, Evidence Act, is a "special law" within the meaning of S. 1 (2), Criminal P. C., and that S. 162 is not a specific provision to the contrary.

In the three cases referred to us the problem is what effect S. 162, Criminal P. C., in view of the above observations of their Lordships, has upon S. 27, Evidence Act. We have heard lengthy arguments by Mr. Mukand Lal Puri on behalf of Haku appellant and by the learned Advocate-General on behalf of the Crown. These arguments have touched upon a great many topics in one way or another connected with the question before us, but it appears to me that the only point for decision is : "Have the provisions of S. 27, Evidence Act, pro tanto been repealed by S. 162, Criminal P. C.?"

Their Lordships have made it perfectly clear that the words of S. 162 are wide enough to exclude any confession made to a police officer whether a discovery is made or not, unless S. 27, Evidence Act, is a special law within the meaning of S. 1 (2), Criminal P. C., and even in that event S. 27 would be pro tanto repealed if S. 162 is a "specific provision to the contrary." S. 162, Criminal P. C., reads as follows :

(1) No statement made by any person to a police officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made :

Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, the Court shall on the request of the accused refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner, provided by S. 145, Evidence Act, 1872.

(2) Nothing in this Section shall be deemed to apply to any statement falling within the provisions of S. 32, cl. (1), Evidence Act, 1872.

Section 27, Evidence Act, enacts as follows :

Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

Section 1 (2), Criminal P. C., is as follows :

... in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force ...

A "special law" is defined in S. 41, I. P. C., as a law applicable to a particular subject. This definition is adopted for the purposes

of the Criminal Procedure Code by virtue of S. 4 (2) of that Code. The history of S. 162, Criminal P. C., and S. 27, Evidence Act, is as follows : In 1861 the Code of Criminal Procedure contained Sections covering some of the present provisions of S. 162, Criminal P. C., and it also contained Ss. 148, 149 and 150 which dealt with statements to a police officer such as are now covered by Ss. 25 to 27, Evidence Act. From these provisions of the Code of 1861, it is clear that confessions to a police officer were not then barred if they led to a discovery. The question now before us could not have arisen under this Code. In the Code of 1872, the provisions of Ss. 148, 149 and 150, originally in the 1861 Act, which dealt with statements to a police officer, were removed from the Code and included in the Evidence Act. There was no conflict in this Code between the provisions equivalent to the present S. 162 and S. 27, Evidence Act, because in this Code oral proof of statements made to a police officer was admissible; only statements or confessions reduced to writing were barred. In the Code of 1882, S. 162 reads as follows:

No statement, other than a dying declaration, made by any person to a police officer in the course of an investigation under this Chapter shall, if reduced to writing be signed by the person making it, or shall be used as evidence against the accused.

By this provision it is to be noted that S. 32, Evidence Act, that is, the Section relating to dying declarations, was specifically exempted, and as the wording of the Section might have made it doubtful whether S. 27, Evidence Act, was affected or not the Section included the proviso :

Nothing in this Section shall be deemed to affect the provisions of S. 27, Evidence Act (1872).

In the Code of 1898, S. 162 dealt only with statements made to a police officer if reduced to writing. The Section barred such a written statement being used as evidence. Again in this Code, S. 27, Evidence Act, in so far as it dealt with oral statements, was not originally affected. It was unnecessary in the Code of 1898 therefore to enact any saving clause as regards S. 27. In 1923 an amendment was made to S. 162, as is seen from the present S. 162 referred to in full above. Statements whether oral or in writing made by any person to a police officer in the course of an investigation were stated not to be available for any purpose (save as was thereafter provided for in the Section itself) in any enquiry or trial in respect of any offence under investigation at the time when such

statement was made. It is clear therefore that, by the amendment, S. 27, Evidence Act, was affected, and there was in this Act no clause saving S. 27, Evidence Act, from the effect of S. 162. Further, S. 32, Evidence Act was expressly mentioned and S. 162 was made inapplicable to the Section of the Evidence Act. In addition, S. 145, Evidence Act, was exempted in so far as S. 162 permitted the accused to refer to the previous statement of a prosecution witness which had been reduced into writing for the purpose of contradicting such a witness.

The history therefore of S. 162, Criminal P. C., and S. 27, Evidence Act, establishes that the Legislature in 1923 apparently deliberately omitted to save S. 27 from the obvious effect of S. 162. It can hardly be contended, in view of the history of the Criminal Procedure Code, that the Legislature did not know that S. 162, Criminal P. C., and S. 27, Evidence Act, were not in direct conflict. It was argued by the learned Advocate-General however that the Legislature might not have realized the effect of S. 162 upon evidence which previously was admissible with regard to confessions which led to discoveries, or that by negligence the Legislature may have omitted a reference to S. 27, Evidence Act. The answer to these arguments however is contained in the observations of Lord O'Hagan in (1878) 3 A C 944.⁵ He says (at page 961) :

But even if the view of the eminent Judges of appeal should be correct as to the consequential repeal of the statutes to which they refer I do not conceive that the respondent ought therefore to succeed. The Legislature may have unconsciously done a thing deemed injurious. It may have acted with improvidence or without sufficient forethought ; but if so, it must be left to correct its own error, and we have no power to defeat its plain intention because of the result which it may or may not have contemplated ; and further (also at p. 961) his Lordship remarked :

As was observed by Grove J., in *Parsons v. Tinsling*,⁶ a very few words would have secured the continuing action of the earlier statutes; but they were not inserted, and their non-insertion derives double significance from the careful reference to the County Courts.

Equally, for the purpose of this discussion, a very few words would have secured the continuing action of the previous Codes, but they were not inserted, and their non-insertion derives double significance from

5. *Garnett v. Bradley*, (1878) 3 A C 944=48 L J Ex 186=39 L T 261=26 W R 698.

6. (1877) 2 C P D 119=46 L J C P 230=35 L T 851=25 W R 255.

the careful reference to Ss. 32 and 145, Evidence Act, in the amendment of S. 162 in 1923. Arguments have been addressed to us by the learned Advocate-General on the problem of when a subsequent statute repeals a previous one, but, in my opinion, these arguments have no force when the wordings of the subsequent statute itself are clear beyond any ambiguity. It is unnecessary to consider whether S. 27, Evidence Act, is a "special law" within the meaning of S. 1 (2), Criminal P. C., a point not free from difficulty—as, in my opinion, S. 162 is a "specific provision to the contrary" within the meaning of S. 1 (2) of the Code. The word 'specific' is defined in Murray's Oxford Dictionary as 'precise or exact in respect of fulfilment, conditions or terms; definite, explicit.' There could hardly be anything more definite or explicit than the terms of S. 162, Criminal P. C. The words

no statement made by any person to a police officer nor shall any such statement or any record thereof, whether in a police diary or otherwise or any part of such statement or record, be used for any purpose (save as hereinafter provided) are, in my opinion, 'specific', that is, definite and explicit. In addition when, as I have pointed out above, there are two exceptions included in the Section affecting the Evidence Act and no mention of S. 27 is made the matter is put beyond doubt.

In my opinion therefore S. 27, Evidence Act, is pro tanto repealed by S. 162, Criminal P. C., and evidence of information, whether it amounts to a confession or not, which relates to the fact discovered in consequence of such information must not now be considered admissible in evidence. It will be for the Legislature to consider the effect of this decision and to amend S. 162, if that is thought to be advisable. Having come to this conclusion the other points raised in this Court do not arise. They are: (1) When is an accused person said to be in custody? (2) If an accused person is not in police custody but makes a statement to another person in presence of the police is that statement admissible under S. 27, Evidence Act? and (3) If an accused is not in custody but makes a statement to a police officer which leads to a discovery of a fact, is that admissible under S. 27? But I may say that in my opinion the question whether an accused person is in custody or not is a question of fact and not of law. Equally, where an accused person makes a statement to another person in presence of the police, whether that statement is made

to the other person or to the police is also a question of fact, and not of law. The cases will be returned to the single Judges originally seised of them for decision according to law in the light of this opinion.

Tek Chand J.—I agree in the conclusion reached by the learned Chief Justice on the main question involved in these cases. I consider that S. 27, Evidence Act, is a "special law" but, I think, that S. 162, Criminal P. C., as amended in 1923, contains a very clear and "specific" provision to the contrary, and, therefore, as laid down in S. 1 (2) of the Code, it pro tanto repeals S. 27. While I am unable to accept the contention of the learned Advocate-General that the whole of the Evidence Act is a "special law" as defined in S. 4 (2), Criminal P. C., read with S. 41, Penal Code, I have no doubt that S. 27 contains the "law on a particular subject" and is, therefore, a "special law" as so defined. The particular subject is the admissibility of information, received from a person accused of any offence in the custody of a police officer, whether it amounts to a confession or not, when a fact is discovered to as having been discovered in consequence of such information.

The learned counsel for the appellant argued that S. 27 is a "general law" inasmuch as it "applies to the whole community, being unlimited both in its area and as regards the individuals in its effect," and he referred to the definition of 'general' and "special" laws as given in Salmond's Jurisprudence (9th Edn.), p. 111, Craie's Statute Law and other textbooks. The quotation above mentioned is from the judgment of Lord Justice Bowen in (1893) 2 Q B 454⁷ at p. 462, where "general" law is distinguished from "local" or "personal" law. Salmond divides the whole body of law—the entire corpus juris—into two parts: (1) "General," consisting of the ordinary law of the land, and (2) "special," which, according to his division, includes International law, Martial law, Foreign law, Conventional law, etc. It is obvious that in the Code of Criminal Procedure the expression "special law" is not used in contradistinction to "general law" in this sense. Here, it has been given a specific meaning, namely that a "special" law is one which deals with a particular subject.

Before 1872, when the Evidence Act was enacted, the law relating to this particular

7. R. v. London County Council, (1893) 2 Q B 454=63 L J Q B 4=4 R 531=69 L T 580=42 W R 1=58 J P 21.

subject was contained in Ss. 147 to 150, Criminal P. C., 25 of 1861. In that year the Code of 1861 was repealed by Act 10 of 1872. The provisions as to the admissibility of confessional statements made by an accused person were taken out of the Code and were incorporated in the Evidence Act 1 of 1872, as Ss. 25 to 27. There was nothing in this Code, or the Codes by which it was replaced in 1882 and 1898, which in any way came in conflict with these Sections and, therefore, the question now before us did not arise. In 1923, however, S. 162 of the Code was materially altered. The amended Section laid down in emphatic terms that no statement made by any person to a police officer shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any enquiry or trial in respect of any offence under investigation at the time when such statement was made.

Then follow certain provisos which exclude from the operation of S. 162 certain other provisions of the Evidence Act, but S. 27 is not one of them. This Section, as worded, is very comprehensive, and soon after its enactment the question arose as to whether it had repealed *pro tanto* S. 27, Evidence Act. Most of the High Courts answered this question in the negative, holding that, though the words "any person" were very wide, they could not have been intended by the Legislature to include "an accused person," for otherwise S. 162 "would virtually repeal" S. 27, Evidence Act—a result which it was thought "could not have been intended by the Legislature." It was, therefore, ruled that the Section applied only to statements of "persons examined as witnesses by the police in the course of investigation and not to the statements of an accused person" (7 Lah 84,⁸ 5 Pat 63,⁹ 54 Cal 237¹⁰ and 4 Rang 72.¹¹) On this interpretation, it was held that the two Sections stood together. This view, how-

ever, can no longer be sustained after the recent pronouncement of the Judicial Committee of the Privy Council in 18 Pat 234.² In that case, their Lordships held that in S. 162 the words themselves declare "the intention of the Legislature" and that there was no reason why the plain words used in the Section be not given their ordinary meaning. They therefore held that "any such statement" made to a police officer in the course of investigation, as used in S. 162, included the statement by "a person ultimately accused."

Their Lordships did not express any final opinion on the question as to whether this Section also affected S. 27, Evidence Act, as this question did not arise in the case before them. But it seems to me that in accordance with the rule of interpretation laid down by their Lordships there is no reason why the words "no such statement or any record thereof shall be used for any purpose whatever (save as hereinafter provided)" be not given their ordinary meaning, and why an exception should be engrafted on the Section in regard to confessional statements of the type described in S. 27, Evidence Act, when the Legislature has not said so. In view of the very comprehensive phraseology of Section 162, there is a clear and marked contrariety between the two enactments, and this Section being the latest expression of the will of the Legislature must prevail. *Leges posteriores priores contraries abrogant.* (Later laws abrogate the prior contrary ones.) It is conceded that this is the general rule, but it is pointed out that the case falls within the well-recognized exception to the rule that *generalia specialibus non derogant*, (a "later general law cannot be taken by implication to repeal an earlier special law"). It is no doubt true that it is one of the canons of the interpretation of statutes that repeal by implication of an earlier enactment is not to be favoured, especially when the earlier enactment dealt with a particular subject. But if the later statute is so worded that the repeal flows from it as a necessary consequence, it is the duty of the Courts to give effect to it. A well known instance of the repeal by implication of an earlier "special law" by a later general law" will be found in (1893) L R P 33.¹² As observed by Craies in his *Statute Law* (Edn. 3, p. 307):

8. Rannun v. Emperor, (1926) 13 A I R Lah 88=94 I C 901=7 Lah 84=27 Cr L J 709=27 P L R 583.

9. Jagwa Dhanuk v. Emperor, (1926) 13 A I R Pat 232=93 I C 884=5 Pat 63=27 Cr L J 484=7 P L T 396.

10. Azimaddy v. Emperor, (1927) 14 A I R Cal 17=99 I C 227=28 Cr L J 99=54 Cal 237=44 C L J 253.

11. Emperor v. Nga Tha Dim, (1926) 13 A I R Rang 116=96 I C 145=27 Cr L J 881=4 Rang 72 (F B).

12. The Dart, (1893) L R P 33=62 L J Adm 32=1 R 572=69 L T 251=41 W R 153=7 Asp M C 353.

Where the terms of a later enactment taken in their primary meaning are wide enough to abrogate a prior enactment, they will be read as repealing it, unless it is fairly open to hold on the words of the later Act, that an intention is manifested to cut down or restrict the primary meaning.

In this case, no such intention can be gathered from the phraseology of S. 162. Indeed, the fact that the Legislature has expressly excluded certain other Sections of the Evidence Act from the bar created by S. 162, but has omitted to so exclude S. 27 indicates that the Legislature had no such intention. I am unable to accept the contention that this is a case, to which the general rule that a later law abrogates an earlier contrary law does not apply.

I am not unmindful of the fact that the contrary has been held by the Allahabad High Court in 55 All 463,¹³ and more recently by the High Courts of Madras and Patna in I L R (1939) Mad 947,³ A I R 1939 Mad 840⁴ and 18 Pat 450.¹⁴ But with the greatest respect, I venture to think that this conclusion is not justified by the plain and all-embracing wording of S. 162. Nor am I impressed by the *argumentum ab inconvenienti* that this interpretation will exclude an important piece of evidence which has been consistently admitted in criminal trials in this country for a very long time and that this would lead to serious consequences. But as observed by their Lordships in 18 Pat 234² (at p. 248) if the words of the Statute are clear, it is inadmissible to consider the advantages of applying the plain meaning whether in the interests of the prosecution or the accused.

The function of the Court is to interpret the law and not to make it (*jus dicere at non jus dare*). If the application as it stands leads to inconvenience the remedy lies with the Legislature. My answer to the question referred to the Full Bench is that S. 162 contains a very clear and "specific provision to the contrary" and therefore S. 27, Evidence Act, must be held to have been pro tanto repealed.

Dalip Singh J.—Their Lordships of the Privy Council in the ruling reported in A I R 1939 P C 47² laid down that the provisions of S. 162, Criminal P. C., applied to statements by accused persons as well as to statements made to the police by persons other than accused persons. This deci-

sion raises a question how far S. 27, Evidence Act, is affected by the terms of S. 162, Criminal P. C. Upon this point their Lordships held as follows :

The words of S. 162 are in their Lordships' view, plainly wide enough to exclude any confession made to a police officer in course of investigation whether a discovery is made or not. They may therefore pro tanto repeal the provisions of the Section which would otherwise apply. If they do not, presumably, it would be on the ground that S. 27, Evidence Act, is a "special law" within the meaning of S. 1 (2), Criminal P. C., and that S. 162 is not a specific provision to the contrary. Their Lordships express no opinion on this topic for whatever be the right view it is necessary to give to S. 162 the full meaning indicated.

Their Lordships therefore left the question open and pointed out that the only way by which S. 27, Evidence Act, could be saved was on the ground that it was a "special law" within the meaning of S. 1 (2), Criminal P. C., and further if it could be held that S. 162, Criminal P. C., was not a specific provision to the contrary. Now before dealing with this point it is necessary to clear another matter which also arises by reason of a sentence in their Lordships' judgment. That sentence runs as follows :

Section 27 seems to be intended to be a proviso to S. 26 which includes any statement made by a person whilst in custody of the police and appears to apply to such statements to whomsoever made, e. g., to a fellow prisoner, a doctor or a visitor. Such statements are not covered by S. 162.

If by this sentence their Lordships meant to lay down definitely that S. 27 was only a proviso to S. 26 and was not also a proviso to S. 25, Evidence Act, then the further point raised by their Lordships themselves, namely, that S. 27, Evidence Act, might be held to be a "special law" within the meaning of S. 1 (2), Criminal P. C., and therefore not pro tanto repealed by S. 162 would not arise and then there would be no conflict between the two Sections. S. 27 would then apply to statements leading to discoveries which were made to persons other than police officers and as S. 162, Criminal P. C., only deals with statements made to police officers there would be no question of S. 162 not over-riding the provisions of S. 27. I therefore think that their Lordships did not mean to lay down that S. 27 was only a proviso to S. 26. Ever since the decision in 6 All 509¹⁵ where Mahmood J. dissented from the judgment of the majority and held that S. 27 was only a proviso to S. 26 all the Courts in India without exception have fol-

13. Emperor v. Faujdar, (1938) 20 A I R All 440 = 1938 Or O 746 = 144 I O 1021 = 55 All 463 = 84 Or L J 875 = 1938 A L J 1518.

14. Emperor v. Mayadhar Pothal, (1939) 26 A I R Pat 577 = 181 I O 1001 = 40 Or L J 625 = 18 Pat 450 = 20 P L T 420.

15. Queen-Empress v. Babu Lal, (1884) 6 All 509 (F B).

lowed the majority decision, so far as I am aware. If their Lordships had meant to overrule all these decisions they would have used more specific language and would have stated, it seems to me, their considered decision that these rulings were incorrect and the decision of Mahmood J. in 6 All 509¹⁵ was correct.

I, therefore, proceed to consider the question as to the over-riding of S. 27 by S. 162 as if the law was that S. 27 was a proviso both to S. 25 and to S. 26, Evidence Act. The first question that now arises is whether S. 27, Evidence Act, can be held to be a "special law." "Special law" is defined in S. 41, I. P. C., as a law applicable to a particular subject. This definition is to apply to the Criminal Procedure Code. It seems to me that particular subject cannot be defined in any general words. It is always a question whether an Act or a particular Section of the Act is a "special law" dealing with a particular subject or not by comparison with the law with which there is an apparent conflict. It may be that a particular Act may be considered to be general with reference to another Act and be considered to be a "special law" with reference to some other Act. Thus, in other words, the question whether a particular Act or a particular Section is or is not a "special law" is entirely a relative matter and could only be considered in comparison with the particular Act or Section with which it has any apparent conflict. Viewed from this point the Evidence Act may be taken to be a "special law" dealing with evidence. On the other hand, there are provisions in the Criminal Procedure Code which deal with evidence in criminal trials and such provisions would, it seems to me, naturally be 'special laws' as compared with the Evidence Act in general which deals with evidence in all classes of suits whether civil or criminal. Again, there may be particular Sections in the Evidence Act which are special provisions with reference to criminal trials and those laws might be "special laws" dealing with criminal trials and therefore notwithstanding provisions in the Criminal Procedure Code might be "special laws" on the subject of evidence in certain criminal trials. It is for this reason that their Lordships pointed out that the question was not whether the Evidence Act was a "special law" but whether S. 27 of that Act was a "special law." Now S. 27, Evidence Act, deals with statements made by persons in police custody to other persons, whether

police officers or not, which lead to discoveries. It is provided that such statements which lead to discoveries are admissible in evidence though statements made by persons in police custody are not admissible in evidence against them. S. 162 deals with statements made by persons whether in police custody or not which are made to police officers, and these statements are all excluded except for certain savings made in the Section itself. The Section definitely states that all statements made to police officers shall be excluded except as provided in that Section.

The question, therefore, now arises which, in the circumstances, is to be considered the "special law." On the one hand, S. 27 may be said to be a "special law" providing that statements made to police officers which lead to discoveries are to be admitted notwithstanding the general provisions that statements to police officers are to be excluded from evidence. On the other hand, it is possible to hold that S. 27 is the general rule providing that statements made by persons in custody to anyone whatsoever which lead to discoveries are admissible in evidence whereas S. 162 is a special provision which lays down that statements made to police officers whether they lead to discoveries or not are inadmissible in evidence. It is clear that the subject-matter of the two Sections is not entirely one and the same and, therefore, I do not think it is possible to hold that S. 162 is a specific provision to the contrary. The question must turn on the decision as to whether S. 27 is to be regarded as the "special law" dealing with statements leading to discoveries or whether S. 162 is to be regarded as the "special law" excluding statements made to police officers. I find considerable difficulty in arriving at either conclusion and in a case where the reasons are so evenly balanced as they appear to me to be to hold either one way or the other. It would seem to me that the correct way of looking at the matter would be to hold that in the absence of direct repeal the statute could not be held to have been indirectly or by implication repealed in a subsequent statute not dealing specifically with the subject-matter of the previous statute. On the whole, therefore, I would be inclined to hold that S. 162, Criminal P. C. does not override the provisions of S. 27, Evidence Act, and that that Section is unaffected by S. 162. I am fortified in this conclusion by the fact that after the deci-

sion by their Lordships of the Privy Council the High Courts of Madras and Patna have still adhered to the view that S. 27, Evidence Act, is unaffected by the provisions of S. 162, Criminal P. C.

Bhide J. — The main point arising for decision in this reference is, whether the provisions of S. 162, Criminal P. C., (1898), (as amended in 1923) repeal by implication, either wholly or in part, those of S. 27, Evidence Act.

The reference has been rendered necessary owing to a recent pronouncement by their Lordships of the Privy Council on the proper construction of S. 162, Criminal P. C., in 18 Pat 234.² It has been held by their Lordships in that case that the Section covers statements to the police during the course of investigation not only by witnesses but also by persons who are accused of the offence to which the investigation relates. This interpretation is contrary to and overrules the view taken by most of the High Courts in India (including this Court), viz. that S. 162 has reference merely to statements made by witnesses and not to those made by accused persons: see 5 Pat 63,⁹ 4 Rang 72¹¹ 54 Cal 237¹⁰ 55 All 463,¹³ and 7 Lah 84.⁸ One of the arguments which had influenced these High Courts in taking the latter view was that, if S. 162, Criminal P. C., were taken to apply to statements to the police made by accused persons during the course of an investigation, S. 27, Evidence Act, would, according to their view, have been virtually repealed, and it was, therefore, felt that this could not have been the intention of the Legislature. Their Lordships of the Privy Council, in taking the contrary view, have emphasized the principle that when the language of a statute is plain, Courts should not be influenced by speculations as to the intention of the Legislature. The Madras High Court was, perhaps, the only High Court in India which had definitely held in a Full Bench decision before the recent pronouncement of their Lordships that S. 162, Criminal P. C., applied to statements made by accused persons as well as to those by witnesses: see 55 Mad 903.¹⁶ The Madras High Court has also considered the question whether this interpretation involves any repeal by implication of the provisions of S. 27, Evidence Act, and had expressed the opinion that S. 27 was not repealed by

implication as it was a 'special law' and was therefore not affected owing to the principle embodied in the maxim *generalia specialibus non-derogant*, i. e. general provisions do not derogate from those of a special character. Their Lordships of the Privy Council have approved of the interpretation placed by the Madras High Court on S. 162, Criminal P. C., in the Full Bench decision referred to above, but have expressed no definite opinion on the question whether this interpretation would involve repeal of the provisions of S. 27, Evidence Act. They have however briefly noticed certain aspects of the question and have pointed out that, in certain circumstances at any rate, the two Sections can stand together. There is therefore no question of any total repeal of S. 27 involved. The only question that arises is that of a pro tanto repeal of S. 27 in so far as the provisions of that Section come into conflict with those of S. 162, Criminal P. C., owing to the interpretation now placed on the Section by their Lordships of the Privy Council. The concluding remarks of their Lordships on this question are as follows :

Whether to give S. 162 the plain meaning of the words is to leave the statement still inadmissible even though a discovery of fact is made such as is contemplated by S. 27, it does not seem necessary to decide. In the present case, the declarant was not in the custody of the police, and no alleged discovery was made in consequence of his statement. The words of S. 162 are in their Lordships' view plainly wide enough to exclude any confession made to a police officer in the course of investigation whether a discovery is made or not. They may therefore pro tanto repeal the provisions of the Section which would otherwise apply. If they do not, presumably it would be on the ground that S. 27, Evidence Act, is a 'special law' within the meaning of S. 1 (2), Criminal P. C., and that S. 162 is not a specific provision to the contrary. Their Lordships express no opinion on this topic; for whatever be the right view it is necessary to give to S. 162 the full meaning indicated.

There can be no doubt that the question of pro tanto repeal by implication of S. 27, which has been left undecided by their Lordships is of vital importance for the purposes of criminal trials, as evidence relating to discoveries of facts made on information given by accused persons to police officers are frequently the mainstay of the prosecution case. The question having been raised in three cases recently, the matter has been referred to a Full Bench so as to obtain an authoritative decision on the point. According to the view of their Lordships of the Privy Council as expressed in 18 Pat 234,² the decision of the question which arises in this reference would depend

16. Syamo Mahapatro In re, (1932) 19 A I R Mad 891 = 1932 Or O 855 = 187 I C 9 = 38 Or L J 418 = 55 Mad 903 = 62 M L J 742 (F B).

upon the decision of two points, viz. (1) Whether S. 27, Evidence Act, is a 'special law'; and (2) Whether S. 162, Criminal P. C., is a 'specific provision' contrary to S. 27 within the meaning of S. 1 (2), Criminal P. C. The first point for decision therefore is whether S. 27, Evidence Act, can be considered to be a 'special law' within the meaning of sub-s. 2 of S. 1, Criminal P. C. That sub-section deals with the extent of the Code and its relevant provision is as follows :

It extends to the whole of British India; but in the absence of any specific provision to the contrary nothing herein shall affect any special or local law now in force, or any special jurisdiction or power conferred or any special form of procedure prescribed by any other law for the time being in force.

It is not suggested that the Evidence Act or S. 27 can fall under any category in the above clause except that of 'special law'. The first question therefore is what is a 'special law'? The term 'special law' has been defined in S. 41, I. P. C. as 'a law applicable to a particular subject' and this definition has been also adopted for the purposes of the Code of Criminal Procedure by sub-s. 2 of S. 4 of that Code. The question therefore is whether the Evidence Act or S. 27 can be held to be 'a law applicable to a particular subject' within the meaning of the above definition. There seems to be paucity of authority on the subject; but in 55 All 463,¹³ a Division Bench ruling of the Allahabad High Court, it was held that the Evidence Act was a 'special law' within this definition. The Allahabad ruling deals with the same question as is now raised before us and in view of the language used in the definition I do not see why this interpretation should not be adopted. The Evidence Act deals with the particular subject of evidence and in this aspect seems clearly to fall within the definition. It might be said that every enactment can be said to deal as a rule with some particular subject. But even if this be so, I do not see any serious difficulty in accepting the above construction. In saving the application of 'special law', the Legislature probably did intend that when there was an enactment dealing specially with any particular subject, which was also included in some of the provisions of the Code, the provisions of the Code should not affect the provisions of the special enactment, unless there was a specific provision to the contrary in the Code itself. This provision seems to me to have been made in order to guard against

any unintentional repeal of the provisions of the special enactment by the provisions of the Code.

The Criminal Procedure Code deals generally with the subject of the procedure applicable to the investigation, inquiry and trial of criminal offences. Now, the Evidence Act also deals with procedure and not substantive law and in so far as it deals with the law of evidence applicable to criminal cases, it might be said to be a part of criminal procedure. It appears that some of the provisions of the Evidence Act, including S. 27, which relate to criminal cases, were actually included in the Code of Criminal Procedure at first and were separated therefrom and included in the Evidence Act when that Act was enacted in 1872. It was presumably considered appropriate that when a special Act dealing with the subject of evidence was being enacted, all rules of evidence should be included therein. There are now only a few rules of evidence left in the Criminal Procedure Code and they seem to have been mostly included in that Code, on account of their being intimately connected with other matters of procedure dealt with in the Code. At the same time they are strictly speaking a part of the law of evidence. Here is therefore precisely a type of case which the Legislature may well have had in mind in saving the provisions of "Special laws." The Evidence Act had been enacted in 1872 and was in force when the Criminal Procedure Code of 1898 was enacted. The Legislature therefore probably intended that the provisions of a Special Act of this kind dealing with the "particular subject" of evidence should not be affected by the Code, unless of course there was any "specific provision" to the contrary.

It was argued that the Evidence Act deals with the subject of evidence in general and hence it is a "general law." But we have to interpret the expression "Special law" according to the wording of the definition as given in S. 41 and not according to the ordinary meaning of the terms "special" and "general." Nor would it serve any useful purpose to discuss the meaning of the term "special law" as used in English law or English rulings based thereon, because we must interpret the term as defined in S. 41. According to that definition any law which is applicable to a particular subject is a "special law" and in this sense the Evidence Act seems to be clearly a "special law." It was next urged that the expres-

sion "special law" as defined in S. 41, I. P. C., only means enactments such as the Excise Act, the Forest Act, etc. which create fresh offences other than those made punishable under the Penal Code. In support of this argument a Single Bench decision of the Lower Burma Chief Court reported in 7 L B R 63¹⁷ was cited. The question which arose for decision in that case was whether the "Whipping Act" was a "special law" within the above definition and it was held that it was not, as the "Whipping Act" does not create any fresh offences, but only provides an additional penalty for offences already punishable under the Penal Code.

The only reason given by the learned Judge who decided the above case in support of his view apparently is that if the Whipping Act were held to be a "Special law" abetment of offences mentioned in S. 3 of that Act would be punishable with whipping whereas a comparison of the wording of the provisions of that Section with that of Ss. 4 and 5 of the Act showed that this could scarcely be the intention of the Legislature. With all respect I must say that the argument seems to be hardly convincing or adequate to support the interpretation placed on the definition of "Special law." S. 109, I. P. C., does place "abetment" on the same footing as the offence itself for the purpose of punishment in cases falling within its scope, and if "abetment" of the offences specified in S. 3 was also held punishable with whipping like the offence itself under that Section, that would not, I think, be inconsistent, at any rate, with the intention of S. 109. Ss. 4 and 5, Whipping Act, cover 'attempts' as well as "abetments" while S. 3 would apply to "abetment" only if the Whipping Act were held to be a "Special law." Moreover, the inconsistency pointed out might as well be due to the Legislature having overlooked the effect of S. 109, I. P. C., on the provisions of S. 3 of the Act. In any case, can this fact alone be considered to be an adequate ground for the conclusion that the expression "Special law" as defined in S. 40 must be taken to mean only enactments which create fresh offences not made punishable under the Penal Code? I do not think any such conclusion necessarily follows.

It is true that the laws with which the

Penal Code would come into conflict would ordinarily be laws dealing with punishment of offences; but it is possible to conceive of statutes dealing with other matters as well which might as well come into conflict with the provisions of that Code, e. g., those relating to the applicability of the Code to certain classes of persons or certain localities and so forth. The framers of the Code may therefore have thought it advisable to save the operation of all statutes dealing with particular subjects or particular localities by defining "Special laws" and "Local laws" in general terms as they did in Ss. 41 and 42, I. P. C. According to the principle emphasized by their Lordships of the Privy Council in their recent decision in 18 Pat 234² in construing a statute the primary test for interpretation must be the language used, and when the language is plain, the Courts should not indulge in any speculations as to the intention of the Legislature. In the present instance the language of S. 41 is plain enough. To ignore the general language used in the definition of "Special law" as given in S. 41 and to put a restricted meaning on it owing to extraneous considerations would, I think, be open precisely to the same objection as the construction placed by most of the High Courts in India on the words "any person" as used in S. 162, Criminal P. C., which was disapproved by their Lordships in the above ruling. If the intention of the Legislature was to confine the expression "special law" to laws creating fresh offences other than those made punishable by the Penal Code, the Legislature could easily have framed the definition accordingly. I think, it may be safely presumed that it would not have, in that case, used the general language to be found in the definition in S. 41.

When the Criminal Procedure Code was enacted the definition of "special law" was adopted from the Penal Code. This is also significant. The laws with which the Code of Criminal Procedure might ordinarily be expected to come into conflict would be laws dealing with procedure and not laws creating fresh offences. If the Legislature had considered that the definition of "special law" in the Penal Code applied only to laws creating fresh offences, I do not think it likely that the framers of the Criminal Procedure Code would have adopted that definition for the purpose of that Code. But as the definition was in general terms it was apparently considered suitable for the Code of Criminal Procedure as well.

17. *Emperor v. Po Han*, (1914) 1 A I R L B 145 = 22 I O 147 = 15 Cr L J 8 = 7 L B R 63.

Section 5, Criminal P. C., also deserves attention in this connexion. Sub-s. (1) of that Section provides that offences under the Penal Code shall be "investigated, inquired into, tried and dealt with" according to the provisions of the Code. Sub-s. (2) of that Section makes a similar provision with respect to offences under any other law. Thus, provision for the procedure governing enactments which deal with offences other than those dealt with in the Code is separately made by this sub-section. It seems therefore unlikely that this class of enactments alone was intended to be included under the term "Special law" as used in sub-s. (2) of S. 1 of the Code.

In 31 Cal 1¹⁸ at p. 6 a Division Bench of the Calcutta High Court held that the "Coroners Act" of 1871 was a Special Act within the meaning of sub-s. (2) of S. 1, Criminal P. C., and the Act was not affected by the Code. The "Coroners Act" does not create any fresh offences but merely deals with the procedure in certain cases. The view of the Calcutta High Court is thus opposed to the view of the Single Judge of the Lower Burma Chief Court referred to above. A similar view appears to have been taken by the Bombay High Court as well in 16 Bom 159.¹⁹ The view of the Calcutta and Bombay High Courts referred to above is obviously in accordance with the plain language of S. 1 (2), Criminal P. C., and this, as pointed out above, must be the primary test for its interpretation. It seems to me in consonance with the language of the definition of 'special law' as well as with the object of S. 1 (2) of the Code to hold that the term "special law" includes any enactment dealing with a particular subject. I am therefore of opinion that the Evidence Act, inasmuch as it deals with the particular subject of evidence is a "special law" within the definition of that term. If the Evidence Act, is a "special law," every provision of it must also be considered to be a part of the special law and in this sense S. 27 of that Act would also be a "special law."

The next point for consideration is whether S. 162, Criminal P. C., is a 'specific provision' contrary to S. 27, Evidence Act. There is no doubt that on the interpretation placed on S. 162, Criminal P. C., by their Lordships of the Privy Council, the Section

does come into conflict with S. 27, Evidence Act, in so far as it is held to be applicable to statements by accused persons. For instance, when 'information' is given by an accused person, in police custody to a police officer, during the course of an investigation and that information leads to a 'discovery' within the meaning of S. 27, the information would be admissible under that Section. But inasmuch as the 'information' consists of statements made to a police officer during the course of an investigation, it would seem to be excluded by S. 162. S. 162 is thus to this extent a provision which is contrary to S. 27. But is it a "specific" provision to the contrary? I am inclined to think it is not. I take it that the Legislature intended to make a clear distinction between a mere 'provision to the contrary' and a 'specific provision to the contrary' and the word 'specific' has been advisedly used. A 'provision to the contrary' would mean any provision of a general character which comes into conflict with another provision. A 'specific provision to the contrary' would, on the other hand, appear to mean a provision relating to the particular subject under consideration. The term 'specific' is often used in this sense in legal phraseology. 'Specific relief,' for instance, means relief directed against the particular wrong complained of. 'Specific performance' of a contract means performance of the very terms of the contract and so forth. I would take the word 'specific' in a similar sense in construing the expression 'specific provision.' According to the dictionary also, the word specific means 'definite' or 'distinctly formulated.' But the contrary cannot, I think, be said to be distinctly formulated unless the provision shows that it was intended to apply to the subject-matter of the provision to which it appears to be contrary.

I think there is also a distinction between a 'specific provision to the contrary' and a provision which provides the contrary by necessary implication. In this connexion it is instructive to consider the language used by the Legislature in Rr. 3 and 5 of O. 8, Civil P. C., with regard to 'specific denial' in pleadings. R. 3 provides that it shall not be sufficient for the defendant to deny generally the grounds alleged by the plaintiff, but he must deal specifically with each allegation of fact. R. 5 provides further that every allegation of fact in the plaint, 'if not denied specifically or by necessary implication' shall be taken to be admitted. It will appear from the wording of this rule that

18. *Emperor v. Jogeshwar Passi*, (1904) 31 Cal 1 = 7 C W N 889.

19. *Queen-Empress v. Mahomed Rajuddin*, (1892) 16 Bom 159.

the Legislature drew a distinction between a 'specific denial' and 'a denial by necessary implication.' 'Specific denial' of a fact would thus seem to mean a denial with reference to the particular fact. Similarly, a specific provision to the contrary would mean a provision which lays down the contrary with reference to the particular subject under consideration.

The use of the word 'specific' in a saving clause like that contained in S. 1 (2), Criminal P. C., seems exceptional. The usual phraseology adopted in cases when contradiction by mere implication is intended to be excluded is 'express' provision to the contrary (see for example the wording of Ss. 193 and 353 as compared with that of S. 369, Criminal P. C.). The term 'express' means 'what is not left to mere implication' (see Wharton's Law Lexicon). I am inclined to think that the word 'specific' is even stronger. As already pointed out S. 1 (2), Criminal P. C., seems to be intended as a safeguard against any unintentional repeal by mere implication of the provisions of a special enactment with which its provisions might come into conflict. It is noteworthy in this connexion that an exactly similar provision is to be found in S. 4 (1), Civil P. C., also. The draftsman's task is often a difficult one and it happens at times that language which is intended to be used in a particular sense is susceptible of other interpretations, which were never contemplated. 'Nothing,' it has been said, 'is so difficult as to construct an Act of Parliament properly and nothing so easy as to pull it to pieces.' The Legislature therefore seems to have thought it advisable to introduce a precautionary provision of this kind in general enactments like the Civil and Criminal Procedure Codes in order to make it clear that provisions of a special enactment with respect to any particular subject were not to be taken as affected, unless there was a 'specific provision' to the contrary. If there is a 'specific' provision to the contrary in the above sense, that would be a clear indication of the attention of the Legislature having been directed to the particular subject and of its intention to change the law on that subject. Let us now consider what is the subject-matter of S. 27, Evidence Act, and whether S. 162, Criminal P. C., is a 'specific provision' contrary to it in the above sense. S. 27 is a provision of a very special character. It runs as follows:

Provided that when any fact is deposed to as discovered in consequence of information re-

ceived from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

The Section begins with the words 'provided that.' At first there were no such words at the commencement of the Section in the corresponding S. 150, as it stood in the Criminal Procedure Code of the year 1861. But these words were introduced in the Section by the Amending Act 8 of 1869. The question naturally arose thereafter as to the Section or Sections to which this Section was to be considered a proviso and the matter not being free from doubt, the question was referred to a Full Bench of the Allahabad High Court in the year 1882: see 6 All 509.¹⁵ It was held by the Full Bench that S. 27 was a proviso not only to the preceding S. 26 but also to S. 25, Evidence Act, and that it therefore formed an exception to S. 25 as well and thus made admissible in evidence confessional statements made to a police officer, when such statements led to a 'discovery.' Mahmood J. on the other hand held that S. 27 was a proviso to S. 26 only, and confessions to police officers were wholly excluded by S. 25 whether they led to discoveries or not.

In their recent decision in 18 Pat 234² their Lordships of the Privy Council have observed in the course of their remarks on the effect of the provisions of S. 162 on the provisions of Ss. 25 to 27, Evidence Act, that S. 27 "appears to be a proviso to S. 26." This remark is obiter, and cannot perhaps be taken to be any definite expression of their Lordships' opinion on the point, but if S. 27 is taken to be a proviso to S. 26 only, no conflict would seem to arise at all between S. 27 and S. 162 and this was conceded by the learned Advocate-General when questioned on the point. For, if S. 27 is a proviso to S. 26 only, the position would seem to be as follows: S. 26 appears to apply to statements made to a person other than a police officer. If, therefore, S. 27 is taken to be a proviso to S. 26 only, S. 27 also will have to be taken to apply only to information given to some person other than a police officer. S. 162, Criminal P. C., on the other hand applies to statements to police officers only. Therefore there will be no conflict between the two Sections. It is true that S. 26 does not say to whom the confession is made; but S. 25 entirely rules out confessions to police officers, and in the circumstances, it does not seem likely that confessions to

police officers were also intended to be included within the scope of S. 26. So far as I can find S. 26 has always been taken to apply to confessions made to some person other than a police officer (*vide* commentary on S. 26 in the Indian Evidence Act by Ameer Ali and Woodroffe). This was apparently also the view of the Full Bench of the Allahabad High Court in 6 All 509.¹⁵ For, if S. 26 covered confessions to police officers as well, the reference to a Full Bench would hardly have been necessary as in that case S. 27 would have covered confessions to police officers, even if it were a proviso to S. 26 only.

However the view now generally accepted in India is that S. 27 is not only a proviso to S. 26, but to the other preceding Sections as well, which deal with confessions: *see e. g.* 31 All 592²⁰ at page 598, 45 Cal 557²¹ at page 566 and 9 Lah 671.²² It must be remembered that S. 27 is an independent Section. The argument that S. 27 is a proviso to S. 26 only, has a certain amount of plausibility as S. 26 immediately precedes S. 27 and the wording of the two Sections has a close resemblance; but the above decisions will show that there are strong grounds to support the contrary view. If S. 27 is not held to be a proviso to S. 26 only, the only other logical position would, I think, be to take it to be a proviso to every other Section with which it comes into conflict. In other words, the words 'provided that' which are used at the commencement of the Section are really equivalent to 'notwithstanding any other provisions to the contrary.' The use of the words 'provided that' at the beginning of the Section shows that the Legislature was anxious to make it clear beyond any doubt that 'information' leading to discovery falling within the Section shall always be held to be admissible in spite of any other provisions in the Act which might otherwise exclude it.

Section 27, in so far as it permits 'information' relating to a discovery being admitted in evidence even when it amounts to a confession is a well known rule of evidence taken from English law (*vide* Taylor's Treatise on the Law of Evidence, Edn. 12, para. 902) and is founded on the broad

ground that although the genuineness of a confession made to a police officer is usually open to doubt owing to likelihood of coercion or torture, the suspicion is removed, when the information leads to some 'discovery' of a positive relevant fact, which serves as a guarantee of the truth of the information. The provisions of S. 27 thus form an important exception to the rule which excludes confessions by accused persons to police officers. S. 27 stands in fact in a class by itself as it is apparently the only provision in the Act, which deals with the subject of the admissibility in evidence of information given by an accused person, when such information leads to a 'discovery.' Every Section of the Act has the effect of a substantive enactment (*cf.* S. 8, Interpretation Act 1889-52-53 Vic. 63). In this aspect also S. 27 by itself may, I think, be looked upon as a 'special law,' in so far as it deals with the above particular subject.

Section 162, Criminal P. C., is, on the other hand, merely directed in a general way against the use of statements made to the police during the course of an investigation. Previous statements of a person are, as a rule, used in evidence either to corroborate or contradict the statements of the same person in Court and thus test the truth of the statements in Court. The general tenor of the provisions of S. 162 shows that it is directed against such use at the trial of statements made to the police during the course of investigations. The prohibition contained in this rule is presumably based on the ground that statements made to the police are apt to be made under coercion or pressure. It was probably felt that such statements being always open to suspicion would have little evidential value and it was therefore laid down in S. 162 that such statements should not be used for any purpose except as provided in that Section. It is however important to note that the Section deals merely with the use of these statements as such irrespective of any other circumstance. S. 27, on the other hand, lets in 'information' from an accused person only if it leads to a 'discovery.' The 'discovery' is considered to be such a safe guarantee of the truth of the information that the Section makes such information admissible in evidence, even if it amounts to a confession and in spite of any other provisions to the contrary. There is nothing in S. 162, Criminal P. C., to show that the attention of

20. *Misri v. Emperor*, (1909) 31 All 592=3 I C 975=6 A L J 839 (F B).

21. *Amiruddin v. Emperor*, (1918) 5 A I R Cal 88=44 I C 321=45 Cal 557=19 Cr L J 305=22 C W N 213=27 C L J 148.

22. *Bulaqi v. Emperor*, (1928) 15 A I R Lah 476=112 I C 347=29 Cr L J 1019=9 Lah 671.

the Legislature was directed to the subject of 'discovery' which is dealt with in S. 27, Evidence Act, and that it contemplated wiping out this important exception to the rule excluding confessional statements to the police. Nor can one conceive of any good reason for doing so. For, when the genuineness of a statement or confession made to the police is guaranteed by the 'discovery' there can hardly be any good ground for excluding such information from being used as evidence.

The only arguments in support of the contrary view which seem to be important are, (1) that the language of S. 162 is wide enough to exclude statements to the police—even if they result in discovery, and (2) that the Legislature has not added any saving clause with respect to S. 27 (such a clause existed in the Code of 1882) although the attention of the Legislature was apparently directed to the Evidence Act, and certain Sections of that Act were excluded from its operation. As regards the first point, as their Lordships of the Privy Council have themselves pointed out in 18 Pat 234² the language of S. 162 is wide enough to exclude statements of accused persons made to a police officer during investigation, even when they lead to a 'discovery.' But the use of such language is not by itself conclusive on the point and S. 27 will still be saved if S. 162 cannot be said to be a specific provision to the contrary. I have already pointed out above that there is no reference in S. 162, Criminal P. C., to the subject-matter of S. 27, Evidence Act, viz. 'information leading to discovery.' Had there been any provision, e.g. in the Criminal Procedure Code dealing with the procedure of the police relating to discovery made in consequence of information given by an accused person and had the prohibition as regards the use of statements to the police been contained therein, the provision might have been held to be a "specific provision to the contrary" in the sense indicated above. But there is no indication in S. 162, Criminal P. C., of the attention of the Legislature having been drawn to the subject of "discovery" and in the circumstances, S. 162, Criminal P. C., cannot, in my opinion, be held to be a 'specific provision' to the contrary. It is noteworthy in this connexion that although their Lordships of the Privy Council distinctly remarked that the words of S. 162, Criminal P. C., were 'plainly wide enough to exclude any confession made to a police

officer in the course of investigation, whether a discovery is made or not,' they did not proceed to decide the point whether S. 27 was repealed pro tanto. Had their Lordships considered that the wide language used in the Section was in itself sufficient to make it a 'specific provision' to the contrary, there would have been no necessity to leave the point undecided. In that case, it would have been wholly immaterial whether S. 27 were taken to be a 'special law' or not. For, in either case, if S. 162, Criminal P. C., were held to be a 'specific provision' to the contrary, on account of its wide wording (to which their Lordships themselves referred), it would have repealed Sec. 27 pro tanto, according to the view expressed by their Lordships. It seems to me reasonable to infer in the circumstances, that in spite of the wide language used in S. 162, Criminal P. C., their Lordships were not prepared to hold on the basis of that language alone that S. 162, Criminal P. C., was a 'specific provision' to the contrary within the meaning of S. 1 (2), Criminal P. C.

The second argument is that the attention of the Legislature was drawn to the Evidence Act while framing S. 162, Criminal P. C., and yet the Legislature did not introduce any saving clause with respect to S. 27, as it did with respect to S. 32. As regards the latter clause, it must be noted however that the saving clause with respect to S. 32 was not introduced at the time of the amendment of the Code in 1923, but had been introduced long ago in 1898. A saving clause with reference to S. 27 also did exist in the Code of 1882, but was removed in the Code of 1898. But this removal is easily explained by the fact that there was no necessity for it in view of the provisions of S. 162 as amended by the Code of 1898. For these provisions merely prohibited the written record of statements taken down by the police being used in evidence. When the provisions of S. 162, Criminal P. C., were again amended in 1923, so as to include oral statements to the police as well, it would have been certainly better if the Legislature had re-introduced a saving clause with respect to S. 27. But I do not think it would be reasonable to infer therefrom that the Legislature intended to repeal S. 27, Evidence Act, to any extent. The omission may be due to two reasons. The Legislature may have overlooked the fact that the amendment of S. 162 was likely to affect

S. 27, as its attention was not drawn to the subject-matter of S. 27 viz. 'information leading to discovery.' Or it may have considered that the subject-matter of S. 27 being sufficiently distinct, and limited in its scope, it could not be affected on the principle embodied in the maxim '*generalia specialibus non derogant*' as was held by the Full Bench of the Madras High Court in 55 Mad 903.¹⁶

However, whatever the precise reasons for the omission may be, the question is whether the omission to add a saving clause with respect to S. 27 has resulted in a pro tanto repeal of S. 27. If there has been any such repeal, it could be only by implication. But such repeal by implication seems to me to be clearly excluded by S. 1 (2), Criminal P. C., which lays down that the provisions of special enactments will not be affected unless there is a 'specific provision' to the contrary. I may mention in the end one other argument which was advanced in support of the view that S. 27 is repealed pro tanto by the provisions of S. 162. It was urged that owing to the proviso to S. 2, Evidence Act, S. 27 of that Act does not affect the provisions of S. 162, Criminal P. C. As to this, it is sufficient to point out that S. 2, Evidence Act, was repealed recently by the Repealing Act of 1938 as having exhausted itself and is no longer on the statute book. That proviso had only reference to Statutes, Acts, Regulations etc., which were in force when the Evidence Act was enacted in 1872, and which were not expressly repealed thereby. Incidentally, however, it is worth noting that although the question of repeal of various provisions of the Evidence Act and other enactments was apparently brought under review in 1938, when the Repealing Act of 1938 was passed the Legislature did not think of amending S. 27 in any way. The presumption is that the Section as it stands still expresses correctly the intention of the Legislature.

In my opinion undue stress should not be laid merely on the wide language used in S. 162, Criminal P. C., in deciding the question before us. Although the ordinary rule of interpretation is that a Section is to be interpreted according to its plain language, when there is a conflict between the provisions of two different statutes, a different rule viz. the principle embodied in the maxim '*generalia specialibus non derogant*' comes into operation and provisions of a general character—however wide the lan-

guage used—are not considered to be sufficient to derogate from special provisions. This is the principle on which a Full Bench of the Madras High Court held in 55 Mad 903¹⁶ that the provisions of S. 27 are not affected by those of S. 162. Their Lordships of the Privy Council have not referred to the above maxim in their remarks on this question, probably because the principle of the maxim seems to be embodied in S. 1 (2), Criminal P. C., and they therefore considered it sufficient to refer to that Section. The following observations on the application of the maxim '*generalia specialibus non derogant*' based on English authorities given at p. 156 of Maxwell's Interpretation of Statutes (Edn. 8) are worthy of attention in this connexion:

Where general words in a later Act are capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation . . . that earlier and special legislation is not to be held indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intention to do so. In such cases it is presumed to have only general cases in view, and not particular cases which have been already otherwise provided for by the special Act, or what is the same thing, by a local custom. Having already given its attention to the particular subject and provided for it, the Legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment unless that intention be manifested in explicit language, or there be something which shows that the attention of the Legislature had been turned to the special Act and that the general one was intended to embrace the special cases provided for by the previous one, or there be something in the nature of the general one making it unlikely that an exception was intended as regards the special act. In the absence of these conditions, the general statute is read as silently excluding from its operation the cases which have been provided for by the special one.

It seems to me that the Legislature had the above principles in view when it enacted in S. 1 (2), Criminal P. C., that other special laws, etc. would not be affected unless there is a specific provision to the contrary. The rule of law laid down in S. 27 is well established. It has stood on the statute book and been in constant use for such a long time, that if the attention of the Legislature had been drawn to it when S. 162, Criminal P. C., was amended in 1923, and if there was any intention to alter the rule, it may be reasonably presumed that there would have been some positive indication in that Section to show the intention and the matter would not have been left to mere inference. I feel therefore little doubt, that there was no intention at all to repeal S. 27 to any extent. In this

case the question is of repeal by implication and the presumption is against and not in favour of any such repeal especially in the case of an important and well-established provision of law as is contained in S. 27, Evidence Act, (cf. Maxwell's Interpretation of Statutes, p. 147, Edn. 8). In the present instance, the Legislature has taken the further precaution of enacting clearly in S. 1 (2), Criminal P. C., that provisions of special law are not to be taken as affected, unless there is a 'specific provision' to the contrary. In view of this provision, it seems to me that S. 27, Evidence Act, stands unaffected.

The only judgment of any importance brought to our notice in which it was definitely held that S. 27, Evidence Act, was repealed by S. 162, Criminal P. C., as amended in 1923 was that of the dissenting Judge—Heald J.—in the Full Bench Rangoon case reported in 4 Rang 72.¹¹ The learned Judge however seems to have based his decision mainly on the wide language used in S. 162 and does not appear to have taken into consideration either the principle of the maxim *generalalia specialibus non derogant* or the effect of the provisions of S. 1 (2), Criminal P. C. Since the pronouncement of their Lordships of the Privy Council in 18 Pat 234² the question raised before us has been considered by Division Benches of the Madras and the Patna High Courts. The question has not been discussed at length, but these Courts have considered the effect of the pronouncement of their Lordships and have adhered to this view that S. 27 is not affected by the provisions of S. 162: see A I R 1939 Mad 840,⁴ A I R 1939 Mad 856³ and A I R 1939 Pat 577.¹⁴ The Madras High Court has followed the previous decisions of that Court on the subject and the Patna High Court has also followed those decisions.

The conclusion reached above proceeds on the view that the Evidence Act as a whole or even S. 27 of that Act is a "special law" within the meaning of S. 1 (2), Criminal P. C., and S. 162, Criminal P. C., is not a specific provision to the contrary. But even if it were considered that the point is open to doubt, the only result will be that it will have to be held that S. 1 (2) does not provide any rule for decision in the event of a conflict between the provisions of an enactment like the Evidence Act and the Criminal Procedure Code. The question will then arise, what rule is to be applied in such a case? In my view, the principle

of the maxim *generalalia specialibus non derogant* which has been already discussed above should be applied, as was done by the Madras High Court in the Full Bench decision reported in 55 Mad 903.¹⁶ Their Lordships of the Privy Council have, no doubt, remarked in the course of their observations on the subject in 18 Pat 234² that if S. 27 is not pro tanto repealed, it will presumably be because of the provisions of S. 1 (2), Criminal P. C. But I do not think this remark can be taken by implication to be equivalent to a pronouncement that S. 27 could not be saved by the principle of the maxim referred to above. Their Lordships made it perfectly clear that they were not expressing any definite opinion on the question of repeal of S. 27 as the point did not arise for decision before them. Their Lordships' remarks were very probably confined only to the arguments advanced before them. I do not therefore think that it could be reasonably presumed that their Lordships were of opinion that the aforesaid principle of the maxim could not save the operation of S. 27.

The learned Judges of the Madras High Court have discussed the point raised before us at length in the light of the above maxim in the Full Bench decision in 55 Mad 903¹⁶ and have given cogent reasons, if I may respectfully say so, for holding that S. 27 is a special law and is not affected by the provisions of S. 162, Criminal P. C. They have also referred to the contrary view on the point taken by the other High Courts and have given their reasons for not accepting that view. The other High Courts had discussed the subject only incidentally and not fully as they were of the opinion that S. 162 did not apply to statements of accused persons. Their Lordships of the Privy Council have not referred to the line of reasoning adopted by the Madras High Court on this point in 55 Mad 903¹⁶ or to the applicability of the maxim *generalalia specialibus non derogant* in their decision in 18 Pat 234.² A Bench of the Madras High Court has however already held as pointed out above, that the view taken by that Court on this point in the Full Bench case referred to above was not affected by the decision of their Lordships of the Privy Council. I respectfully concur in this view.

My conclusion briefly is that S. 1 (2), Criminal P. C., governs the case and in view of it, S. 27 is not repealed either wholly or in part. Further, even if that Section were not applicable I would hold

the operation of S. 27 to be saved by the principle of the maxim *generalia specialibus non derogant*. In the end I may refer to two other comparatively minor points which were raised in this reference in connexion with the interpretation of S. 27, Evidence Act, and S. 162, Criminal P. C., viz. (i) when should a person be considered to be in the "custody" of a police officer within the meaning of S. 27 and (ii) whether a statement made to a person assisting the police during the course of an investigation can be considered to be a statement made to a police officer within the meaning of S. 162. There does not seem to be anything in the recent decision of their Lordships of the Privy Council to necessitate reconsideration of these points; but they may be dealt with briefly as they have been raised.

As regards the first point, the term "custody" is not defined either in the Criminal Procedure Code or in the Evidence Act. There is, of course, no doubt that an accused person will be in the "custody" of the police after his arrest; but the question is whether he can be considered to be in "custody" at any time earlier, when he has not been formally arrested, but is merely detained by the police for the purpose of the investigation. S. 27 is anomalous in so far as it applies only to information leading to a discovery when received from an accused person in the custody of the police, but not if he is not in the custody of the police. If the information is relevant when it comes from a person in the custody of the police, there seems no good reason why it should not be so when it comes from an accused person, who is not in the custody of the police and therefore not under the influence of the police. The real intention of the Section very probably is to make information from an accused person which leads to discovery relevant even when the person is in police custody. But the language of the Section makes such information relevant only when it comes from an accused person in the custody of the police.

The language used in the Section thus leads to the curious result probably never intended — that when such information is given by an accused person, who is not in the "custody" of the police it will not be covered by the Section. However, apart from the above anomaly, the intention of the Section seems, I think, clear enough and that is to make information leading to a discovery relevant, even when it comes

from an accused person who is in the custody of the police and thus subject to police influence. Ordinarily information coming from an accused person, who is liable to be influenced by the police will be open to suspicion. But if the information leads to the discovery of a relevant fact, that discovery is considered to be a guarantee of the truth of the information as has been pointed out already and hence such information is made relevant by S. 27. Now there can be little doubt, that even before his formal arrest, an accused person, who is detained by the police owing to suspicion against him, is liable to be influenced by the police. This Court has therefore put a wide interpretation on the word "custody" as used in S. 27. In AIR 1933 Lah 609,²³ it was held by a Division Bench of this Court consisting of Sir Shadi Lal and Colds-cream J. that 'police custody' does not necessarily mean custody after formal arrest and that it also includes 'some form of police surveillance and restriction on the movements of the person concerned by the police.'

In 15 Lah 310,²⁴ it was held by another Bench (Sir Abdul Qadir and Rangi Lal, JJ., following 1 Rang 609²⁵) that as soon as an accused or suspected person comes into the hands of a police officer, he is, in the absence of clear and unmistakable evidence to the contrary, no longer at liberty and is therefore in custody within the meaning of Ss. 26 and 27, Evidence Act. The interpretation placed in these rulings on the word 'custody' seems to be in keeping with the spirit and intention of S. 27 and in the absence of any definition of the word 'custody', limiting it to detention after arrest, I see no reason for departing from this interpretation.

The second question on which opinion is invited is whether a statement made to a person assisting the police during the course of an investigation, e. g. a zaildar or a lambardar, can be held to be made to a 'police officer' within the meaning of S. 162, Criminal P. C. This question, so far as I can see, does not really arise on the facts of the three cases which have given rise to the reference. For, in all these cases the statements in question had led to discoveries

23. Rodhal Mal v. Ramji Das, (1933) 20 A I R Lah 609=146 I C 40.

24. Aishan Bibi v. Emperor, (1934) 21 AIR Lah 150=1934 Cr C 330=152 I C 206=36 Cr L J 14=37 P L R 67=15 Lah 310.

25. Maung Lay v. Emperor, (1924) 11 AIR Rang 173=77 I O 429=25 Cr L J 381=1 Rang 609.

and were sought to be proved under S. 27. For the purposes of that Section, it is immaterial whether the statement is made to a police officer or to some person other than a police officer and hence the statement would be admissible in either case. 14 P R 1911 Cr²⁶ and 18 P R 1917 Cr²⁷ at p. 69, to which reference was made and in which it was held that confessions made to a zaildar or a lambardar in the presence or the vicinity of the police, were virtually confessions to the police and as such inadmissible in evidence, were apparently cases in which the alleged confessions had not led to any discoveries. Moreover, apart from this the question would seem to be essentially one of fact. S. 162 applies only to statements made to a police officer during the course of an investigation. It follows, therefore, that statements to other persons will not be excluded by that Section. If, however, it is found on the facts of any case, that a statement made to a third person, was in reality intended to be made to the police and was represented as having been made to a third person, merely as a colourable pretence in order to evade the provisions of S. 162, Criminal P. C., the Court will hold it to be excluded by that Section. This was apparently the view taken in the two rulings referred to above. But it would be, I think, going too far to lay down that every statement made to a person assisting the police during an investigation should be treated as a statement made to the police and as such excluded by S. 162, Criminal P. C. For example, if a suspected person is sent for by the police, and is brought to the police station by a lambardar in his custody and if on the way to the police station he makes a confession to the lambardar, there seems to be no good reason for excluding such a statement as one made to a police officer within the meaning of S. 162, Criminal P. C., or as a confession to a police officer under S. 25, Evidence Act. The question is thus one of fact and must, I think, be decided in view of all the circumstances in which the statement sought to be proved was made.

Din Mohammad J.—The main question involved in the three cases referred to the Full Bench is, whether S. 162, Criminal P. C., pro tanto repeals S. 27, Evidence Act. Under S. 162, no statement made by any

person to a police officer can be used for any purpose, save as provided in the proviso to that Section, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made. Under S. 27, Evidence Act, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Formerly, most of the High Courts in India were of opinion that S. 162 did not cover the statements of accused persons and, consequently, no question of a conflict between that Section and S. 27 arose. The discordant note was struck mainly by the Madras High Court when, in a case reported in 55 Mad 903,¹⁸ the learned Judges observed that the language of S. 162 was wide enough to cover the statements of accused persons as well. Later, in a case before the Privy Council, reported in 18 Pat 234,² their Lordships favoured the Madras view in preference to the view held by the other High Courts in India. That being the true position now so far as the applicability of S. 162, Criminal P. C., is concerned, the question at once arises whether S. 27 is or is not affected by S. 162, inasmuch as under S. 27 certain statements of accused persons in the custody of a police officer, even if made to the said officer, are admissible. This conflict was envisaged in the Privy Council case itself, but their Lordships refrained from expressing any opinion upon the matter inasmuch as on the facts stated before them it did not arise.

It is evident that S. 162 and S. 27 so far as it relates to statements made to police officers cannot be reconciled and it is also clear that S. 162 as it stands at present was enacted subsequent to S. 27, Evidence Act. The ordinary principle of the interpretation of statutes is that when two statutes are contrary in matter, the later abrogates the former (Craies on Statute Law p. 316). Further, as remarked by Dr. Lushington, it is not necessary that any express reference be made to the statute which it is intended to repeal. The prior statute would be repealed by implication if its provisions were wholly incompatible with a subsequent one, (Craies, p. 317). There are however two important exceptions attached to this general proposition. They are: (1) if the intention of the Legislature is apparent that the previous statute should

26. *Kutab Ali v. Emperor*, (1911) 14 P R 1911 Cr = 12 I O 978 = 42 P W R 1911.

27. *Matu v. Emperor*, (1916) 8 AIR Lah 3 = 36 I O 888 = 18 Cr L J 6 = 18 P R 1917 Cr.

not be repealed, the previous statute remains unaffected by the subsequent one, (Craies p. 320); and (2) the general principle does not apply if the prior enactment is special and the subsequent enactment is general. Special provisions will control general provisions, (Craies, p. 321). A departure from the general principle was recognized by the Indian Legislature when sub-s. (2) of S. 1, Criminal P. C., was enacted. It reads :

..... In the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force or any special jurisdiction or power conferred or any special form of procedure prescribed by any other law for the time being in force.

In order to determine, therefore, whether Sec. 27 has been pro tanto repealed by S. 162, it is necessary to decide : (a) whether the Evidence Act is a special law; and (b) if so, whether S. 162 is a specific provision to the contrary? On behalf of the convicts, it was urged that the Evidence Act could in no circumstances be characterized as a special law within the meaning of Sec. 1 (2), Criminal P. C., and that, at any rate, S. 162 was a specific provision to the contrary. It was further stressed that the Legislature was aware of the apparent conflict between the two provisions of law to the extent indicated above and had expressly manifested its intention to abrogate S. 27, while enacting S. 162. The Advocate-General, on the other hand, maintained that neither was it intended by the Legislature to override the provisions of Sec. 27 while enacting S. 162 nor could S. 162 pro tanto repeal S. 27, as it was a special law and S. 162 was not a specific provision to the contrary. Reliance was placed on several English authorities and English textbooks, which define what a special law is. But although in certain cases the principles deducible from such authorities may be helpful to some extent in determining the question involved, in this particular case we have principally to rely on the interpretation put by the Indian Legislature itself on the term "special law" as used in the Criminal Procedure Code. By sub-s. (2) of Sec. 4, Criminal P. C., all words and expressions used in the Code and not defined therein but defined in the Indian Penal Code shall be deemed to have the meanings respectively attributed to them by the latter Code. S. 41, Penal Code defines a "special law" as a law applicable to a particular subject. We have to determine, therefore, what the Legislature in-

tended to connote when they defined "special law" as a law applicable to a particular subject. It is obvious that this term was defined in the Indian Penal Code on account of its use in S. 40, wherein the word "offence" was defined and it was provided that in certain Sections of the Indian Penal Code the word "offence" denoted a thing punishable not only under the Indian Penal Code but under any special or local law "as hereinafter defined."

Evidently, therefore, when in relation to the Indian Penal Code the term "special law" was used, it referred only to a law dealing with those matters which had not been dealt with in that Code, i.e. a law creating offences not contemplated by the Indian Penal Code. Had the Legislature intended to use the term "special law" in a different sense in relation to the Code of Criminal Procedure, it could have defined the term in that Code itself and not merely relied on its definition given in the Penal Code. It might be argued that the Criminal Procedure Code as such has nothing to do with anything besides procedure and consequently laws creating new offences are outside its ambit. This is true but we cannot enter into the minds of legislators as to why they chose to use this term. It is noteworthy that alongside the term special law, the term local law was also used in sub-s. (2) of S. (1), Criminal P. C., and this term had also occurred in Sec. 40, Penal Code, and defined in S. 42 afterwards. Moreover, special form of procedure was specifically protected in this sub-section and if 'special law' meant 'special procedure' only the words 'special form of procedure' would not have been repeated after the words 'special law.' The intentional use of these words at the place where they occur obviously indicates that something else than procedure was contemplated when the term 'special law' was used in the earlier part of the sub-section. Whatever signification, therefore, may be attached to the term "special law" as used in its general sense, in the particular sense in which it is used in the Criminal Procedure Code, no other interpretation can be put upon this term. In a case reported in 22 I C 147,¹⁷ Twomey J. of the Lower Burma Chief Court observed :

It might be argued that the Whipping Act is a 'special law' within the meaning of S. 41, as it is a law 'applicable to a particular subject,' namely whipping. But it appears to me that the special laws contemplated by Ss. 40 and 41 of the Code are only laws, such as the Excise, Opium and

Cattle Trespass Acts, creating fresh offences that is, laws making punishable certain things which are not already punishable under the general Penal Code. The Whipping Act is not a special law in this sense; it creates no fresh offences, but merely provides a supplementary or alternative form of punishment for offences which are already punishable primarily under the Penal Code or other enactments.

Even otherwise it is difficult to hold that S. 27 or for that matter the Evidence Act is a special law merely because it deals with a subject which has not been dealt with anywhere else. If this be a sound test, then every law and every provision of every law could be characterized as a special law, as no subject dealt with in one enactment or Act of Legislature is dealt with in the other. The Evidence Act was enacted to apply generally to all cases to which it was made applicable by S. 1 thereof, irrespective of the nature of the case or of the persons affected thereby and it cannot therefore be argued that it is a special law in any sense of the term. The Advocate-General besides relying on certain passages from English judgments and English text books has further referred to 55 All 463,¹³ 55 Mad 903¹⁶ and 51 Mad 967.²⁸ It is true that these judgments support his contention but with all respect, they are not convincing as they either advance no reason for the view propounded therein or the reasoning advanced is not sound. In 55 All 463¹³ all that is said is :

Now, a special law is defined in S. 41, I. P. C., as a law applicable to a particular subject. The Evidence Act therefore is such a special law, as it is a law specially applicable to the subject of evidence.

In 55 Mad 903¹⁶ at page 923 Ayyar J., observed :

Section 27, Evidence Act, is a special provision, whereas S. 162, Criminal P. C., is general, and nothing that we say here would in any way affect the operation of S. 27, Evidence Act, when the conditions mentioned therein are fulfilled.

Similarly at p. 926 Chetti J., remarked :

Section 162 seems to be a general rule for the exclusion of statements made by any person to the police, and in view of the principle that a special rule is not impliedly affected by the general rule, S. 27, Evidence Act, being such a rule or an exception to the general rule, the Legislature may have omitted the said proviso as being unnecessary.

At page 940 Pandalai J. said :

All the Courts recognize that S. 27, Evidence Act, is not in any way affected by S. 162, Criminal P. C. The view approved by the Full Bench is that the former is to be regarded as an exception to the latter and therefore saved according to a well-re-

cognized rule of interpretation To my mind, whether you regard S. 162 as a general rule to which S. 27, Evidence Act, is an exception or as a special rule applicable to accused persons and therefore itself an exception to the general rule under S. 8, Evidence Act, it is impossible to believe that the Legislature in framing S. 162, Criminal P. C., intended by a side wind to repeal or modify the effect of a general statute of such great importance as the Evidence Act, and a general provision in it of such obvious use to the administration of justice as S. 8 thereof.

The use of the words "general statute" in this passage is significant. In 51 Mad 967²⁸ at pages 973 and 974 Ramesam J., observed :

It seems to me that S. 162 relates generally to the admissibility of statements and it says that statements described in that Section are inadmissible. S. 27 relates to a more particular matter. It creates an exception to the general inadmissibility of statements made to a police officer, namely where the statement consists of information received from the accused in custody in consequence of which a certain fact is discovered. On the principle that a general rule is affected by a special rule and not the special by the general rule, I am of opinion that S. 27 is not affected by S. 162, Criminal P. C., but S. 162 is affected by S. 27, Evidence Act. The result is not that the construction of S. 162 which I indicated above cannot stand but that a special exception to it exists in the circumstances mentioned in S. 27, Evidence Act. In cases not covered by the exception, S. 162 as interpreted by me above continues to operate. The view indicated above is also the view taken in all the other High Courts besides Rangoon : vide 6 Lah 24,²⁹ 6 Lah 171,³⁰ 7 Lah 264,³¹ 26 Bom L R 965³² and 54 Cal 237.¹⁰

With all respect, apart from the fact that the words "particular subject" have been interpreted in their literal sense without any reference to S. 40, I. P. C., the observations made by the learned Judge even otherwise are not legally sound. In the first place, S. 162, Criminal P. C., can never be affected by any provision in the Evidence Act as is laid down in S. 2, Evidence Act, itself. It says :

Nothing herein contained shall be deemed to affect any provision of any statute, Act or regulation in force in any part of British India and not hereby expressly repealed.

In the face of this clear provision of law it is altogether erroneous to say that any provision in the Evidence Act affects any provision in the Code of Criminal Proce-

29. Labh Singh v. Emperor, (1925) 12 A I R Lah 397=88 I C 513=26 Cr L J 1153= 26 P L R 189=6 Lah 24.

30. Rakha v. Emperor, (1925) 12 A I R Lah 399=93 I C 230=27 Cr L J 438= 6 Lah 171= 26 P L R 304.

31. Bahadur Singh v. Emperor, (1926) 13 A I R Lah 367=95 I C 467=7 Lah 264=27 Cr L J 803=27 P L R 379.

32. Emperor v. Vithu Balu, (1924) 11 A I R Bom 510=83 I C 1007 = 26 Cr L J 223 = 26 Bom L R 965.

28. Chinna Thimmappa v. Talu Kunta Thimmappa, (1928) 15 A I R Mad 1028 = 112 I C 682=29 Cr L J 1098=51 Mad 967=55 M L J 351 (F B).

ture in any manner. Secondly, the reliance placed on the judgments cited by the learned Judge for the proposition advanced by him is not warranted by what was said in those judgments. In 6 Lah 24,²⁹ the only reference to S. 162 was made in connection with the manner in which it should be used by the Courts and no conflict of this Section with any Section of the Evidence Act was in issue before the learned Judge. Similarly, in 6 Lah 171,³⁰ what was said rather goes against the contention of the learned Judge. It was observed there by Sir Shadi Lal C. J. :

It is true that S. 157, Evidence Act, lays down the rule that, in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact is admissible in evidence, but this general rule is controlled by the special provisions contained in S. 162, Criminal P. C., relating to criminal trials.

In 7 Lah 264³¹ a Division Bench of this Court explained the interpretation to be put on S. 162 and held that under that Section written statements were excluded as much as oral statements. Similarly, 26 Bom L R 965³² and 54 Cal 237¹⁰ merely lay down how statements recorded under S. 162 should be used. In a recent judgment of the Madras High Court too, reported in (1939) 2 M L J 455,³ a Division Bench of that Court composed of Burn and Stodart JJ., held that S. 27, Evidence Act, was a special law which was not derogated from by the general rule enacted in S. 162, but this view was based solely on 51 Mad 967²⁸ and 55 Mad 903,¹⁶ and as I have tried to explain above, the learned Judges there did not consider the question so fully as it deserved their main anxiety being to save S. 27 in spite of its apparent conflict with S. 162.

In another set of judgments too, such as 7 Lah 84,⁸ 5 Pat 63⁹ and 54 Cal 237,¹⁰ a similar anxiety is visible, but there reconciliation between the two conflicting Sections was effected by holding that S. 162 did not refer to the statements of accused persons at all. It is significant however that in all those judgments it was expressly observed that if S. 162 covered the statements of accused persons, S. 27 would stand repealed. In 7 Lah 84⁸ at p. 87, Sir Shadi Lal C. J. observed :

Our attention has been invited to the language of the Section which it is urged forbids the use of a statement made by "any person" to a police officer in the course of an investigation, and it is argued that the words "any person" include an accused person. This contention, if accepted, would virtually repeal S. 27, Evidence Act, and we do not think that such a result was ever intended by the Legislature.

In 5 Pat 63⁹ at p. 78, Mullick A. J. C., remarked :

To what extent the provisions of a special enactment, such as the Criminal Procedure Code, override the provisions of a general enactment such as the Evidence Act, must depend upon the language of the special Act, but reading the present Ss. 161 and 162 of the Code I think it is clear that the main object of the Legislature was to prohibit the use of the statements of prosecution witnesses as corroboration under S. 157, Evidence Act. The general provisions of the law with regard to the admissibility of statements made by accused persons like other admissions do not seem, in my opinion, to be affected. If it were otherwise, Ss. 27 and 28, Evidence Act, must be considered repealed.

It may be noted that this learned Judge described the Criminal Procedure Code as a special enactment and the Evidence Act as a general enactment. In 54 Cal 237¹⁰ at p. 243, Rankin J. observed :

In this Court it is settled law that in spite of the generality of the language of S. 161 of the Code, that Section does not apply to an accused. Both the context of S. 162 and its contents point in the same direction. "Any person" means *quivis ex populo*. It is unreasonable in view of the special law applicable to the statements of accused persons to the police, to refuse to apply the well established rule "*generalia specialibus non derogant*." A contrary view involves an implied but complete repeal of S. 27, Evidence Act.

In 48 Mad 640,³³ another solution was found to enable the two Sections to operate together. It was ruled there that S. 162 did not cover oral statements; but even in that judgment at p. 446 Wallace J. admitted that if S. 162 had been designed to prohibit the use of oral statements made to police officers in the course of police investigation, he should have expected an amendment of S. 27, Evidence Act. As against this, there are certain Judges who have held definitely that S. 27, Evidence Act, was pro tanto repealed by S. 162, Criminal P. C. In 4 Rang 72¹¹ at p. 89, Heald J. remarked :

I entirely agree with the learned Judges that statutes are not to be held to be repealed by implication unless the repugnancy between the new provisions and the former statute is plain and unavoidable, but in this case the repugnancy is clear and admitted, and I do not think that the learned Judges have given good or sufficient reasons for avoiding it. Practically all that they say is that they are unable to believe that the Legislature could have intended that S. 162 should affect S. 27, Evidence Act, and that the provisions of the Act are independent of those of the Code. If, as I believe, we are not entitled to consider the intention as against the actual words of the Legislature, then the first of these reasons is no reason, and in view of the fact that the provisions of Sec. 162 of the Code unquestionably affect, to a

33. Venkatasubbiah v. Emperor, (1925) 12 A I R Mad 579=85 I C 209=26 Cr L J 721=48 Mad 640=48 M L J 195.

greater or less extent, those of Ss. 155 (3) and 157, Evidence Act, it is difficult to see on what principle it must be held that they cannot affect S. 27.

At p. 90, the learned Judge added :

The conflict between the natural meaning of the words used in S. 162 of the Code and that of S. 27, Evidence Act, in so far as the latter would allow proof of statements made to the police during a police investigation under Chap. 14 of the Code by an accused person while in the custody of the police, is such that the latter to the extent in which it allows proof of such statements, must be regarded as having been repealed.

In A I R 1927 Nag 203,³⁴ Kotval A. J. C., remarked :

Abrogation by implication is by no means uncommon and that such abrogation of S. 27, Evidence Act, results is no reason for not interpreting the Section according to its plain language. Nor is the provision contained in S. 27, Evidence Act, of such paramount importance that there should be great hesitation in accepting an implied abrogation of it. It is to be further noted that S. 162, Criminal P. C., by cl. (2) expressly saves S. 32 (1), Evidence Act. The implication of the abrogation of Sec. 27, Evidence Act, is so obvious that we should expect that Section also to be expressly saved.

In 94 I C 706,³⁵ Doyle J. observed :

There was really no admissible evidence on which M. K. could be convicted, since S. 162, Criminal P. C., must be taken as overriding S. 27, Evidence Act.

It is strenuously contended by the Advocate-General that the Legislature should not be taken to have repealed S. 27 by implication and that if it intended to do so while enacting S. 162, Criminal P. C., it should have indicated its intention in a clearer manner. He has relied in this connexion on the following remarks made by Maxwell in his treatise on Interpretation of Statutes, at p. 156 :

It is but a particular application of the general presumption against an intention to alter the law beyond the immediate scope of the statute to say that a general Act is to be construed as not repealing a particular one, that is, one directed towards a special object or a special class of objects. A general later law does not abrogate an earlier special one by mere implication Where general words in a later Act are capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation . . . that earlier and special legislation is not to be held indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intention to do so . . . The intention must be manifest in explicit language or there be something which shows that the attention of the Legislature had been turned to the special Act.

There is no force however in this contention. Apart from the fact that the Evi-

dence Act does not deal with a special object or special class of objects as contemplated in the quotation reproduced above, the Legislature here has consciously abstained from protecting S. 27, although its attention had turned to the Evidence Act while drafting S. 162 and it was aware of the apparent conflict between the two Sections in the matter of such statements of accused persons in custody to a police officer as lead to discovery. Firstly, dying declarations have been excluded ever since the law of Criminal Procedure was codified. Secondly, in the Criminal Procedure Code of 1882 a separate paragraph was added to S. 162 wherein it was expressly stated that the Section would not affect the provisions of S. 27, Evidence Act. In 1898, this paragraph was deleted and a separate sub-section added in which S. 32, cl. (1), Evidence Act, was specifically saved. In 1923, sub-s. (1), S. 162 was completely re-drafted but no protection was afforded to S. 27, although sub-s. (2) dealing with dying declarations was retained. In the face of such conscious and deliberate acts on the part of the Legislature, it cannot be argued that the repeal of S. 27 is merely by implication. It is not for us to speculate on the reasons which led the Legislature to adopt this course but the fact remains that in 1882 S. 27 was protected and that in 1898 this protection was withdrawn.

It is further obvious that S. 27 is not the only Section which is controlled by S. 162. Several other Sections of the Evidence Act have been affected in a similar manner. For instance, the power of a Judge under S. 165, Evidence Act, to ask any question he pleases in order to discover or to obtain proper proof of relevant facts, cannot now be exercised for the purpose of introducing evidence in contravention of S. 162, Criminal P. C. : 58 Cal 1009³⁶ and A I R 1926 Cal 147.³⁷ Similarly, S. 157, Evidence Act is controlled by S. 162 : 6 Lah 171.³⁸ Besides, S. 155, Evidence Act, has also been modified to some extent by S. 162, A I R 1933 Pat 589³⁹ at p. 593.

The Advocate-General has further contended that to hold that S. 162 pro tanto repeals S. 27 would lead to a manifest con-

36. *Rahjaddi v. Emperor*, (1931) 18 A I R Cal 189 = 1931 Cr C 253 = 132 I C 159 = 58 Cal 1009 = 35 O W N 317 = 32 Cr L J 841.

37. *Keramat Mandal v. Emperor*, (1926) 13 A I R Cal 147 = 92 I C 453 = 27 Cr L J 277 = 42 O L J 528.

38. *Emperor v. Najibuddin*, (1933) 20 A I R Pat 589 = 1933 Cr C 1350 = 147 I C 142 = 35 Cr L J 379 = 14 P L T 543.

34. *Bhagla v. Emperor*, (1927) 14 A I R Nag 203 = 100 I C 820 = 28 Cr L J 340.

35. *Emperor v. Nga Kyaing*, (1926) 13 A I R Rang 112 = 94 I C 706 = 27 Cr L J 658.

tradition of the apparent purposes of the enactment and further cause hardship and injustice, which presumably was not intended by the Legislature, and that, consequently, a modified interpretation can be put upon S. 162, which avoids these results. In my view however this is not so. There is neither any manifest contradiction of the purposes of the enactment nor will any hardship or injustice result, if oral statements made by persons in the custody of a police officer leading to discovery, are ruled out of consideration. On the other hand, in the majority of cases miscarriage of justice or hardship apprehended will be avoided. In the course of the arguments, it was also considered whether S. 27 was a proviso to S. 26 only, or whether it was intended to serve as a general exception to all the relevant Sections in the Evidence Act. Suffice it to say that the trend of authority of the various High Courts in India has so far been to treat S. 27 as a general proviso to all the relevant Sections and not only to S. 26 (59 Cal 1040³⁹) and this appears to me to be the correct view to adopt.

I am therefore of opinion (a) that the Evidence Act is not a 'special law' but a 'general Act' which, to borrow the language of Lord Bowen "applies to the whole community and is unlimited both in its area and as regards individual in its effect," or, in the words of Lord Blackburn, "is a general enactment for the benefit of all of His Majesty's liege subjects;" and (b) that being an earlier Act, it has been abrogated to that particular extent with which we are at present concerned by the enactment of S. 162 at a later period. Consequently, statements which were, prior to the enactment of S. 162, admissible in evidence in the circumstances specified in S. 27, cannot now be used as evidence for any purpose whatever.

In this view of the law, the question, whether S. 162 is or is not a specific provision to the contrary in case it is held that the Evidence Act is a special law, does not arise. But if the question did arise, I would not find it difficult to hold that S. 162 was a specific provision to the contrary. The very language of the Section indicates that it was intended to supersede all provisions wherever contained relating to this subject. The only exception that was contemplated by the Legislature while enacting this Sec-

tion was specifically provided for in the body of the Section itself, and in the face of such a clear language, it cannot be urged that any other law relating to the subject was kept intact in spite of the provision made in this Section.

In one of the cases referred to us, the following two questions further arise, namely: (1) when is a person said to be in the custody of a police officer; and (2) is a statement made to a person other than a police officer but in the immediate presence of a police officer and on a question put by or at the instance of the said officer, a statement within the purview of S. 162? To ascertain what custody implies, Ss. 46 (1), 167 and 169, Criminal P. C., where the word custody is used, may be referred to among others. S. 46 (1) reads:

In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

Under S. 167, whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station shall forward the accused to the nearest Magistrate. Under S. 169, if upon an investigation under Chap. 14 there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall if such person is in custody, release him on his executing a bond to appear if and when so required before a Magistrate empowered to try the accused. "Custody" therefore implies some sort of restraint or detention either by word or action. By virtue of S. 169, the detention is of such a character that to get rid of it, a person in custody is required to execute a bond. Unless therefore there is some such restraint as is contemplated in these Sections, a person cannot be said to be in the custody of a police officer. Reference in this connexion may be made to 1885 A W N 59,⁴⁰ 1 Rang 609²⁵ and 15 Lah 310.²⁴ In 1885 A W N 59,⁴⁰ five Judges of the Allahabad High Court including Petheram C. J. and Mahmood J. observed in relation to an accused person that though he had not been formally arrested he was in a condition of restraint which in fact amounted to his being in cus-

89. *Durlav Namasudra v. Emperor*, (1932) 19 A I R Cal 297=1932 Cr C 266=138 I C 116=33 Cr L J 546=59 Cal 1040=36 C W N 373.

40. *Emperor v. Mudar*, (1885) A W N 59 (F B).

today of the police. They further added that at any rate they were not prepared to believe that he was a free agent and capable of going whither he chose. In 1 Rang 609²⁵ at pp. 615 and 616, May Oung J. remarked:

This idea of 'free detention' is, in my view, altogether mistaken, sometimes even hypocritical. It is an infringement of the spirit. While appearing to conform to the strict letter of the law, and I would lay down that as soon as an accused or suspected person comes into the hands of a police officer, he is in the absence of clear and unmistakable evidence to the contrary, no longer at liberty and is therefore in custody within the meaning of Ss. 26 and 27, Evidence Act.

In 15 Lah 310,²⁴ a Division Bench of this Court followed with approval the remarks of May Oung J. as quoted above and observed that in order to make the statements given by an accused person, in consequence of which some discoveries were made, admissible in evidence under S. 27, Evidence Act, it was not necessary that the accused should be in police custody under a formal arrest. From these judgments as well as from the language of the Sections of the Criminal Procedure Code referred to above, it follows that a person cannot be said to be in the custody of a police officer unless some sort of restraint has been exercised on him either by word or by action. If his movements are not restricted or in other words, if he is a free agent and can go whither he chooses as observed by the learned Judges of the Allahabad High Court, he cannot be said to be in the custody of the police. To determine therefore whether a person is in custody or not, no general rule can be laid down, and it would always be a question of fact to be decided on the circumstances of each case.

As regards the second question, 14 P R 1911 (Cr.),²⁶ 18 P R 1917 Cr.²⁷ and A I R 1926 All 737⁴¹ may be referred to with advantage. In 14 P R 1911 Cr.,²⁶ a confession had been made by a suspect to a zaildar as well as a lambardar after the arrival of the Sub-Inspector of Police who at the time of the confession was sitting only a few yards off. A question arose whether that confession was inadmissible under S. 25, Evidence Act, which says that no confession made to a police officer shall be proved as against the person accused of any offence. A Division Bench of the Punjab Chief Court presided over by Sir Arthur Reid C.J., and Rattigan J., (who afterwards became the first Chief Justice of this Court)

came to the conclusion that that confession came within the mischief of S. 25. The learned Judges observed as follows:

It is true that technically this confession was not made to the police, but we cannot lose sight of the fact that in reality it was so made. The police were actually present and must have heard everything that was said, and to admit that a confession, nominally made to a third party, does not come within the spirit or letter of S. 25, Evidence Act, because, although the police were present, the confession was addressed to a third person would, in our opinion, be tantamount to holding that the police could by this convenient subterfuge evade the stringent provisions of that Section. We hold therefore that Sahara's confession to the Zaildar and the Lambardar, made in the immediate presence of the police, was also inadmissible in evidence.

The Division Bench that decided 18 P R 1917 Cr.²⁷ was composed of Sir Donald Johnstone C. J., and Leslie-Jones J. (who later became a Judge of this Court). In that case a suspect had been made over by the police to a few gentlemen who took him away a short distance where he was alleged to have confessed. The learned Judges observed:

The confession made on 24th May to P.Ws. 7 to 9, is clearly inadmissible in evidence. The learned Sessions Judge has distinguished 14 P R 1911 Cr.²⁶ and similar rulings. No doubt in 14 P R 1911 Cr.²⁶ it was found that the police were sitting within earshot when the confession was made but in principle the ruling fully covers a case like this where the police make over a suspect to a few gentlemen, who take him away a short distance (perhaps beyond earshot), get a confession from him and return him to the police.

In A I R 1926 All 737,⁴¹ Walsh and Pullan, JJ., made the following observations:

We say nothing to throw doubt on the proposition that a confession made to another person in the presence of a police officer, who has asked or instructed that other person to take the confession in such a way as to be his agent, where the confession takes place under such circumstances that the police officer is in such proximity as to make his presence likely to affect the mind of the confessing person, is in substance a confession to a police officer.

In my view, the words "to a police officer" as used in S. 162, Criminal P. C., are also susceptible of the same meaning as has been placed upon those words as used in S. 25, Evidence Act. The Advocate-General contends that the expression "to a police officer" is to be literally interpreted and that unless a statement is addressed to a police officer, it cannot be hit by S. 162. I do not agree. The opinion of the six learned Judges mentioned above, all of whom were Englishmen and who could thus say with authority what meaning should be given to the expression "to a

41. Emperor v. Har Piari, (1926) 18 A I R All 737 = 97 I O 44 = 49 All 57 = 27 Cr L J 1068 = 24 A L J 958.

police officer" is entitled to great respect. Not to extend the meaning of this expression in the manner indicated above will necessarily lead to a grave miscarriage of justice—a result which must be avoided on all recognized canons of the interpretation of statutes.

The result is that, in my view, (1) information received by a police officer from an accused person in custody, in consequence of which any fact is deposed to as discovered, which was admissible under S. 27, Evidence Act, prior to the decision of their Lordships of the Privy Council that S. 162, Criminal P. C., covers statement of an accused person as well, can, after that decision, no longer be used as evidence against him on account of its being expressly barred by S. 162; (2) the term 'custody' as used in S. 27 connotes some idea of restraint on the movements of a person either by word or action and it is open to an accused person to prove in every case that arises that he was actually in the custody of a police officer, although in the police diaries he was not shown to have been formally arrested; and (3) an accused person can urge that a statement intended to be used against him under S. 27 on the ground that it was made to a person other than a police officer should be deemed to have been made to a police officer in the circumstances in which it is proved to have been made.

Monroe J.—I agree with the view of the learned Chief Justice. I express no opinion on the meaning of the words 'dealing with a particular subject' which I find it impossible to interpret.

Ram Lall J.—Having had the advantage of reading the judgments recorded by the learned Chief Justice and my other learned brethren, I am in agreement with the views expressed by the Hon'ble Chief Justice on the main question referred and also with Din Mohammad J. generally.

Order of the Full Bench

The answer to the question submitted to the Full Bench is that S. 162, Criminal P. C., repeals pro tanto S. 27, Evidence Act. The cases will be returned to the Judges in Single Bench to be dealt with in the light of this decision.

D.S./R.K.

Answered accordingly.

A. I. R. 1940 Lahore 154

BHIDE J.

Intzamia Committee, Gurdwara Ramsar Manji Sahib—Plaintiff—Appellant.

v.

Mani Ram — Defendant—Respondent.

Second Appeals Nos. 424 and 425 of 1939, Decided on 24th November 1939, from decree of Senior Sub-Judge, Amritsar, D/- 16th December 1938.

(a) Punjab Sikh Gurdwaras Act (8 of 1925), S. 5—Dismissal in default of petition under S. 5 is not tantamount to declaration as to rights of Gurdwara.

An Act like the Sikh Gurdwaras Act which interferes with the ordinary civil rights of persons must be strictly construed. There is no provision in the Act to the effect that even the dismissal in default of a petition under S. 5 is to be taken as equivalent to an adjudication of the right in dispute in favour of the Gurdwara: *A I R 1935 Lah 279, Rel. on*; *A I R 1936 Lah 939, Ref.*

[P 156 C 1]

(b) Punjab Sikh Gurdwaras Act (8 of 1925), S. 32—Only those claims should be referred to tribunal for which prescribed period of limitation has not yet expired.

Section 32 is intended to apply only to claims which could be made under certain Sections of the Act and for which the prescribed period of limitation has not yet expired. It could not be intended that the Civil Courts should entertain such claims, at any time even after the lapse of the prescribed periods: *A I R 1936 Lah 939, Rel. on.* [P 156 C 2]

(c) Limitation Act (1908), Art. 120—Suit for declaration of plaintiff's occupancy rights—Plaintiff in possession—Denial of his title can furnish fresh cause of action.

Where in a suit for a declaration of the plaintiff's occupancy rights, the plaintiff has been found to be in possession, any denial of plaintiff's title can furnish a fresh cause of action: *140 P R 1907 and A I R 1928 Lah 516, Rel. on.* [P 157 C 1]

(d) Punjab Tenancy Act (16 of 1887), S. 77—Civil suit is barred only if relationship of landlord and tenant is admitted but nature of tenure is disputed.

It is only when the relationship of landlord and tenant is admitted but the nature of the tenure is disputed that S. 77 of the Punjab Tenancy Act operates as a bar to a civil suit: *A I R 1931 Lah 362, Rel. on.* [P 157 C 1]

J. N. Aggarwal and Narinder Singh —
for Appellant.

Bhagat Ram and Shamsher Bahadur —
for Respondent.

Judgment.—Regular Second Appeals Nos. 424 and 425 of 1939 arise out of two suits of which the facts were similar and they can be conveniently disposed of together. The plaintiff in both the suits was the Managing Committee of Gurdwara, Ramsar, in the Amritsar District. The plaintiffs claimed that certain sales of land in which the Gurdwara had occupancy rights

by a woman named Mt. Jiwani in favour of the defendants in these suits, were fictitious and void and sued for a declaration that they are not binding on the Gurdwara. The suits were decreed by the trial Court but were dismissed on appeal. From this decision the Managing Committee of the Gurdwara has preferred second appeals.

The facts in the plaints and the pleadings on behalf of the plaintiff Gurdwara did not appear to be very clear. It was argued before me that Musammatt Jiwani was never an occupancy tenant, but only a Mahantani and the occupancy rights belonged to the Gurdwara. In the circumstances, it was sufficient for the Gurdwara to sue merely for a declaration that the Gurdwara was the occupancy tenant of the lands in suit. This declaration though not specifically claimed is implied in the relief claimed, viz. that the sale by Mt. Jiwani should not affect the plaintiffs' rights. The plaintiffs could seek such a declaration only if the plaintiffs had any rights in the land. It is claimed on behalf of the plaintiffs that the Gurdwara was the occupancy tenant of the lands in suit. This fact was however denied by the defendants. There are no entries in the revenue records in favour of the Gurdwara and there is therefore no presumption of any kind in favour of the plaintiffs. The plaintiffs had therefore to prove first of all that they were occupancy tenants of the lands in suit. If they succeed in proving that the Gurdwara and not Mt. Jiwani was the occupancy tenants of the lands in suit, they would be clearly entitled to a decree; for the defendants only claim to have purchased the occupancy rights from Mt. Jiwani and if Mt. Jiwani herself had never any occupancy rights in the lands in dispute, as is contended before me on behalf of the plaintiffs, the defendants' case must fail. In support of the claim of the Gurdwara to the occupancy rights, the learned counsel for the appellants merely relied on the notification under S. 3 of the Punjab Sikh Gurdwaras Act, notifying a claim to these rights, which was made on behalf of the Gurdwara and the subsequent dismissal by the Sikh Gurdwaras Tribunal of a petition, filed by some of the landlords to contest the claim. The facts that the Gurdwara had claimed occupancy rights in the land in dispute and the claim was disputed by some of the landlords but their petition was eventually dismissed in default are established by the evidence on the record and have not been disputed. The only point which requires decision therefore is

whether the notification coupled with the dismissal, in default of the petition of some of the landlords is sufficient to establish the Gurdwara's claim to occupancy rights. The learned counsel for the appellants has relied in this respect only on the provisions of the Sikh Gurdwaras Act and has referred in particular to the provisions of Ss. 37 and 30 of the Sikh Gurdwaras Act. The point is not perhaps free from difficulty but after carefully considering the relevant provisions of the Act, I have come to the conclusion that the above contention is not sound. S. 37, Sikh Gurdwaras Act, runs as follows :

Except as provided in this Act, no Court shall pass any order or grant any decree or execute wholly or partly, any order or decree, if the effect of such order, decree or execution would be inconsistent with any decision of a tribunal, or any order passed on appeal therefrom, under the provisions of this part.

The argument on behalf of the appellants is that the Gurdwara's claim to occupancy rights in the present suit could not be dismissed because such dismissal would be inconsistent with the order of dismissal by the Sikh Gurdwaras Tribunal of the petition filed by some of the landlords in which they had contested the Gurdwara's claim to occupancy rights. But that petition was merely dismissed in default and there was no adjudication as regards the rights of the parties. It is noteworthy that even in the proceedings before the Tribunal, the burden of proving that the Gurdwara possessed occupancy rights had been placed on the Managing Committee of the Gurdwara. When no evidence was adduced and no decision given on the point, I do not see how the mere dismissal in default of the landlords' petition could be held to be tantamount to a declaration that the Gurdwara had occupancy rights in the lands in dispute. The question whether any declaration as to the rights of a Gurdwara could be made at all in a petition presented under S. 5 of the Sikh Gurdwaras Act is itself doubtful. In 16 Lah 968¹ it was held that no such declaration could be made. In A I R 1936 Lah 939,² a different view was taken, but even there it was held that a declaration could be made as regards the Gurdwara's rights, only when those rights were established by the evidence. No authority has been pro-

1. *Shromani Gurdwara Parbandhak Committee, Amritsar v. Jagat Ram*, (1935) 22 AIR Lah 279=156 IC 1042=16 Lah 968=38 PLR 44.
2. *Amarjit Singh v. Shiromani Gurdwara Parbandhak Committee*, (1936) 28 A I R Lah 939=168 IC 905=39 PLR 439.

duced in support of the contention of the learned counsel for the appellants that even a dismissal in default of a petition under S. 5 is tantamount to a declaration as to the rights of the Gurdwara.

The position might have been, no doubt, different if no claim petition had been presented by anybody to the Local Government under S. 5 of the Sikh Gurdwaras Act and the Local Government had issued a notification under sub-s. 3 of S. 5 stating that no petition had been filed to contest the claim made by the Gurdwara in respect of the occupancy rights. If such a notification had issued, the Gurdwara might have been able to sue for possession under S. 28, Sikh Gurdwaras Act. But that is not the position in the present suits. It seems, no doubt, anomalous as pointed out in 16 Lah 968¹ at p. 972 that the Gurdwara should be placed in a worse position merely because some landlords chose to file a petition under S. 5, but allowed it to be dismissed in default. Possibly, there is a lacuna in the Act. But be that as it may, an Act like the Sikh Gurdwaras Act which interferes with the ordinary civil rights of persons must be strictly construed and the plaintiffs cannot succeed in this case unless they can do so, on the basis of any of the statutory provisions of the Sikh Gurdwaras Act. There is admittedly no provision in the Act to the effect that even the dismissal of a petition under S. 5 is to be taken as equivalent to an adjudication of the right in dispute in favour of the Gurdwara.

The provisions of S. 30 of the Act, which were next referred to also do not appear to help the plaintiffs. The first sub-section is clearly inapplicable. The second sub-section could be a bar only if the defendants in this case had claimed the occupancy rights and had sued to establish the same. But the defendants are landlords. They do not claim any occupancy rights. In fact their contention is that the occupancy rights were possessed by Mt. Jiwani and have now become extinct. It is the plaintiffs who claim the occupancy rights and have to prove them and consequently the provisions of S. 30 do not seem to help them in any way. In the end it was urged that as a contest has now arisen with regard to the occupancy rights between the Gurdwara and the defendants, the issue should be referred for trial to the Sikh Gurdwaras Tribunal under S. 32, Sikh Gurdwaras Act. But that Section also does not seem to me to apply to the present

suits. The Section appears to be intended to apply only to claims, which could be made under certain Sections of the Act and for which the prescribed period of limitation has not yet expired. The words 'within the time prescribed therein' occurring in the Section are very significant in this connexion. There could be no necessity for introducing these words, unless the intention was that only those claims should be referred to the Tribunal, for which the prescribed period of limitation has not yet expired. It could not be, I think, intended that the Civil Courts should entertain such claims, at any time even after the lapse of the prescribed periods. Any such interpretation would render the periods of limitation prescribed wholly nugatory and defeat the object of the Act—which was to get all disputes in connexion with the properties claimed by the Gurdwara settled promptly : *vide* A I R 1936 Lah 939.²

It was conceded that there was no independent evidence on the present record to establish the rights of the Gurdwara, and the appellants cannot therefore succeed except on the basis of the notification under S. 3 and the order of the Sikh Gurdwaras Tribunal dismissing the landlord's petition, under S. 5 referred to above. The learned counsel for the appellants referred half-heartedly to a statement made by Mt. Jiwani before the Sikh Gurdwaras Tribunal in which she admitted that the occupancy rights vested in the Gurdwara and that she was only an office-holder (*Mahantani*). Mt. Jiwani appears to have asserted at first her rights as an occupancy tenant before the Tribunal, but eventually entered into a compromise with the Committee of Management of the Gurdwara. She was however not a party to the proceeding before the Tribunal and the Tribunal merely noted the statement made by Mt. Jiwani without giving any decision on the matter. I do not see how the statement made by Mt. Jiwani can help the appellants in any way, when the position taken up by their counsel before me is that Mt. Jiwani never had any occupancy rights in the land. On the other hand, if she was an occupancy tenant, she could not transfer the occupancy rights to the Gurdwara by a mere admission before the Tribunal in the absence of the landlords and without their consent. The occupancy rights could not be transferred without complying with the provisions of the Punjab Tenancy Act : *vide* Ss. 53 and 56 of the Act.

It was argued on behalf of the respondents that the suits as framed were barred by time under Art. 120, Limitation Act, as the sales in favour of the defendants which were being challenged took place about the year 1926 and secondly that the suits being by an occupancy tenant against landlords were really triable by a Revenue Court. On the findings arrived at above, it is unnecessary to go into these points. But, I may note that the question of limitation was apparently not pressed in the Courts below and no issue was framed on the point, while the question of jurisdiction was not even raised. As regards limitation, the suit was in its essence one for a declaration of the plaintiff's occupancy rights. Plaintiff has been found to be in possession and consequently any denial of plaintiff's title could furnish a fresh cause of action: *cf.* 140 P R 1907³ and 9 Lah 428.⁴ Such fresh cause of action arose recently, when the plaintiff's title was denied by the defendant, when an attempt was made by the plaintiffs to get their occupancy rights entered in the revenue records. From this point of view, the suit being governed by Art. 120 would obviously be within time. As regards the question of jurisdiction, the plaintiffs no doubt claim occupancy rights on behalf of the Gurdwara but the defendants do not admit that the Gurdwara is the occupancy tenant. It is only when the relationship of landlord and tenant is admitted but the nature of the tenure is disputed that S. 77, Punjab Tenancy Act, operates as a bar to a civil suit: *cf.* 12 Lah 111⁵ at p. 114.

I am therefore of opinion, that the suits were triable by a Civil Court and were within limitation. But as the plaintiffs' claim has not been established on merits and as the plaintiffs cannot, in my opinion, succeed merely on the basis of the notification under S. 3 and the dismissal of the landlord's petition under S. 5, Punjab Sikh Gurdwaras Act, I must dismiss these appeals. In view of the questions of law involved which are not free from difficulty, I leave the parties to bear their costs.

D.S./R.K.

Appeals dismissed.

3. Hakim Singh v. Waryaman, (1907) 140 P R 1907.

4. Fateh Ali Shah v. Muhammad Bakhsh, (1928) 15 A I R Lah 516=119 I C 258=9 Lah 428.

5. Sham Singh v. Amarjit Singh, (1931) 18 A I R Lah 362=182 I C 15=12 Lah 111=32 P L R 329.

A. I. R. 1940 Lahore 157

YOUNG C. J. AND TEK CHAND J.

Nihal Singh Dewa Singh and others
Convicts — Appellants

v.

Emperor.

Criminal Appeal No. 289 of 1939, Decided on 26th October 1939, from order of Sess. Judge, Lahore, D/- 28th February 1939.

(a) Penal Code (1860), Ss. 300 and 302—Accused confessing offence under S. 302—Onus is on him to show that he comes under exceptions to S. 300.

Where the accused admits that he took part in the killing, the onus is strongly upon him to show that his case comes under one of the exceptions to Section 300. [P 158 C 2]

(b) Criminal Trial—Confession — Partly true and partly false—Court may consider only part found to be true and need not take confession as a whole.

Where a part of the confession by the accused is found to be false, the Court may consider only the part which is found to be true and need not take into account the confession as a whole. [P 158 C 2]

(c) Criminal Trial — Eye-witnesses' evidence found to be doubtful — Evidence need not be rejected—It can be corroborated.

In case of doubt concerning the eye-witnesses' evidence the Court need not discredit it altogether but may accept it after corroboration. It is only where there is some doubt about a witness that the rule of prudence demands corroboration of his evidence. [P 158 C 2]

M. L. Puri and Durga Das Khullar —

for Appellants.

Basant Krishan for Advocate-General —

for the Crown.

Young C. J. — Nihal Singh, Harnam Singh and Tarlok Singh have been condemned to death by the learned Sessions Judge of Lahore for the murder of one Kishan Singh. Kishan Singh and his party had cause of enmity against Nihal Singh and his party. This is agreed to by both the defence and the prosecution and it is unnecessary therefore to refer to the evidence on the subject. Shortly before the death of Kishan Singh, Nihal Singh and others built a wall which encroached on Kishan Singh's land. This was demolished by Arjan Singh, the son of Kishan Singh. The next day Nihal Singh and others of his party rebuilt the wall. On 22nd August 1938, that is the next day, Kishan Singh was killed. The prosecution alleged that, about 4 P. M. that afternoon, Kishan Singh left his house in order to go to the shop of a Mochi. He proceeded from his haveli down a lane and then at the bottom of that lane he turned to the right into the lane

leading to the shop of the Mochi and further on the haveli of the accused. It is alleged that when Kishan Singh turned into this lane Nihal Singh and the two others came from their haveli and attacked Kishan Singh with sharp and blunt weapons, the result of which was that Kishan Singh died.

There were four eye-witnesses called by the Crown: a brother, a nephew and a son of the deceased and another person Sajjan Singh. The learned Sessions Judge did not feel inclined to rely completely upon the evidence of the obvious relatives of Kishan Singh. He however did rely very strongly on the evidence of Sajjan Singh. We allowed an application, when this case first came up for hearing, for further evidence to be taken as regards Sajjan Singh, especially as the learned Sessions Judge had laid emphasis upon his evidence. We are satisfied from the additional and the original evidence upon the record that Sajjan Singh also is not to be completely trusted. That he is a relative of Kishan Singh we have no doubt. When he was cross-examined he said on more than one occasion that he could recollect neither the name of his maternal grandfather or grandmother. This we cannot believe. He was obviously prevaricating. Every villager knows the pedigree of his family even further back than his grandfather and grandmother. In addition, it has been proved that Sajjan Singh had given evidence on behalf of Kishan Singh about six months before the murder took place and it is also proved that a brother of Sajjan Singh gave evidence for Kishan Singh in a criminal matter some years ago. We therefore believe that Sajjan Singh is in the same class as the other witnesses and none of them can be completely relied upon. We are also a little doubtful about the evidence of these witnesses for this reason that we think it doubtful that they all should have happened to have been in this part of the village at the actual moment of the assault. Their reason for being there was that they were going to their fields. An examination of the map however shows that the lane down which Kishan Singh went and down which others followed Kishan Singh does not proceed to their fields. It is said by these witnesses that they went in a roundabout way because of the rain which had caused a certain amount of flooding on the path leading directly to their fields. There had been rain but we are doubtful, if there had been sufficient rain to make these villagers go to their

fields by other than the direct route. All these matters raise a certain amount of doubt in our mind as to the reliability of these witnesses. We therefore have come to the conclusion that we require corroboration of their evidence.

As regards Nihal Singh there is complete and very strong corroboration. He has himself in Court confessed that he took part in the killing of Kishan Singh and indeed the principal part. Further, from him were taken a turban and shorts (kechhera) stained with human blood. It has been argued on behalf of Nihal Singh by Mr. Mukand Lal Puri that we may take into consideration also the rest of the confessional statement. We are satisfied however that this is not a case where we must take the confession as a whole. This is a case where there is evidence other than the confession. We are satisfied that a part of the confessional statement is false. We are also satisfied that the meeting of Kishan Singh and Nihal Singh did not take place where the wall had been erected as Nihal Singh states. Nor do we believe that Kishan Singh chased Nihal Singh from this place right up to the neighbourhood of Nihal Singh's haveli where Nihal Singh would certainly get help from his relations. This part of the confession, in our opinion, is false. This confession therefore and the discovery of the bloodstained clothing, corroborate strongly the evidence of the eye-witnesses so far as Nihal Singh is concerned. Further, having admitted that he took part in the killing the onus is strongly upon Nihal Singh to show that his case comes under one of the exceptions under S. 300, I. P. C. This, as we have pointed out above, he has failed to do.

It has been argued by Mr. Mukand Lal Puri that we must take the confession as a whole because we have some doubt as to the eye-witnesses' evidence. He argues that if there is any doubt concerning the eye-witnesses' evidence we ought to discredit it altogether and that it cannot be corroborated. This is an argument which we cannot accept. If we had no doubt about the eye-witnesses' evidence it is obvious that we would need no corroboration of that evidence. It is only where there is some doubt about a witness that the rule of prudence demands corroboration of his evidence. With regard however to Harnam Singh and Tarlok Singh, the only evidence against them is that of the four eye-witnesses. There being no corroboration of

these witnesses' evidence as regards Harnam Singh and Tarlok Singh, we must accept their appeal. With regard to Nihal Singh, we see no reason to interfere with the sentence of death and therefore we confirm it and dismiss his appeal. We acquit Harnam Singh and Tarlok Singh.

G.N./R.K.

Order accordingly.

A. I. R. 1940 Lahore 159

SKEMP J.

Mangal Singh — Plaintiff — Appellant.
v.

Pandit Dial Chand — Defendant
— Respondent.

Second Appeal No. 1665 of 1939, Decided on 19th January 1940, from decree of Dist. Judge, Gujranwala, D/- 24th July 1939.

Contract—Specific performance—One of co-sharers contracting to sell entire land and undertaking to obtain consent of other co-sharers — Contract not fulfilled as other co-sharers refused to give up their shares—Vendee is entitled to damages — Statement by vendee that as contract was not capable of specific performance he would confine his claim to damages has no bearing on trial.

Where one of the cosharers enters into a contract for sale of the entire land including the interest of the other cosharers, at the same time giving an undertaking to obtain the consent of the other cosharers to the transfer and the contract is not fulfilled on account of the refusal of the rest of the cosharers to give up their shares, the vendee is entitled to damages for non-performance of the contract. A statement by the vendee that he would confine his claim to damages only as specific performance was not possible can have no bearing at all on the course of the trial: *A I R 1925 Lah 465, Rel. on; (1885) 28 Ch D 356 and A I R 1924 Pat 81, Disting; A I R 1928 P C 208, Expl. and Disting.* [P 161 C 2]

M. L. Puri—for Appellant.

Achhru Ram and Arjan Das

— for Respondent.

Judgment. — This second appeal has arisen from a suit for specific performance of a contract to sell land and, in the alternative, for damages. On 29th August 1937, Dial Chand, defendant 1, entered into an agreement with the plaintiff Mangal Singh to sell a plot of land measuring about 3 kanals, 16 marlas at Kamoke. Dial Chand was not the sole owner of the plot but was one of four co-owners. The agreement provided that the plot should be sold at the rate of Rs. 34 per marla, that the sale-deed would be executed and registered within one month, that in case of default the plaintiff would be entitled to a refund of Rupees 100 earnest money and to compensation

for the breach of the contract, and that Dial Chand would be responsible that the other parties should carry out the contract of sale. On 28th September 1937, that is the last date for carrying out the contract, the plaintiff sent a registered notice to defendant 1, but this was not delivered till 1st October. On 29th September, he sent a telegram to Dial Chand to come and execute the sale deed, but nothing was done. On 20th November 1937, the plaintiff sued for specific performance of the contract and in the alternative, for Rs. 1368 damages resulting from the breach and also for refund of his earnest money, Rs. 100. Defendants 2 to 4, the other share-holders, pleaded that they had not covenanted to sell their shares, that they had not authorized defendant 1 to do so and that the suit, therefore, did not lie against them. On 1st March 1938, the oral statements of parties were taken. The plaintiff then said: "In view of the statements of defendants 2 to 4 I now confine my claim to a claim for damages only." The plaint was, however, not amended. Defendant 1, Dial Chand, pleaded that the plaintiff knew that he was not a mukhtar for his co-defendants and accordingly could not assume responsibility for them; and that he had said that if the other co-sharers were not willing, then he was not responsible. If the plaintiff wished he could take Dial Chand's share, Dial Chand was ready to sell his one-fourth share on receiving the full price at the rate of Rs. 34 per marla.

On 1st March 1938, Dial Chand made an oral statement that the writer of the agreement in accordance with the general custom wrote that he was responsible for the other co-sharers but in reality he took no responsibility on their behalf. He had asked the plaintiff either to take his one-fourth share or receive back Rs. 100 earnest money but the plaintiff refused and he was willing to repay the earnest money. On these pleadings the trial Court framed the following issues:

1. Whether defendant 1 did not hold himself responsible for getting the shares of defendants 2 to 4 sold to the plaintiff and that he had told plaintiff that he would owe no responsibility if they would refuse to part with their shares? 2. Has not defendant 1 caused a breach of the contract entered into by himself and the plaintiff? 3. Whether plaintiff has suffered any loss as a result of the breach caused by defendant 1; if so, to how much compensation is he entitled? 4. Relief?

Another Subordinate Judge found as follows: Issue No. 1: He held that the words "I would be responsible on their behalf"

occurring in agreement Ex. P-1 were vague and imposed no legal responsibility, that the plaintiff had insisted on this clause being inserted probably with the prospect of getting compensation, and that defendant 1 could not give any undertaking on behalf of his co-sharers and as no misrepresentation was made by him, he could not be held liable for the vague clause in the agreement. Issue No. 2: He held that the agreement was unenforceable. Further that the plaintiff was not entitled to any compensation because he had sued for specific performance and had only in the alternative asked for compensation. As he had elected to abandon his claim for specific performance, the Court could not award compensation. Issue No. 3: He said that if the plaintiff had succeeded, he would have awarded compensation because the price of the land had arisen; and on issue No. 4, decreed a refund of the earnest money of Rs. 100 with interest amounting to Re. 1-12-0.

Plaintiff appealed to the learned District Judge who dismissed the appeal on the authority in 52 Bom 597¹ saying that when a party has declined to accept specific performance, he becomes disentitled to claim compensation as an additional or alternative relief. He also said that on the merits the plaintiff stood on very weak ground, but gave no definite finding. The plaintiff has come here on second appeal through Rai Bahadur Lala Mukand Lal Puri. The defendant-respondent has been represented by Mr. Achhru Ram. Mr. Mukand Lal drew attention to a Division Bench ruling of this Court, 6 Lah 221,² which is exactly in point. In that case the defendant, one Bal Kishan, agreed to sell a plot of land owned by himself and his son-in-law. The son-in-law was not a party to the agreement but the defendant gave an assurance that he would have no objection. The son-in-law did object and it was held that the purchaser could not enforce specific performance of the entire contract but he could do so in respect of Bal Kishan's half share provided that he relinquished all claim to further performance and all right to compensation for the deficiency, and was ready to pay the full price agreed upon as provided in S. 15, Specific Relief Act. If he did not agree, specific performance could not be

granted but Bal Kishan was liable to pay damages for breach of the contract. In A I R 1924 Pat 81³ the reason was pointed out why specific performance of a contract like this would not be enforced in part:

The rule is firmly established that a contract for sale of property in one lot will generally be considered indivisible for the reason that there is obvious injustice in compelling the purchaser of the entirety to take undivided parts or shares of the estate.

Thus, in the present case, the plaintiff, while still willing to take the bargain as a whole, does not want to take only Dial Chand's one-fourth share amounting to 19 marlas, because he wishes to build a go-down, and the small area which he would thus receive is useless for that purpose. On the merits therefore the trial Judge was clearly wrong. Plaintiff no doubt went into the agreement with his eyes open but so did the defendant and I cannot see that moral blame is to be imputed to the plaintiff rather than the defendant. The defendant made the agreement; he is unable to carry it out and he must take the consequences. Mr. Achhru Ram for the respondent hardly contested the force of these arguments, but contended that in view of 52 Bom 597¹ the claim could not be decreed. The facts of that case are that Judah, nephew and agent of Mrs. Sassoon, entered into a contract to sell property belonging to Mrs. Sassoon to the plaintiff. The contract was alleged to be made on 29th December 1919. The suit was lodged on 10th January 1921. The issues were not framed until January 1925. On 19th March 1924, i. e. nine months or more before the trial, the plaintiff through his solicitors gave notice that he would not claim specific performance but would claim damages which he assessed at seven lacs. The trial Judge decreed the claim but a Division Bench of the Bombay High Court dismissed it and their decision was upheld in the Privy Council. Their Lordships of the Privy Council held that Judah had no authority to enter into the contract in question. They also spoke of the effect of the plaintiff's abandonment of his claim for specific performance on 19th March 1924.

The plaintiff as explained to the Board by his counsel had found it inconvenient any longer to retain in readiness for completion of the purchase the money payable under the contract, and this was the explanation of his decision to convert his claim against the defendant into one of a character which could be successfully maintained without

1. *Ardeshir Mama v. Flora Sassoon*, (1928) 15 A I R P C 208=111 I C 413=55 I A 360=52 Bom 597 (P C).

2. *Sitaram v. Balkishan*, (1925) 12 A I R Lah 465=88 I C 472=6 Lah 221=26 P L R 366.

3. *Abdul Haq v. Mahomed Yahya Khan*, (1924) 11 A I R Pat 81=78 I C 493=4 P L T 553.

further financial strain upon himself. Their Lordships do not doubt the correctness of this statement, but they are not convinced that the glittering prospect of very heavy damages claimable in the special circumstances of the case may not largely have influenced the plaintiff's decision (pages 602-603).

Their Lordships after an interesting historical explanation of the fact that a plaintiff could sue either for specific performance or in the alternative for damages, came to the conclusion that S. 19, Specific Relief Act, laid down the same law which exists in England. They said:

The Section embodies the same principle as Lord Cairns' Act, and does not any more than did the English statute enable the Court in a specific performance suit to award 'compensation for its breach' where at the hearing the plaintiff has debarred himself by his own action from asking for a specific decree.

And on looking at the plaint in this suit, their Lordships can have no doubt, any more than the English Court of Appeal had with reference to the statement of claim in (1885) 28 Ch D 356⁴ that it is framed with reference to S. 19 and that the alternative claim for damages thereby made is in the plaint conditioned just as it is conditioned in the Section. It follows that in their Lordships' judgment there was after the letter of 19th March 1924, no power left in the trial Judge, without an apt and sufficient amendment of the plaint, to award the plaintiff at the hearing any relief at all. (Pages 623 and 624.)

In my judgment the Courts below have misunderstood the effect of this ruling. In his oral statement of 1st March 1938, which has already been quoted, the plaintiff virtually said that "as defendants 2 to 4, the co-owners, refuse to give up their shares, the contract is incapable of performance and therefore I confine my claim to a claim for damages." The plaint was not amended at all. Supposing that the plaintiff had not made this statement, what would have been the course of the action? The Court would have presumably framed an issue on the question whether the contract was capable of performance and forthwith decided it in the negative. The facts were obvious and the plaintiff anticipated this conclusion. His statement had no real effect on the course of the trial.

Mr. Achhru Ram on behalf of the respondent also quoted (1885) 28 Ch D 356.⁴ Hipgrave was the vendor of a business, and claimed specific performance of a contract by which he had agreed to sell and the defendant to purchase the business; he alleged that he was able and willing to perform the contract but that the defendant refused. He claimed liquidated damages for

the refusal. After the close of the pleadings, Hipgrave gave notice that unless the defendant completed the purchase within a week, he should re-sell the business, which he accordingly did. The action went on to trial without amendment of the pleadings. The learned Vice-Chancellor held that the suit must fail and the Court of Appeal agreed. Lord Selborne L. C. said (page 361):

The defendant, in his statement of defence, alleges. that the plaintiff was not able and willing to perform the contract. Such being the state of the record, the plaintiff puts it out of his power to perform the contract by selling the property, and so disables himself from doing that which by his pleadings he offers to do. It is therefore by his own action entirely that he is placed in his present position.

This is quite different from the present case where the plaintiff did not alter his position at all but merely recognized that the contract was incapable of being carried out, because defendants 2 to 4 who were not parties to the contract refused to sell their shares of the land. Accordingly in my opinion the Courts below were wrong in dismissing the suit on this ground. Unfortunately it does not seem possible to conclude the case as the learned District Judge has not given a finding as to damages. Indeed the trial Judge gave no definite finding though he intimated what he might have found, if he had not dismissed the suit on other grounds. I accept the appeal, set aside the judgments and decrees of the Courts below, find that the plaintiff is entitled to damages from defendant Dial Chand and remand the case to the learned District Judge for a finding in accordance with law on the quantum of damages. The finding as to return of earnest money and interest was not attacked and is maintained. The costs of this hearing and also of the Courts below shall be costs in the litigation. The parties are to attend in the Court of the learned District Judge on 9th February and there ask for a date for the *pacca* hearing.

G.M./R.K.

Appeal accepted.

A. I. R. 1940 Lahore 161

SKEMP J.

Bishen Singh and others — Judgment-debtors — Appellants.

v.

Jaishi Ram — Plaintiff — Decree-holder — Respondent.

Exn. First Appeal No. 280 of 1939, Decided on 25th January 1940.

⁴ Hipgrave v. Case, (1885) 28 Ch D 356=54 L J Ch 399=52 L T 242.

Execution—Constructive res judicata applies.

The objections to the execution were heard and disallowed and the objection that execution could not proceed because the deed of assignment in favour of the decree-holder was not registered was not taken :

Held that the judgment-debtors were precluded from raising that plea by the rule of constructive res judicata : *A I R 1940 Lah 7*; *A I R 1935 Lah 200*; *A I R 1937 Lah 772* and *A I R 1936 Lah 696, Rel. on*; *A I R 1933 Lah 3, Expl.*; *A I R 1940 Lah 27, Disting.* [P 162 C 2; P 163 C 1]

J. L. Kapur and Madan Mohan Kapur—
for Appellants.

Amar Nath Grover — for Respondent.

Judgment.—The question in this appeal is how far the doctrine of constructive res judicata applies to execution proceedings. In 1928 Sri Balraj, a minor, obtained a decree for Rs. 6647-12-0 and Rs. 805 costs against Katha Singh and Bishan Singh. Execution was taken out and during execution proceedings a compromise was made between the next friend of the minor and the judgment-debtors whereby Rs. 2000 were to be paid at once and Rs. 5000 after a year. Didar Singh, son of Bishan Singh, became surety for payment of Rs. 5000 and effected a charge on land belonging to him towards satisfaction of this undertaking. On 21st September 1935 the decree-holder, then a major, assigned his rights under the decree to Jaishi Ram by means of an unregistered instrument. Jaishi Ram applied for execution and on 18th December 1935 the original decree-holder having confirmed the assignment in Court the Court substituted Jaishi Ram as decree-holder. A warrant of attachment for Katha Singh's property was then issued. On 13th February 1936 the judgment-debtors lodged an application under O. 21, R. 2, Civil P. C., that they had paid Rs. 5000 to Jaishi Ram in full satisfaction of the decree. The heading of the application mentions Jaishi Ram as the decree-holder. In February 1937 the Subordinate Judge found that this payment was not proved and an appeal to the High Court was rejected in July of the same year.

Before the appeal was heard, on 30th March 1937, Katha Singh, judgment-debtor, made an application under S. 47, Civil P. C., in which he took several objections to execution, as follows : (1) the executing Court had no power to recognize assignment of the decree; (2) execution was barred by limitation; (3) the second friend for execution proceedings was not properly appointed; (4) the execution was void and illegal because the warrant for attachment was not struck out outside the Collector's Court; and (5)

the application was void because the value and income of the property had been wrongly given.

Bishan Singh, judgment-debtor, on 4th March 1937 made an application including (2) (3) and (4) of these grounds. In August 1937 the executing Judge dismissed these objections and his order is now final. In October 1937, the judgment-debtors took the matter to the Debt Conciliation Board where it remained till November 1938, being returned on an application of the judgment-debtors that the Board had no jurisdiction to deal with the matter. On 4th March 1939, the judgment-debtors took the point that execution could not proceed because the deed of assignment to Jaishi Ram in 1935 was not registered. The learned executing Judge following *A I R 1935 Lah 200*¹ and *A I R 1937 Lah 772*² has held that this point ought to have been taken in the previous objections of March 1937 and that not having been taken the judgment-debtors are now barred from raising it by the rule of constructive res judicata. He dismissed the objections.

The judgment-debtors have come here and their appeal has been argued by Mr. J. L. Kapur who, while admitting that the Lahore High Court has in a series of rulings, held that the rule of constructive res judicata applies to execution proceedings, argues that this rule is not followed in other High Courts, notably in the Allahabad High Court, and urges that the rule has been doubted by Dalip Singh J., in *15 Lah 208*³ and dissented from by Din Mohammad J., in *A I R 1940 Lah 27*.⁴ There is no doubt that the rule of constructive res judicata in execution proceedings does not apply in the Allahabad High Court; and *A I R 1937 All 446*,⁵ a Division Bench ruling, supports the appellants. The learned Judges, however, who decided that case expressly stated that the Full Bench ruling, *58 All 313*,⁶ did not apply to the circumstances before them.

1. *Prabhu Dayal v. Dewat Ram*, (1935) 22 *A I R Lah 200*=155 *I C 286*=15 *Lah 869*=35 *PLR 429*.

2. *Nanak Chand-Ramji Das v. Ibrahim*, (1937) 24 *A I R Lah 772*=174 *I C 965*=40 *P L R 38*.

3. *Kidar Nath v. Taj Mahomed Khan*, (1933) 20 *A I R Lah 3*=144 *I C 259*=15 *Lah 208*=34 *P L R 685*.

4. *Ganga Ram Trust Society, Lahore v. Mehta Sundar Lal*, (1940) 27 *A I R Lah 27*=186 *I C 653*.

5. *Aley Rasul v. Balkishen*, (1937) 24 *A I R All 446*=169 *I C 997*=1937 *A L J 482*.

6. *Genda Lal v. Hazari Lal*, (1936) 23 *A I R All 21*=160 *I C 394*=58 *All 313*=1935 *A L J 1189* (F B).

The principle has, however, always been applied in the Lahore High Court: see the two rulings already cited and also A I R 1936 Lah 696.⁷ The fact that Dalip Singh J., though with some hesitation, applied the principle in 15 Lah 208³ is really an argument to stand by the principle consistently acted on in this Court. A I R 1940 Lah 27⁴ may be distinguished on the facts. Din Mohammad J. held that the plea not raised in the previous objections ought not to have been raised because it was inconsistent with pleas actually raised. He also pointed out that subsequent to the previous application Act 2 of 1936 had come into force which had changed the law applicable to the subject. For these reasons I am of opinion that that case was decided on particular facts and that its principle does not apply to the present case. Indeed, in another case, A I R 1940 Lah 7,⁸ Din Mohammad J. said :

33 C L J 218,⁹ 14 Lah 409¹⁰ and A I R 1935 Lah 949¹¹ all lay down that principles of constructive res judicata apply in execution proceedings.

The facts of that case are, however, distinguishable from the present facts. Mr. Jiwan Lal Kapur also contended that in most of the cases and notably in A I R 1935 Lah 200¹ there was a previous application for execution on which it was held the objection ought to have been taken whereas in the present case the application for execution is the same as that to which the objections of March 1937 were taken. I cannot see that this circumstance makes any difference and in A I R 1937 Lah 772² it would appear that the application for execution was the same although the point was not there raised. For the foregoing reasons I dismiss the present appeal with costs. Mr. Grover for the respondents requests that as the decree was granted nearly 12 years ago, the records may be sent immediately to the lower Court.

G.N./R.K.

Appeal dismissed.

7. Punjab National Bank Ltd., Amritsar v. Shamsher Singh, (1936) 23 A I R Lah 696=166 I O 391=38 P L R 936.
8. Musharaf Hussain v. Agha Munawar Ali Khan, (1940) 27 A I R Lah 7.
9. Raja of Ramnad v. Velusami Tevar, (1921) 8 A I R P C 23 = 59 I O 880 = 48 I A 45 = 33 C L J 218 (P O).
10. Ved Kaur v. Balkishen Das, (1933) 20 A I R Lah 594 = 141 I O 577 = 14 Lah 409 = 34 P L R 528.
11. Umrao Singh v. Hafiz Mahomed Abdullah, (1935) 22 A I R Lah 949 = 162 I O 208 = 38 P L R 517.

A. I. R. 1940 Lahore 163

DALIP SINGH J.

Nand Singh — Decree-holder —
Appellant.

v.

Chaudhri Gulzar Khan — Judgment-debtor — Respondent.

Exn. Second Appeal No. 1013 of 1939, Decided on 3rd January 1940, from order of Senior Sub-Judge, Rawalpindi, D/- 14th April 1939.

Punjab Relief of Indebtedness Act (7 of 1934), S. 20 (3)—Execution of decree obtained before certification is not barred by S. 20 (3).

Where a decree has already been obtained and the creditor does not sue for the debt and obtains a decree but seeks to execute a decree already obtained prior to certification, S. 20 (3) does not bar the execution of such a decree. Whatever may have been the intention of the Legislature the words used are clear and a decree obtained before certification is not barred. [P 164 C 1]

Shamair Chand — for Appellant.

Judgment. — The appellant in this case obtained a decree on 3rd January 1935. Thereafter it appears that the judgment-debtor applied to the Debt Conciliation Board and there was an agreement under S. 17 and this debt was certified under S. 20. The decree-holder now took out execution of the decree obtained before this certification and was met by the plea that he had to wait till the expiry of the period fixed in the agreement under S. 17 and six months after under S. 20 (3), Relief of Indebtedness Act. The trial Court upheld this plea and so did the Appellate Court. The question turns on construction of sub-s. (3) of S. 20 which reads as follows :

Where after the date of an agreement made in accordance with S. 17 or of certification any unsecured creditor sues for the recovery of a debt in respect of which a certificate has been granted under sub-s. (1) or any creditor sues for the recovery of a debt incurred after the date of such agreement, any decree passed in such suit notwithstanding anything contained in the Code of Civil Procedure, 1908, shall not be executed until six months after the expiry of the period fixed in the agreement authenticated under sub-s. (1) of S. 17.

It would seem from this that where a debt has been certified and the creditor sues for the recovery of that debt and obtains a decree, that decree cannot be executed until six months after the expiry of a certain period. But the question in this case is where a decree has already been obtained and the creditor does not sue for the debt and obtains a decree but seeks to execute a decree already obtained prior to certification, does this Section bar the execution of such a decree for a certain period. No doubt

the word "debt" has been defined in S. 7 as including a decretal debt but it is impossible so far as I can see to sue for the recovery of a decree, nor would there be any meaning in saying "any decree passed in such suit" if a decree has already been obtained and only execution is sought. Whatever may have been the intention of the Legislature the words used appear to be clear and a decree obtained before certification does not appear to be barred. I therefore accept this appeal and send the case back to the trial Court for disposal according to law. The appellant will have his costs throughout.

G.N./R.K.

*Appeal accepted.** **A. I. R. 1940 Lahore 164**

ABDUL RASHID J.

Arura Vir Singh — Judgment-debtor —
Petitioner.

v.

Punjab Zamindara Bank, Ltd., Lyallpur, Decree-holder and another, Judgment-debtor — Respondents.

Civil Revn. No. 1034 and Exn. F. A. No. 242 of 1939, Decided on 28th November 1939, from order of Dist. Judge, Lyallpur, D/- 10th June 1939.

* Civil P. C. (1908), O. 32, R. 5 and S. 141 — Award against minor — Application by arbitrator for filing of award not containing prayer for appointment of guardian for minor — Application and orders thereon are nullity as against minor.

The presentation of the application by the arbitrator to the Court for the filing of an award comes within the category of civil proceedings within the meaning of S. 141. Hence, where an award is against a minor it is incumbent to make a prayer in such application for a person being appointed the guardian of the minor. Where no such prayer is made the application and the orders thereon are nullity as against the minor and the minor can seek his remedy by an application under O. 32, R. 5 and not necessarily by a separate suit: *A I R 1928 Cal 844 and A I R 1933 All 116, Rel. on.*

[P 165 C 1, 2]

Shamair Chand — *for Petitioner.*Iqbal Singh — *for Respondents.*

Order. — Lal Singh is alleged to have borrowed about Rs. 6000 from the Punjab Zamindara Bank, Ltd., Lyallpur. Vir Singh is alleged to have become a surety. Lal Singh, the principal debtor, was adjudicated an insolvent on 23rd January 1934. On 23rd January 1937, the Punjab Zamindara Bank, Ltd., Lal Singh, insolvent, and Arura, minor son of Vir Singh, through the guardianship of his mother Mt. Mallan, appointed Kapur Singh as the sole arbitrator about

the debt due from Lal Singh. On 4th February 1937, Kapur Singh gave an award to the effect that Lal Singh, the principal debtor, and Arura, minor son of Vir Singh, were liable to the Bank in the sum of Rs. 9543-1-3. On 6th February 1937, Kapur Singh put in an application stating that a decree should be passed in accordance with the terms of the award in favour of the Zamindara Bank, Ltd., Lyallpur, and against Lal Singh and Arura, minor, under the guardianship of his mother. On 10th February the Court passed an order to the effect that Kapur Singh, arbitrator, had put in the award and that notices should now issue to the other party to file any objections they liked within ten days and that the objection will be heard on 1st March 1937. As no objections were put in, the award was filed on 31st March 1937. On 18th January 1938, Arura, minor put in an application under O. 32, R. 5, Civil P. C., stating that as he was not properly represented either before the arbitrator or in the proceedings before the Court the award and the decree based thereon were a nullity and should be set aside. The application was dismissed. Against this decision, Arura minor, under the guardianship of his maternal uncle Partap Singh has preferred an appeal to this Court.

Mr. Shamair Chand admitted in the course of his arguments that no appeal lay and that his appeal should be treated as a petition for revision. Notices issued to Mt. Mallan on 20th February do not appear to have been served on her. The report on the notice was to the effect that Mt. Mallan had gone to Chak No. 55 and could not be served. On 27th February the report was to the effect that Mt. Mallan had been asked to accept service but she had refused and the notice had been affixed to her house. O. 32, R. 3 lays down that where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor. Sub-r. (3) of R. 4 of O. 32 lays down that no person shall, without his consent, be appointed guardian for the suit. R. 5 of O. 32 lays down that every order made in a suit or in any application before the Court in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, where the pleader of the party at whose instance such order was obtained knew, or might reason-

ably have known, the fact of such minority, with costs to be paid by such pleader.

It was contended by Mr. Shamair Chand that in the application preferred to the Court for the filing of the award under S. 11, Arbitration Act, there was no prayer for the appointment of Mt. Mallan as a guardian of Arura, minor. Mt. Mallan was not served, but even if she were served and failed to appear, it was the duty of the Court to appoint some one else as the guardian, as nobody can be appointed a guardian without his consent. The learned counsel therefore urged that so far as Arura was concerned, the application of the arbitrator dated 6th February 1937 was no application at all and that the entire proceedings taken on this application and the orders passed thereon were a nullity. Under S. 141, Civil P. C., the procedure provided in regard to suits is to be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction. The presentation of the application by the arbitrator in my opinion comes within the category of 'civil proceedings'. It was incumbent to make a prayer, in this application, for Mt. Mallan being appointed the guardian of Arura, minor. No such application was made: no order was passed by the learned District Judge appointing Mt. Mallan as the guardian of Arura and the provisions of O. 32, Rr. 3, 4 and 5 were completely ignored.

In A I R 1928 Cal 844¹ it was held that if a decree is obtained against a minor without appointing any person as his guardian-ad-litem the decree is a nullity as against him. The following remarks occur in A I R 1933 All 116²:

The learned advocate for the applicant has relied strongly on A I R 1920 Mad 713³ and urged before us that the only remedy open to a minor who is not properly represented is to bring a separate suit, and that he cannot be allowed to be heard in the suit itself because he is not a party. We may point out that the view which has prevailed in this Court has been that a minor against whom a decree has been passed without the appointment of a proper guardian has several remedies open to him; he may in that very suit, if the facts justify, appeal against the decree, apply for re-hearing under O. 9, R. 18, apply for a review of judgment or apply for an order under O. 32, R. 5 (2) of the Code, and he

has in addition the ordinary remedy to bring a separate suit.

These observations were made in a case that came before the Allahabad High Court on the revisional side. I am of the opinion that it is open to the minor to put in an application under O. 32, R. 5, Civil P. C., and it is open to the Court to declare on such an application that all the proceedings taken against the minor were a nullity. The principal argument addressed on behalf of the respondent was that the only remedy open to the minor is a separate suit and that it is not open to him in an application under O. 32, R. 5 to get the entire proceedings before the arbitrator and in the Court to be declared a nullity. Several rulings were relied on in this connexion, e. g., 3 Lah 296,⁴ 50 Cal 1,⁵ 60 Cal 670⁶ and A I R 1929 Lah 882.⁷ Under S. 14, Arbitration Act, any person affected by an award can file objections to the effect that an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured. If the Court comes to the conclusion that an award has been improperly procured, the Court may set aside the award. Had Arura been validly represented by a guardian in the Court of the District Judge, it was open to him to say that Mt. Mallan was not his guardian and she had no power to make a reference to arbitration. As no guardian was appointed by the Court, Arura was deprived of the right of challenging the award on this score.

For the reasons given above, I accept this petition for revision, set aside the orders of the lower Courts, dated 31st March 1937, and 10th June 1937 so far as Arura is concerned and declare that the award cannot be enforced as if it were a decree of the Court, and that all the proceedings taken against Arura on the application of the arbitrator are a nullity. In view of the belated nature of the application of the minor, I order that the parties will bear their own costs throughout.

D.S./R.K.

Petition accepted.

1. *Abdul Karim v. Thakur Das Thakur*, (1928) 15 A I R Cal 844=113 I C 843 = 55 Cal 1241= 32 C W N 665.
2. *Moti Chand v. Balram Das*, (1933) 20 A I R All 116=143 I C 326=55 All 136=1932 A L J 1128.
3. *Eda Punnayya v. Jangala Kama Kotayya*, (1920) 7 A I R Mad 713 = 53 I C 184 = 37 M L J 399.

4. *Jai Narain-Babu Lal v. Narain Das-Jaini Mal*, (1922) 9 A I R Lah 369=69 I C 583=3 Lah 296.
5. *Sasoon & Co. v. Ramdutt Ramkissen Das*, (1922) 9 A I R P C 374=70 I C 777=49 I A 366=50 Cal 1 (P C).
6. *Jnanendra Mohan v. Rabindra Nath*, (1933) 20 A I R P C 61=142 I C 324=60 I A 71=60 Cal 670 (P O).
7. *Damodar Das v. Basheshar Das*, (1929) 16 A I R Lah 882=124 I C 318.

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BHIDE J.

Punjab National Bank, Ltd. —
Appellant.

v.

Official Receiver, Karnal — Respondent.Second Appeal No. 14 of 1939, Decided
on 7th November 1939, from order of Dist.
Judge, Karnal, D/- 5th March 1939.**(a) Insolvency — Date of admission of insolvency petition is date on which insolvent was asked to furnish security for appearance.**The date of admission of insolvency petition must be deemed to be at least the date on which the Court directed the insolvent to furnish security for his appearance : *A I R 1936 Lah 885, Rel. on.* [P 167 C 2]**(b) Civil P. C. (1908), O. 2, R. 2—Mortgagee suing for portion of mortgaged property and obtaining decree creating charge on that portion — In execution he purchasing whole property and remaining in possession of it — Omission to sue for remaining portion of mortgage bars fresh suit but does not extinguish security—He can rely on security of whole land by way of defence in receiver's proceeding under S. 51, Provincial Insolvency Act.**

Where a mortgagee brings a suit in respect of a portion of mortgaged property instead of suing for the whole and obtains a decree creating a charge over that portion, O. 2, R. 2 bars a fresh suit in respect of the remaining portion but does not extinguish the security. Where such mortgagee has realized the whole security by auction purchase and is in possession of it he can resist receiver's claim in proceedings under S. 51, Provincial Insolvency Act, on the plea that he was a secured creditor in respect of the whole of the land.

[P 168 C 2; P 169 C 1, 2]

(c) Limitation — Time-barred debt repaid after expiry of period of limitation — Debtor cannot sue to recover it — Same principle is recognised in Ss. 60 and 61, Contract Act (*Obiter*).

If a time-barred debt is repaid after the period of limitation has expired, no action will lie for its recovery on the ground that it was barred at the date of the payment, the reason being that though the remedy at law was barred, the right in the debt still subsisted. This principle is also recognised in Ss. 60 and 61, Contract Act, which give the right to a creditor to appropriate payment even towards time-barred debts when they are not specifically paid towards other debts. [P 169 C 2]

(d) Hindu Law — Partition — Declaration of intention to separate and not actual partition is essential.

All that is necessary for partition amongst members of a joint Hindu family is a clear declaration as regards intention to separate and actual partition of the property by metes and bounds is not necessary to effect severance of joint status.

[P 170 C 2]

(e) Registration Act (1908), S. 17 (1) (b) — Document merely containing list of documents deposited with mortgagee — Mere fact that it is stated in heading of list that property was encumbered will not make document registrable.Where a document contains a mere list of documents deposited with the mortgagee when creating an equitable mortgage regarding certain property, the mere fact that it is stated in the heading of the list that the property was encumbered will obviously not be sufficient to turn it into a document embodying the agreement between the parties. Such document does not require registration : *A I R 1935 Lah 889, Disting.* [P 171 C 1]**(f) Registration Act (1908), S. 17 (1) (b) — Contract of guarantee on behalf of certain persons that they would be liable if mortgagor failed to pay his debt—Document merely reciting that mortgage took place between debtor and creditor — Document is not registrable.**Where document contains a contract of guarantee on behalf of certain persons that they would be liable to the mortgagee if the mortgagor failed to pay his debt and is not the main transaction of mortgage between the mortgagor and mortgagee but merely recites that the transaction of mortgage took place between the mortgagor and the mortgagee, such document is not registrable: *A I R 1935 Lah 889, Disting.*; *A I R 1939 P C 167, Rel. on.* [P 171 C 1]Jagan Nath Aggarwal — *for Appellant.*Faqr Chand Mittal — *for Respondent.***Judgment.** — This is a second appeal arising out of an application by the receiver under S. 51, Provincial Insolvency Act, in proceedings relating to the insolvency of one Randhir Singh. It has been held in 14 Lah 724¹ that a decision under S. 51, Provincial Insolvency Act, like the one challenged in this case would fall under S. 4 of that Act. A second appeal would therefore be competent and this point has not been disputed before me. The material facts are briefly as follows: Randhir Singh owed a large sum of money to the Punjab National Bank which is alleged to have been secured by an equitable mortgage of certain properties including about 3000 bighas of land situated in a village called Babian. The Bank sued Randhir Singh on the footing of the mortgage, but it is stated that through some mistake the Bank claimed in the plaint an equitable mortgage only over $\frac{1}{4}$ th of the abovementioned land in Babian instead of claiming it over the whole of it. The Court decreed the Bank's claim on 29th October 1929 and held that the Bank was entitled to a charge in respect of about 864 bighas 14 biswas, i. e., the one-fourth share of the Babian land on which an equitable mortgage had been claimed. The Bank then took out execution and attached the above area of 864 bighas 14 biswas of land in Babian over which its charge had been declared by the decree, as well as the remaining area in1. *Sardar Mohammed v. Labhu Ram*, (1933) 20 *A I R Lah 477* = 144 *I C 580* = 14 *Lah 724* = 34 *P L R 1076*.

that village. The whole land was thus auctioned in the execution proceedings and purchased by the decree-holder Bank on 7th June 1934 for Rs. 43,000 and the decree was satisfied to that extent, the sale being confirmed on 15th August 1934. In the meantime i. e. on 8th March 1934, Randhir Singh had put in an application for being declared an insolvent. The petition was registered and Randhir Singh was asked to furnish security on 13th March 1934. This was duly furnished. On 27th November 1934, notices were issued to the creditors. On 15th August 1935 Randhir Singh was adjudged insolvent.

The Punjab National Bank then put in its claim in the Insolvency Court claiming a sum of over a lac of rupees which was still due to it. It was stated in the application that the Bank had already realised its security by the execution sale referred to above and the balance was claimed. The receiver thereupon put in the present application under S. 51, Provincial Insolvency Act, alleging that the Bank had realised the assets by the execution sale after the admission of the petition and was therefore not entitled to the benefit thereof except to the extent of the proceeds of the one-fourth share in the land in Babian over which it had obtained a charge by the decree. The Bank resisted the claim on two grounds, viz., (i) that the assets were not realized after the admission of the petition but before its admission and (ii) that the Bank had an equitable charge on the whole of the above-mentioned area of about 3000 bighas of land at Babian and it was entitled to claim it as against the receiver in these proceedings, notwithstanding the fact that a charge on only one-fourth of the land had been declared in its favour by the decree referred to above.

These contentions were repelled by the Courts below. The Insolvency Court granted the Receiver's application and ordered the Bank to refund three-fourth of the sale proceeds of the Babian land amounting to Rs. 30,500. On appeal the learned District Judge held that the Bank itself being the auction-purchaser, the 'benefit' received by it in this case consisted of three-fourth of the land and the receiver was therefore entitled to this land and not its price in cash. The learned District Judge accordingly varied the order of the executing Court to the extent of directing the Bank to hand over to the receiver three-fourth share in the Babian land which

it had purchased. From this decision, the Bank has preferred this second appeal.

In his arguments, the learned counsel for the appellant Bank has relied on the same two points which were raised in the Courts below. As regards the first point, viz., whether the assets were realised by the Bank before or after the admission of the petition, I feel no hesitation in agreeing with the view taken by the Courts below. According to S. 18, Provincial Insolvency Act, the procedure laid down in the Civil Procedure Code is to be followed so far as it is applicable in respect of insolvency petitions. The procedure for admission of petitions is to be found in O. 4 read with Orders 6 and 7, Civil P. C. Ss. 11, 12 and 13, Provincial Insolvency Act, contain similar rules of procedure for instituting petitions for insolvency. In the present instance, it is not alleged that the petition for insolvency was defective in form. It was presented on 8th March 1934 and was ordered to be entered in the Court register on 13th March 1934. The Court also passed an order on that date directing the insolvent to furnish security for his appearance. The petition must, I think, be held to have been admitted at least on 13th March 1934, when the Court passed an order requiring the petitioner to furnish security for attendance. S. 21, Provincial Insolvency Act, shows that such an order could only be passed by the Court 'at the time of passing an order admitting the petition or at any subsequent time before adjudication.' It follows therefore that the petition must be held to have been admitted on 13th March 1934 if not earlier. A similar view was taken by a learned Judge of this Court in AIR 1936 Lah 885.² As stated already, the sale of Babian land in favour of the Bank took place on 7th June 1934 and was confirmed on 15th August 1934. As the petition for insolvency was admitted on 13th March 1934, the Bank is clearly not entitled to the benefit of the execution, except in so far as it may be protected as a secured creditor under sub-s. (2) of S. 51, Provincial Insolvency Act.

The main point for decision in this appeal therefore is whether the Bank can claim to be a secured creditor to the extent of the whole of the land in Babian, in spite of the fact that it omitted to claim a mortgage over it except to the extent of one-fourth share in the suit instituted on the footing of the mortgage and was granted charge

2. Agar Chand v. Pirthvi Singh, (1936) 23 A I R Lah 885=167 I C 837=88 P L R 1148.

over that share only by the decree. The learned counsel for the appellant has addressed lengthy arguments on this point and has referred to a number of authorities, though he admitted that none of the authorities was directly in point. Briefly stated, the argument of the learned counsel was that although a receiver has a dual capacity in insolvency proceedings, viz. as a representative of the insolvent's estate and also of the creditors, he could not succeed in the present case in either capacity. It was contended that, if he comes as a representative of the insolvent, he could not succeed without getting the sale set aside by an application to the executing Court which held the sale under S. 47, Civil P. C. If, on the other hand, he comes as a representative of the creditors the previous decree cannot be of any avail, as the receiver or the creditors were not a party to the previous suit and the previous decree was, therefore, not binding either on the receiver, or on the Bank in these proceedings. It was further argued that the decree in the previous suit only precluded the Bank from filing a fresh suit with respect to the area of land omitted in the previous suit, owing to the provisions of O. 2, R. 2, Civil P. C., but that there is nothing to prevent it from relying on the security of that land by way of defence in the present proceedings. In support of the contention, that O. 2, R. 2, Civil P. C., only bars the remedy but does not extinguish the security, reliance was placed on A I R 1921 Lah 351,³ A I R 1933 Bom 51⁴ and some other rulings of the same character.

As regards the first question, viz. whether the receiver's application in this case is to be treated as one made by him as a representative of the insolvent or of the creditors, I do not think it really arises; for the receiver is applying not merely as a representative of the insolvent's estate or of the creditors, but under the statutory power conferred on him by the provisions of S. 51, Provincial Insolvency Act. That Section runs as follows:

(1) Where execution of a decree has issued against the property of a debtor no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realized in the course of the execution by sale or otherwise before the date of the admission of the petition.

(2) Nothing in this Section shall affect the

3. Akbar Hussain v. Ragnandandas, (1921) 8 AIR Lah 351=57 I C 348=8 P L R 1921.

4. Official Assignee of Bombay v. Ohimniram Motilal, (1933) 20 AIR Bom 51=142 I C 370=57 Bom 346=34 Bom L R 1615.

rights of a secured creditor in respect of the property against which the decree is executed.

(3) A person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquire a good title to it against the receiver.

It would appear from the above provisions that if any assets are shown to have been realized in execution by sale or otherwise after the date of the admission of the petition for insolvency, the receiver will be entitled to claim from the executing decree-holder the benefit of the execution so received by him, unless the case of the decree-holder falls under sub-s. 2. That sub-section is intended to protect the 'rights of secured creditors and according to it the rights of a secured creditor in respect of the property against which the decree is executed' are not affected by the provisions of the Section. The crucial question, which requires decision in the present case, therefore, is: what were the rights of the Bank in the land at Babian which was sold in execution at the time of the sale?

I have already stated above that although the Bank had obtained a charge over one-fourth of the Babian land only, the whole of the Babian land was attached and sold in execution. The contention of the Bank is that the whole of the land at Babian was actually mortgaged in its favour and the learned Judge has found this fact in favour of the Bank. The learned counsel for the appellant has argued that although the Bank had omitted to claim a mortgage over three-fourth of the Babian land by mistake, there was nothing to prevent it from pleading this mortgage in defence in the present proceedings under S. 51, Provincial Insolvency Act. On behalf of the receiver, on the other hand, it is contended that as a result of the previous suit, the mortgage merged into the decree and the security was thereafter confined to one-fourth area of the Babian land, over which a charge was given by the decree.

After carefully considering the various authorities bearing on this point to which I have been referred, I have come to the conclusion that the principle that limitation merely bars the remedy but does not extinguish the right helps the appellant in the circumstances of this case. This principle has also been held to be applicable to the bar to a fresh suit created by O. 2, R. 2, Civil P. C.: see A I R 1921 Lah 351,³ A I R 1933 Bom 51,⁴ 52 All 539,⁵ A I R 1933

5. Jokhu Bhunja v. Sitla Bakhsh Singh, (1930) 17 AIR All 416 = 122 I C 411 = 52 All 539 = 1930 A L J 750.

Nag 241⁶ and (1902) A C 147.⁷

In the present instance the appellant Bank is not trying to enforce the security. It has already realized the whole of the security by the sale of the land at Babian and is only relying on it by way of defence in the present proceedings under S. 51, Provincial Insolvency Act. The learned counsel for the respondent contended that the Bank's right as a mortgagee merged in the judgment in the previous suit instituted on the footing of the mortgage and therefore it was a secured creditor only in respect of one-fourth of the land at Babian at the time it was sold in execution. Reference was made in this connexion to 49 Mad 691⁸ (at pp. 707-708) and 59 Cal 1464⁹ (at p. 1471), but I do not think these authorities support the contention that the mortgagee rights in the whole of the land at Babian were extinguished. The mortgagee rights in one-fourth of that land only were in dispute and the judgment could only operate to merge these rights in the judgment. Apart from the bar to a fresh suit created by O. 2, R. 2, Civil P. C., I do not see how the previous judgment could have any effect on the mortgagee rights in the remaining three-fourths of the land at Babian.

In 56 All 561,¹⁰ the question arose whether a second suit for redemption of a mortgage was barred when the terms of a previous decree for redemption had not been fulfilled and as a result the suit was dismissed. Their Lordships of the Privy Council, after considering the terms of the mortgage decree and the relevant provisions of the Transfer of Property Act held that the second suit was not barred as the decree did not order that the right of redemption was extinguished. It would thus appear that the relation of a mortgagor and mortgagee cannot be terminated except by the act of the parties or operation of law. In the present instance the parties had not entered into any new contract superseding the previous mortgage. The decree only

determined the mortgagee's rights in the one-fourth land at Babian which was the subject-matter of the previous suit and the only legal effect of the decree on the mortgagee's rights in the remaining three-fourth of the land at Babian appears to be the bar in respect of a fresh suit created by O. 2, R. 2, Civil P. C. I am therefore of opinion that the mortgagee rights in the three-fourth of the land at Babian, which was not included in the previous suit, subsisted in spite of the judgment and decree in the previous suit.

It follows from the above that the appellant Bank still had subsisting rights as a secured creditor in the whole of the land at Babian when it was sold in execution. As it happened the Bank was able to realise its security in the execution proceedings without the necessity of a fresh suit and is now in actual possession of the land at Babian. In the circumstances there seems to be no good reason why it should not be able to resist the receiver's claim in the present proceedings on the plea that it was a secured creditor in respect of the whole of that land. To take the analogous case of time-barred debts, if such a debt is repaid after the period of limitation has expired, no action will lie for its recovery on the ground it was barred at the date of the payment,—the reason being that though the remedy at law was barred the right in the debt still subsisted : see cases cited at p. 3 of U. N. Mitra's Law of Limitation. This principle seems to be also recognised in Ss. 60 and 61, Contract Act, which gives the right to a creditor to appropriate payments even towards time-barred debts when they are not specifically paid towards other debts. The appellant Bank appears to me to stand in a similar position in the present case. Its remedy to realise the security in the three-fourth of the land at Babian was barred by O. 2, R. 2, Civil P. C. But as pointed out above, the Bank is no longer seeking to enforce the security. It has already done so in the execution proceedings and is now in possession of the land, after having it auctioned. It is true that the Bank did not claim to be a secured creditor in respect of the whole land at Babian in the execution proceedings also. But that seems immaterial, when it appears that legally its rights as a secured creditor in the whole of the land at Babian still subsisted at the time of the execution sale.

In the above discussion of the law point raised on behalf of the appellant Bank I

6. Ram Shanker v. Gulab Shanker, (1933) 20 AIR Nag 241=144 I C 736=30 N L R 142.
7. Economic Life Assurance Society v. Osborne, (1902) A C 147=71 L J P O 34=85 L T 587.
8. Thirukonda Ellarayan v. Rangaswami Aiyar, (1926) 18 A I R Mad 816=96 I C 607=49 Mad 691=50 M L J 612.
9. Asia Khatun v. Nurjahan Khatun, (1933) 20 A I R Cal 39=142 I C 125=59 Cal 1464=36 O W N 955.
10. Raghunath Singh v. Hunsraj Kunwar, (1934) 21 A I R P O 205=151 I C 37=61 I A 362=56 All 561 (P C).

have assumed that the Bank had actually an equitable mortgage over the whole land at Babian. This point was apparently not seriously disputed before the learned District Judge who has briefly disposed of it with the remark that there was a mass of correspondence on the record in support of it. An attempt was however made on behalf of the receiver to dispute this finding also before me. The finding is one of fact but it has been urged that documents have been misunderstood and I shall therefore briefly deal with this point also.

The allegation of the Bank is that Randhir Singh executed a promissory note for Rs. 62,000 in favour of the Bank on 19th October 1925 and deposited with the Bank title deeds with respect to his property including the land at Babian: *vide* list Ex. R/18 dated 20th October 1925. It was not disputed that such a deposit would constitute an equitable mortgage over the property covered by the deeds, but it was contended on behalf of the receiver that (1) it has not been shown that the sale deeds dated 11th May 1852 and 1st May 1848 (Nos. 1 and 4 in the aforesaid list Ex. R/18) cover the whole of the land at Babian over which the appellant claims that mortgage and (2) that Randhir Singh had only one-fourth share in the land at Babian according to the extract from the jamabandi relating to the village Babian (*vide* No. 7 in Ex. R/18) which was also deposited with the Bank. On behalf of the appellant, on the other hand, reliance was placed in this connexion on the agreement Ex. R/3 dated 19th October 1925 and a letter from the debtor marked as Ex. R/13. It would appear from a perusal of Ex. R/3, that it is a contract of guarantee on behalf of certain persons that they would be liable if Randhir Singh failed to pay his debt. It has been recited in this document that Randhir Singh had executed a promissory note and had secured the same by property belonging exclusively to Randhir Singh. This document therefore shows that Randhir Singh had mortgaged properties exclusively belonging to him. The agreement also mentions that there had been a partition amongst the members of the family to which Randhir Singh belonged and that they had divided their debts and properties. The second document R/13 on which the appellant relied was a letter from the debtor to the Bank in connexion with the mortgage transaction. The letter does not bear any date, but the contents leave no

doubt that it refers to the transaction now under consideration. It is shown in the list on the back of this letter that the two sale deeds of 1848 and 1852 by which the land at Babian was purchased covered areas of above 867 and 1801 bighas and that this land belonged to Randhir Singh. The total area purchased by the deeds was thus about 2668 bighas. This is approximately the total area in the village Babian over which the appellant claims a mortgage.

There is thus no room for doubt that the title-deeds of 1848 and 1852 which were deposited with the Bank did cover the whole of the land at Babian over which mortgage is claimed by the Bank. The next point for consideration is whether the debtor Randhir Singh was owner of the whole of this land or only one fourth of it. The decision of this point depends on the question whether a partition of the property had in fact taken place before 19th October 1925. The learned counsel for the respondent pointed out that a mutation as to the partition was entered after some months, viz. on 7th March 1920 (*vide* Ex. R/23), but the report of the patwari shows that it had been entered on receipt of intimation from the Tahsil. The date of the partition has been given in this document as 7th March 1926. But this seems obviously to be an error—the date of the report having been apparently entered instead of the date of the transaction. I have already referred above to the fact that the agreement Ex. R/3 dated 19th October 1925 shows that a partition had already taken place before the mortgage transaction in question and that Randhir Singh was mortgaging property belonging to him exclusively. This document was executed by the other cosharers in the land and I therefore see no reason to doubt that a partition had taken place before 19th October 1925. It must be remembered in this connexion that all that is necessary for partition amongst members of a joint Hindu family is a clear declaration as regards intention to separate and that actual partition of the property by metes and bounds is not necessary to effect severance of joint status. The recital in the agreement is further supported by the evidence of Ram Prasad (R. W. 3) (one of the quondam co-parceners) who has appeared in the witness-box and has deposed that a partition had taken place and Randhir Singh had become the sole owner of the land at Babian, at the time of the mortgage in question.

The documents referred to above have been duly proved and admitted in evidence and I see no reason to doubt their genuineness. But a belated plea was raised in the end that the agreement (R/3) and the list of documents (Ex. R/18) on which the Bank relied were inadmissible in evidence for want of registration. In support of this contention reliance was placed chiefly on a ruling of this Court reported in A I R 1935 Lah 889.¹¹ I do not think there is any force in this contention. Ex. R/18 is a mere list of documents and the mere fact that it is stated in the heading of the list that the property was unencumbered will obviously not be sufficient to turn it into a document embodying the agreement between the parties. The contents of R/3 show that it was really a contract of guarantee on behalf of the other cosharers and not the main transaction of mortgage as between Randhir Singh and the Bank which is the subject-matter of the present dispute. The latter transaction is merely recited in R/3 as having taken place. The document which was relied on in A I R 1935 Lah 889¹¹ related to the transaction in dispute in that case and was in different terms. The law on the subject has been clearly laid down in several rulings of their Lordships of the Privy Council including a recent decision reported in A I R 1939 P C 167¹² and after considering the principles laid down therein I see no reason to hold that Exs. R/3 and R/18 are inadmissible in evidence to establish the Bank's security over the whole of the Babian land. On the above findings this appeal must succeed. I accordingly accept the appeal and dismiss the application made by the receiver under S. 51, Provincial Insolvency Act. In view of the somewhat difficult questions of law involved, I leave the parties to bear their costs throughout. As a result of the decision in the appeal, the cross-objections by the respondent are dismissed with costs.

D.S./R.K.

Appeal allowed.

11. *Jiwan v. Punjab National Bank Ltd.*, Lahore, (1935) 22 A I R Lah 889=160 I C 897.

12. *Hari Sankar Paul v. Kedar Nath Saha*, (1939) 26 A I R P C 167 = 181 I C 935=66 I A 184 (P O).

A. I. R. 1940 Lahore 171

TEK CHAND J.

*Firm Ramditta Mal Sant Lal through
Sant Lal — Plaintiffs — Appellants.*

v.

*Firm Seth Jot Ram Kidar Nath through
Seth Pana Lal — Defendants*

— Respondents.

Second Appeal No. 667 of 1939, Decided on 18th January 1940, from decree of Senior Sub-Judge, Lyallpur, D/- 30th March 1939.

(a) Principal and Agent — Suit for accounts against agent should be filed at place where agent works.

The general rule is that a suit for accounts against a commission agent must be filed at the place where the commission agent works : 79 P R 1902, *Rel. on.* [P 172 C 1]

Where the contract was entered into and was to be performed at Karachi and the business done in pursuance of the contract was done at Karachi with third parties, the proper place where the accounts can be taken is Karachi and therefore the Court at the principal's place of residence has no jurisdiction to entertain the suit. [P 172 C 1]

(b) Civil P. C. (1908), S. 21—Suit for accounts against agent — Objection to jurisdiction overruled—Preliminary decree passed — S. 21 held no bar to Appellate Court reversing preliminary decree.

In a suit for accounts by the principal against the agent, the objection as to jurisdiction by the agent was overruled and a preliminary decree for rendition of accounts by agent was passed. In the appeal by the agent:

Held that as only the issue of jurisdiction had been decided by the trial Court and the preliminary decree had to follow as a matter of course, the real trial of the suit had not begun and therefore S. 21 was no bar to the Appellate Court reversing the preliminary decree passed by the trial Court. [P 172 C 2]

(c) Jurisdiction—Objection to, allowed—Dismissal of suit is illegal—Plaint should be returned for presentation to proper Court.

Where an objection on the point of jurisdiction is allowed the dismissal of the suit is illegal. The proper course in such a case is to return the plaint for presentation to proper Court. [P 172 C 2]

Roop Chand — for Appellants.

Shamair Chand — for Respondents.

Judgment. — The plaintiff-appellant instituted a suit against the defendant-respondents for rendition of accounts, in the Court of the Subordinate Judge, Toba Tek Singh, District Lyallpur. The defendants, who are a firm of commission agents working at Karachi, objected that the Court had no jurisdiction to entertain or try the suit as the cause of action arose at Karachi, where the contract was completed and was to be performed. The trial Judge overruled this objection and as no other point was raised he passed a preliminary decree directing the defendants to render accounts to

the plaintiff. The defendants appealed to the Senior Subordinate Judge who, disagreeing with the finding of the trial Judge, held that the Courts in Lyallpur District had no jurisdiction to try the suit. He accordingly accepted the appeal, set aside the decree of the trial Court and dismissed the suit with costs. The plaintiff firm has come in second appeal and it is contended on its behalf that the finding of the learned Judge that the Court at Toba Tek Singh had no jurisdiction, is erroneous, that the preliminary decree passed by the trial Judge should not have been reversed as there had not been a consequent failure of justice (Sec. 21, Civil P. C.) and in any case the learned Judge should not have dismissed the suit but should have returned the plaint for presentation in the proper Court.

After hearing counsel, I do not find any force in the first two contentions. The defendants were sued as commission agents and the general rule is that a suit for accounts against a commission agent must be filed at the place where the commission agent works (79 P R 1902¹). Moreover, in this case, there is nothing to show that the contract was made at Gojra, as is alleged by the plaintiff. The letter (Ex. P-1) on which reliance is placed in support of this contention, merely contains the terms on which the defendants intimated their readiness to do business with the plaintiff. It was in no sense an offer, which was accepted by the plaintiff at Gojra. On the other hand, in pursuance of the terms mentioned in the letter the plaintiff made an offer to the defendants which was accepted by them at Karachi. The contract was therefore made at Karachi. Admittedly, it was to be performed at Karachi. The defendants had their place of business at Karachi. The Lyallpur Courts, therefore, had no jurisdiction and the finding of the Senior Subordinate Judge on this point is correct.

It is no doubt true that under S. 21, Civil P. C., an objection as to the place of suing cannot prevail in an appellate or revisional Court unless such objection had been taken in the Court of first instance at the earliest possible opportunity and there has been a consequent failure of justice. In this case nothing substantial has so far been done; only the issue of jurisdiction has been decided, and as the defendants do not deny that they were commission agents and are the accounting party, a preliminary decree

followed as a matter of course. The real trial of the suit is to begin now when accounts are to be taken. As the contract was to be performed at Karachi and the business done in pursuance of this contract was done at Karachi with third parties, the proper place where the accounts can be taken is Karachi. It is, therefore, in the interests of justice that the accounts be taken at Karachi. It will be highly inconvenient for the parties to have the trial at Toba Tek Singh, in the Lyallpur District. I therefore hold that S. 21, Civil P. C., is no bar to the Senior Subordinate Judge reversing the preliminary decree passed by the Court of first instance, in the peculiar circumstances of this case. The learned Judge, however, was clearly in error in dismissing the suit, and Mr. Shamair Chand for the respondents does not support this part of his order. The proper order in the case was to return the plaint to the plaintiff for presentation in the proper Court. I accept the appeal, set aside the decree of the Senior Subordinate Judge and in lieu thereof direct that the plaint be returned to the plaintiff for presentation in the proper Court. In the circumstances, I leave the parties to bear their own costs in all Courts.

G.N./R.K.

*Appeal accepted.***A. I. R. 1940 Lahore 172**

BHIDE J.

Khan Gul Khan — Plaintiff —

Appellant.

v.

*Mt. Karam Nishan and others —**Defendants — Respondents.*

Second Appeal No. 1245 of 1938, Decided on 27th November 1939.

(a) **Specific Relief Act (1877), S. 42 — Declaratory decree in favour of female that alienation by widow of last male holder is not binding on her as reversioner — Inference that decree-holder must necessarily be next person entitled to succeed does not follow.**

No general rule as regards the circumstances in which a female can maintain a declaratory suit challenging an alienation by another female can be laid down. Therefore, where a female obtains a declaratory decree to the effect that an alienation by widow of the last male holder does not bind her as reversioner, the inference that she must necessarily be the next person entitled to succeed after the widow does not follow : *A I R 1915 Lah 333, Rel. on; A I R 1921 Lah 168; 135 P R 1908; A I R 1921 Lah 176; A I R 1927 Lah 366 and A I R 1933 Lah 187, Disting.* [P 174 C 1, 2]

(b) **Res Judicata — Declaratory decree in favour of reversioner that alienations by widow of last male holder do not bind him raises presumption that decree-holder had locus standi**

1. *Devi Dyal v. Hari Chand*, (1902) 79 P R 1902.

—Decision operates as *res judicata* on point of locus standi as heir.

A person who obtains a declaratory decree in his favour to the effect that certain alienations by the widow of the last male holder are not binding on him must be deemed to have been held sufficiently proximate heir in order to maintain the declaratory suit. It is obvious that the person could not have any locus standi to maintain that suit except for the protection of his own interest in the property in dispute and he could have no such interest unless he was in the line of heirs. The question of his locus standi must either have been admitted or decided in his favour and therefore the matter would be *res judicata* as between the parties by virtue of Explan. 4 to S. 11, Civil P. O. [P 175 C 1]

(c) Custom — General — There is no such thing as "general custom"— Parties should be governed by custom applicable to them.

There is no such thing as general custom and the point at issue in each case must be decided in accordance with the custom applicable to the parties if any such custom is proved: *A I R 1935 Lah 93; A I R 1936 Lah 68 and A I R 1936 Lah 804, Rel. on.* [P 175 C 2]

(d) Custom (Punjab)—Parties Mahomedans— In absence of custom Mahomedan law applies.

Where the parties to a suit are Mahomedans and no rule of custom is proved on a particular point, the Mahomedan law must be applied as far as that point is concerned: *110 P R 1906 (F B) and A I R 1917 P C 181, Foll.* [P 176 C 1]

(e) Mahomedan Law — Succession — Exclusion of murderer and descendants — Plaintiff proving criminal conviction for murder — Burden shifts on defendant to rebut presumption

arising out of conviction — Murder need not be proved by independent evidence.

Where a Mahomedan in a suit wants to exclude the defendant from inheritance on the ground that he claims through a murderer, and proves a criminal conviction for murder and transportation for life he need not prove the murder by independent evidence. The burden in such a case shifts on the defendant to rebut the presumption raised by the plaintiff's evidence. A person cannot be expected to prove a murder independently after a lapse of several years and if such rule is held to be indispensable the rule of public policy which excludes a murderer and his descendants from succession would be rendered nugatory at least in cases where the question arises a long time after the murder: *A I R 1922 Lah 243, Ref.* [P 176 C 1, 2]

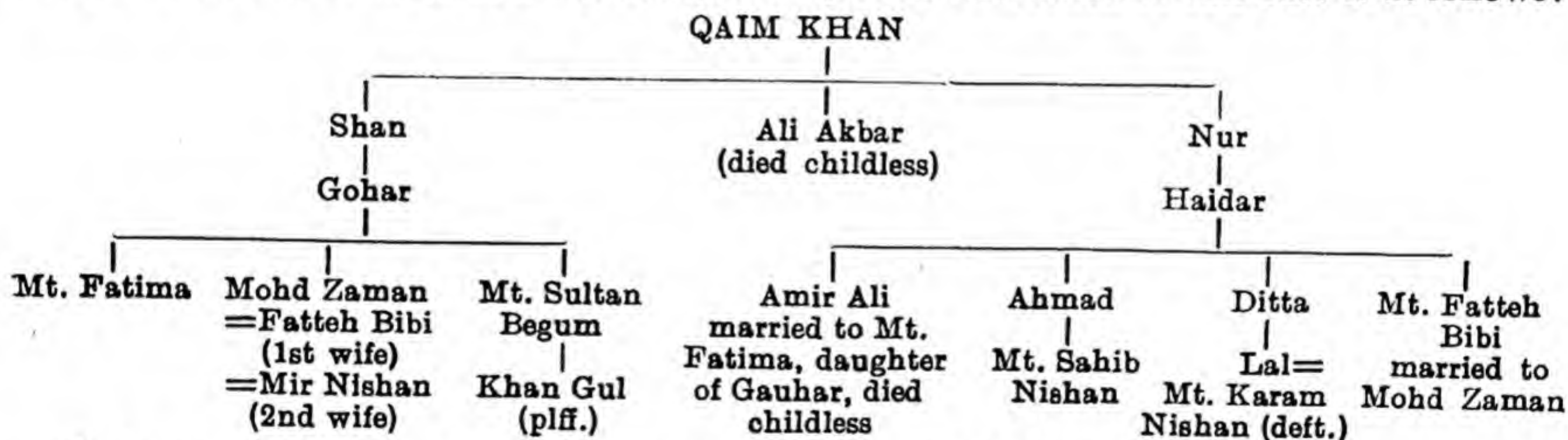
(f) Mahomedan Law — Succession — Exclusion of murderer and his descendants — Rule of exclusion applies even where life-estate intervenes — Motive for murder is immaterial.

Under the Mahomedan law the rule of exclusion from succession applies to the murderer and his descendants. The rule of exclusion applies even where a life-estate intervenes, e. g. a widow's estate held by widow of the murdered person. In order to attract the rule of exclusion based on public policy it is not necessary that the murder should have been committed with the object of getting the murdered man's property: *A I R 1924 P C 209, Rel. on.* [P 176 C 2]

Barkat Ali — for Appellant.

Achhru Ram — for Respondents.

Judgment. — The pedigree-table of the parties concerned in this case is as follows:



The present suit was instituted by Khan Gul for possession of 325 kanals 14 marlas of land of which the last male holder was Mohammad Zaman. Mohammad Zaman was murdered some time in 1898. His widow Mt. Fateh Bibi, who succeeded to a life interest in his property sold the land in dispute to Lal son of Ditta, who was a collateral of Mohammad Zaman in the fourth degree, on 29th September 1914. Mt. Sultan Begam, sister of Mohammad Zaman, instituted a suit thereafter for a declaration that the sale by Mt. Fateh Bibi was without necessity and consideration and will not affect her reversionary rights and succeeded in obtaining a declaration to that effect in the year 1916. Mt. Fateh Bibi died in 1936 and thereafter

Khan Gul, Mt. Sultan Bibi's son, sued for possession of the land in dispute on the basis of the decree obtained by Mt. Sultan Begum. The suit was resisted mainly on the grounds that (i) the plaintiff was not an heir of Mohammad Zaman at all under the Customary Law and (ii) that he was in any case not entitled to succeed in preference to the heirs in the line of Ditta, collateral of Mohammad Zaman, who are still in existence. On the other hand, it was contended on behalf of the plaintiff that his right to succeed to the property on the death of Mt. Fateh Bibi, follows from the decree obtained by Mt. Sultan Bibi, as she could not have obtained the decree unless she was held to be the next heir entitled to succeed on the death of Mt. Fateh Bibi,

and that he was also entitled to succeed according to law and custom, in preference to the defendants. The plaintiff further claimed that Ditta had murdered Muhammad Zaman and hence his descendants were not entitled to inherit his property. The trial Court decreed the suit, but on appeal, the learned District Judge has dismissed it holding that plaintiff had not proved that he had a right to succeed to the property in preference to Ditta's line, or that Ditta's descendants were disqualified owing to the alleged murder of Muhammad Zaman by Ditta. From this decision plaintiff has preferred this second appeal.

The first contention put forward by the learned counsel for the appellant was that in view of the declaratory decree obtained by her, Mt. Sultan Bibi, plaintiff's mother must be presumed to have been held to be the next heir entitled to succeed to the property of Muhammad Zaman after the death of his widow and the matter should be taken as *res judicata*. In support of this contention, reliance was placed on 74 I C 639,¹ 135 P R 1908,² 4 L L J 336,³ A I R 1927 Lah 366⁴ and 34 PLR 137.⁵ I have carefully considered these rulings, but I do not think these rulings establish the proposition contended for by the learned counsel for the appellants. It is true that the words 'immediate heir' or 'next heir' are used in some of the rulings with reference to the status of a female plaintiff claiming a declaratory decree of this kind but these rulings do not contain any discussion of the question whether a female heir, who is a prospective heir but not an immediate heir of the alienor would or would not be entitled to maintain a declaratory suit of this character. In 34 P L R 137,⁵ e. g. the expression 'immediate heir' is used and reliance was placed on 135 P R 1908,² which was perhaps the first ruling in which an attempt was made to lay down a general rule as to the circumstances in which a female could challenge an alienation of property by another heir. But the rule was merely 'postulated' and in the particular case, the fact the plaintiff 'might' succeed in the absence of all heirs

was considered sufficient to give them locus standi to sue (see p. 616 of the report). This ruling does not thus show that it was held that the plaintiff in such cases must necessarily be the next person entitled to succeed. Of course, a court may in its discretion refuse to grant a declaration if the plaintiff's chances of succession are remote; but that is a different matter. There are, on the other hand cases, where the nearer heir is, for some reason or other (e. g. minority etc.) unable to sue and a remoter heir is, in such cases allowed to sue (*cf.* para. 67 of Rattigan's Customary Law).

In 17 P W R 1916,⁶ a Full Bench ruling (*sic*), it was held that no general rule as regards the circumstances in which a female can maintain a declaratory suit challenging an alienation by another female could be laid down. Unfortunately, the record of the declaratory suit instituted by Mt. Sultan Bibi was burnt and there is nothing to show what view was taken by the Courts as regards the locus standi of Mt. Sultan Bibi to maintain the declaratory suit. The only evidence now available as regards the decree is a copy of the judgment of the Appellate Court, which was rewritten by the District Judge, on such materials as he was able to obtain for the purpose after the destruction of the record. It has been urged that this copy of the judgment is not admissible at all, as the learned District Judge wrote the judgment on the basis of the materials supplied by the plaintiff's counsel and his own recollection without issuing any notice to the opposite side. The point whether the reconstructed judgment can properly be treated and admitted as secondary evidence is not perhaps free from doubt, but, even taking the copy of the reconstructed judgment as it is, it throws no light on the point now under discussion as the judgment does not give the pleadings or the issues, but merely states that the plaintiff's suit was decreed. It is also not known which of the collaterals of Mahammad Zaman were alive at the time. The point whether the plaintiff's locus standi was challenged in the suit instituted by Mt. Sultan Bibi and if so on what grounds she was held to have a locus standi to sue cannot therefore be ascertained. It is possible that Mt. Sultan Bibi may have been considered to be entitled to sue because Lal may have been issueless at the time and she may

1. *Diyal Kaur v. Mehtab Kaur*, (1921) 8 A I R Lah 168=74 I C 639.

2. *Maqsoodunnissa v. Kaniz Zohra*, (1908) 135 P R 1908.

3. *Dalipa v. Dallu*, (1921) 8 A I R Lah 176=95 I C 413=4 L L J 336.

4. *Imam Din v. Khamandi*, (1927) 14 A I R Lah 366=100 I C 1014.

5. *Fateh Alam v. Gulam Sarwar*, (1933) 20 A I R Lah 187=141 I C 270=34 P L R 137.

6. *Mt. Partapi v. Hazara Singh*, (1915) 2 A I R Lah 333=31 I C 794=33 P R 1916=17 P W R 1916.

have been considered a sufficiently proximate heir and as such entitled to sue for a declaration. I am therefore not prepared to hold as a matter of law on the materials before me that Mt. Sultan Bibi must have been held to be entitled to succeed immediately on the death of Mt. Fateh Bibi and treat the matter as *res judicata*. It seems however clear that Mt. Sultan Bibi must have been at least held to be a sufficiently proximate heir in order to maintain the declaratory suit referred to above. It is obvious that she could not have any locus standi to maintain that suit except for the protection of her own interest in the property in dispute (*cf.* S. 42, Specific Relief Act) and she could have no such interest unless she was in the line of heirs. The question of the locus standi of Mt. Sultan Bibi must therefore have been either admitted or decided in her favour. Even if the defendant to the previous suit did not raise any plea in this respect, the question must be held to have been decided against him by implication and the matter would be *res judicata* by virtue of Explan. IV to S. 11, Civil P. C. I accordingly hold that Mt. Sultan Bibi must have been found to be an heir in the previous suit and to that extent the matter is *res judicata* as between the parties.

The next point for consideration is whether the plaintiff can succeed independently of the decision in the previous declaratory suit. The plaintiff is a son of Mt. Sultan Bibi, i. e., sister's son of the last male holder Muhammad Zaman and what he has to prove is that he has a right to succeed to Muhammad Zaman's property in preference to the defendant. The defendant is Mt. Karam Nishan, widow of Lal who was a collateral of Muhammad Zaman in the fourth degree (*vide* pedigree table given at the commencement of this judgment: p. 173.) The parties are admittedly governed by custom generally, and the question for decision is whether any custom on the point at issue has been proved. It is not disputed that the property of Muhammad Zaman was non-ancestral. It was also admitted before me by the learned counsel for the parties that Question 27 in the Customary law of the district which relates to the right of succession of sisters and their sons must be taken to refer to ancestral property only. There is no specific rule given in the customary law as regards succession to non-ancestral property in the case of sisters and their sons. The oral evidence produced

by the parties was of little value and was rightly rejected by the learned District Judge. The result is that no rule of custom on the point at issue has been proved by the evidence on the record.

It was urged that according to general custom sisters do not succeed in the presence of collaterals and that the plaintiff's own case was that he could succeed only if Ditta's line were excluded owing to Ditta being a murderer of Muhammad Zaman. As regards "general custom," there is now ample authority in support of the proposition that there is no such thing as "general custom" and the point at issue in each case must be decided in accordance with the custom applicable to the parties—if any such custom is proved (*cf.* 17 Lah 10,⁷ 17 Lah 101⁸ and 17 Lah 296⁹ at page 300). In the present instance, no such rule has been proved as stated above. In the circumstances, the point in dispute must be decided according to personal law so far as that point is concerned (*cf.* S. 5, Punjab Laws Act; and 110 P R 1906¹⁰ and 10 Lah 86¹¹).

The contention of the learned counsel for the respondents that the plaintiff's own case was that he could succeed only if Ditta's line were excluded on account of Ditta being a murderer does not appear to be correct. In paras. 5 and 6 of the plaint it was claimed—without reference to the exclusion of Ditta's line on account of his being a murderer—that according to law and custom the plaintiff was entitled to succeed. The issue framed on the point (issue 3) was also a general one viz., is the plaintiff next heir after the death of Mt. Fateh Bibi? A note was added after issues that

the question whether the plaintiff is the next heir even in the presence of the descendants of Ditta and whether Ditta, owing to his having murdered Muhammad Zaman excluded his descendants from inheriting the property of Muhammad Zaman are involved in issue 3. Moreover, the question of occurrence of murder is also involved therein.

It will thus appear that the question whether the plaintiff was entitled to succeed in the presence of the descendants of Ditta was also in issue between the parties,

7. *Samon v. Shahu*, (1935) 22 AIR Lah 93=161 I C 245=17 Lah 10=38 P L R 198.

8. *Keshar Singh v. Achhar Singh*, (1936) 23 AIR Lah 68=161 IC 692=17 Lah 101=38 P L R 502.

9. *Kartar Singh v. Banto*, (1936) 23 A I R Lah 804=168 I C 879=17 Lah 296=38 P L R 300.

10. *Dayaram v. Sohail Singh*, (1906) 110 P R 1906=81 P L R 1907=59 P W R 1907 (F B).

11. *Vaishno Ditti v. Rameshri*, (1928) 15 AIR P C 294=113 I C 1=10 Lah 86=55 I A 407 (PC).

independently of the question of exclusion of Ditta's line, owing to his being a murderer. The parties being Mahomedans, when no rule of custom is proved on a particular point, the Mahomedan law, must be applied as far as that point is concerned according to the Full Bench decision in 110 P R 1906¹⁰ (which has been approved by their Lordships of the Privy Council in 45 Cal 450¹²). It was admitted before me by the learned counsel for the respondents that according to Mahomedan law, plaintiff as a sister's son, would rank as a preferential heir as compared with Mt. Karam Nishan, who is a widow of Lal, a fourth degree collateral. Plaintiff appears to fall under the category of "distant kindred" of the third class and the defendant, Karam Nishan, does not appear to have any preferential right over him according to Mahomedan law (*cf.* Mulla's Muhammadan Law, Edn. 11, pages 65-66).

On the above finding it seems unnecessary to go into the question whether Ditta has been proved in this case to have murdered Muhammad Zaman and if so, whether that fact would be sufficient to exclude Ditta's descendants from succession. However I may deal with it very briefly. The fact that Ditta was convicted of the murder of Muhammad Zaman and sentenced to transportation is not disputed, but it is urged that the conviction is not relevant in this case and the fact that Ditta murdered Muhammad Zaman should have been independently proved. Reliance is placed on 3 Lah 242.¹³ On behalf of the appellant it is urged that the conviction is relevant and should be considered to be sufficient in the circumstances of the case to shift the burden of proof to the respondents, as the appellant could not be expected to prove the murder in this case independently after the lapse of some forty years. I am inclined to think there is force in this contention. Although the fact that Ditta was a murderer has to be proved in the present case. I do not see why the fact that Ditta was publicly tried and found guilty of murder should not be considered to be sufficient to shift the burden to the opposite side in this case. It is indeed difficult to see how the appellant could be expected to prove the murder independently after the lapse of so many

years and if such independent proof is held to be indispensable, the rule of public policy which excludes a murderer and his descendants from succession would be rendered nugatory at least in cases where the question arises a long time after the murder as in this case.

The learned District Judge has held that Ditta and his descendants could not be excluded from inheritance in this case, as Ditta had not committed the murder with the object of getting the property of Muhammad Zaman. The learned counsel for the respondents however conceded that in order to attract the rule of public policy referred to above, it is not necessary that the murder should have been committed with the object of getting the murdered man's property. He however contended that the rule of exclusion operates when there is any question of getting immediate benefit from the murder and that it will not apply where other estates intervene as, e.g. the widow's estate held by Mt. Fateh Bibi, widow of Muhammad Zaman in this case. The learned counsel for the respondent was however not able to cite any authority in point to support his contention and I see no good reason why the rule of exclusion should not be held to apply where a life-estate intervenes. According to the rule laid down by their Lordships of the Privy Council in AIR 1924 P C 209,¹⁴ the rule would seem to apply to the murderer as well as his descendants. I am therefore of opinion that the defendant in this case is not entitled to inherit the property of Muhammad Zaman on this ground as well. On the above findings, I accept this appeal and restore the decree of the trial Court. In view of all the circumstances however I leave the parties to bear their costs throughout.

Note.—It was stated before me in the course of arguments by Mr. Barkat Ali, counsel for the appellant, that Mt. Karam Nishan, defendant, had died before the case was argued, but he withdrew that statement after further inquiries and stated that she was still living.

G.N./R.K.

Appeal accepted.

14. *Kenchava v. Girimallappa Channappa*, (1924) 11 A I R P C 209=82 I C 966=48 Bom 569=51 I A 368 (P C).

12. *Abdul Hussein Khan v. Bibi Sona Dero*, (1917) 4 A I R P C 181=43 I C 306=45 Cal 450=45 I A 10=12 S L R 104 (P C).

13. *Har Bhagwan v. Hukam Singh*, (1922) 9 A I R Lah 243=68 I C 769=3 Lah 242.

A. I. R. 1940 Lahore 177

DIN MUHAMMAD J.

Ghulam Qadir — Defendant —
Appellant.

v.

Alaf Din, Plaintiff and others,
Defendants — Respondents.

Second Appeal No. 528 of 1939, Decided on 7th December 1939, from decree of Dist. Judge, Gurdaspur, D/- 28th January 1939.

Custom (Punjab) — Widow — Alienation — Income derived from husband's estate ample— She cannot alienate husband's property even for discharge of her husband's debts.

The income of the widow is an important factor to be considered in the determination of the question whether the alienation by her of her husband's property is or is not for necessity. Where the income derived by her from her husband's estate is ample she cannot alienate husband's property even for the discharge of her husband's debts: 95 P R 1879; 128 PWR 1911; AIR 1915 Lah 166; AIR 1926 Lah 23 and AIR 1926 Lah 208, Rel. on. [P 177 C 2; P 178 C 1, 2]

Malik Barkat Ali — *for Appellant.*

Lala Mukand Lal Puri —
for Respondent (Plaintiff).

Judgment.—The suit out of which this appeal has arisen was instituted by Alaf Din, a reversioner of Ghulam Mohammad, the deceased husband of the two widows, Mt. Daulte and Mt. Sardaran. It was for a declaration that the two mortgages effected by the widows in favour of Ghulam Qadir, a brother-in-law of Mt. Sardaran, would not prejudice his reversionary rights. This suit was resisted on the ground that the alienations in dispute were for consideration and valid necessity. The trial Court upheld the plea raised by the defendants and dismissed the suit. On appeal, the District Judge agreed with the Court below that the debts were no doubt just antecedent debts but taking into consideration the income that accrued to the widows from the property to which they had succeeded, he set aside the alienations on the ground that it was not necessary for the widows to have encumbered the property in their hands in the manner they had done to discharge the debts for which the alienations had been made. The mortgagee appeals.

Counsel for the appellant contends that the widows were not bound to account for the income they realized from the property in their possession and that inasmuch as the debts which were discharged by these alienations were just debts in the sense that they were either the arrears of land revenue or the sums raised by or decreed against

the husband, the mortgages could not be set aside. In support of his contention, he refers to several cases of this Court where it has been held that a widow governed by the Customary law is empowered to alienate her husband's land to discharge his liabilities. He further argues that inasmuch as no question of the widow enjoying ample income had been raised in those cases, it should be held that that was not a point which merited consideration in the decision of such cases: see among others A I R 1926 Lah 671¹ and AIR 1932 Lah 447.² Counsel for the respondent however urges that the income received by a widow from the property to which she has succeeded is one of the important factors to be determined in such cases and that as it has been proved from the statements of the defendants' own witnesses that the widows in this case realized ample income from the estate, they could not effect any alienation to the prejudice of the reversioners. In support of his contention, he relies on 95 P R 1879,³ 128 P W R 1911,⁴ 29 I C 780,⁵ 89 I C 960⁶ and 1 L C 474.⁷

The judgment reported in 95 P R 1879³ is a leading judgment on the point at issue. It was a case relating to the Bukhari Sayyads of Jhang who were admittedly governed by the Customary law. Plowden J. discussed this matter at great length and came to the conclusion that if the income derived from the estate was ample, a widow could not alienate her husband's property even for the discharge of her husband's debts. At p. 255 the learned Judge observed :

To return to the test of a valid disposition, it is by no means sufficient in all cases to look merely at the purpose for which the debt is incurred or even the object to which it was applied. The circumstances under which the widow had recourse to borrowing must also be regarded in order to see whether they justified such a proceeding on her part.

One of the authorities relied upon by the learned Judge was 19 W R 79,⁸ where for two small debts of the husband outstanding

1. Fattu v. Nur Mohammad, (1926) 13 AIR Lah 671=96 I C 1035.

2. Phuman v. Surjan Singh, (1932) 19 AIR Lah 447=138 I C 143=33 P L R 568.

3. Shahabal v. Ram Das, (1879) 95 P R 1879.

4. Arjan Singh v. Indar Singh, (1911) 128 P W R 1911=12 I C 429=233 P L R 1911.

5. Indar v. Motiram, (1915) 2 A I R Lah 166 = 29 I C 780=112 P L R 1915.

6. Parsram v. Tehu, (1926) 13 A I R Lah 23=89 I C 960.

7. Rur Singh v. Nazar Singh, (1926) 13 AIR Lah 208=91 I C 479=26 P L R 15=1 L C 474.

8. Lalla Byjnath Pershad v. Bissen Beharee Sahay, (1878) 19 W R 79.

at the time when the estate devolved upon the widow and to provide for the expenses of her daughters' marriages and for the Government revenue, she had encumbered the estate and the alienation was set aside on the ground that the income was ample. At p. 257, the learned Judge gave the following reasons for the proposition laid down by him :

According to the argument addressed to us at the hearing of the appeal, it is sufficient to show that the debts incurred by the widow were incurred for purposes for which they might by possibility be legitimately incurred, without regard to the question whether there was a necessity for borrowing. If this were true, the destruction of the reversionary interest would only be a question of time, if the widow was disposed to destroy it. She might take the whole income of the estate, and expend it for her own enjoyment; and for every purpose connected with the management of the estate for cultivation and for payment of the Government revenue, she might borrow the requisite funds, and let the debt grow and interest accumulate upon it, until the creditor chose to bring the estate to sale in satisfaction of his claim, whether in her hands or those of the reversioners. This doctrine bears its own refutation with it: for this is nothing else but to say that the widow can be permitted to waste indirectly the estate which it is her duty to protect and preserve from being wasted by her own acts or omissions. The unquestionable rights of reversionary heirs would be placed in the utmost jeopardy, if it was once admitted that the estate was liable for every debt incurred by the widow in connexion with its proper management, notwithstanding that there was no real necessity for resorting to the expedient of borrowing.

In 128 P W R 1911,⁴ Kensington J. took into consideration the matter of the income realized from the estate. In 29 I C 780,⁵ Shadi Lal J. observed :

The law enunciated in para. 65, Explan. (1) of Rattigan's Digest of Customary Law goes to show that the income of the widow is an important factor to be considered in the determination of the question whether the alienation is or is not for necessity.

In 89 I C 960,⁶ Campbell J. remarked:

It has been pointed out on more than one occasion by this Court that only in the case of an alienation by a woman is the alienee required to show that the alienor's income was insufficient to provide the money required for the purpose for which the sale was made.

In 1 L C 474,⁷ Harrison J. took into consideration the income that the widow had realized from the estate and on the evidence led in the case came to the conclusion that she had not sufficient necessity to create the charge. These authorities evidently support the respondent and I am in respectful agreement with the principle enunciated therein. Counsel for the appellant concedes this principle so far as the personal debt of the widow is concerned but urges that this consideration does not

apply if the widow effects any alienations to discharge the liabilities of her deceased husband. I, however, am disposed to think that there is no distinction at all between these two matters. A widow cannot, as remarked by Plowden J., be allowed to squander the income of the property which she holds for a limited purpose in any way she likes and encumber the estate for meeting the husband's liabilities to the prejudice of the reversionary heirs who are eventually to succeed to the property held by her.

On the question whether the widows in this case had ample income, I am inclined to agree with the District Judge. He has mainly relied on the statements of the defendants' own witnesses and in the face of those statements, it cannot be urged that the finding arrived at by the District Judge is open to any objection whatever. I accordingly maintain the decree of the District Judge and dismiss this appeal. In the circumstances of the case there will be no order as to costs before me. Leave to appeal granted.

D.S./R.K.

Appeal dismissed.

* A. I. R. 1940 Lahore 178

DIN MUHAMMAD J.

Ismail — Judgment-debtor — Appellant.

v.

Anjuman Imdad Qarza — Decree-holder — Respondent.

Exn. Second Appeal No. 879 of 1939, Decided on 28th November 1939, from order of Dist. Judge, Lahore, D/- 17th March 1939.

(a) Civil P. C. (1908), S. 48 (2) (a)—**Fraudulent transfer amounts to fraud.**

A fraudulent transfer amounts to fraud within the meaning of S. 48 (2) (a) : *A I R 1925 Nag 82; 4 Mad 292 and A I R 1935 Mad 8, Rel. on.*

[P 179 C 1]

* (b) Civil P. C. (1908), O. 21, R. 11 (2) — **Omission to mention ground of extension of period of limitation is not fatal.**

Omission to mention the ground of extension of the period of limitation in the application for execution cannot be treated as fatal. [P 179 C 1]

Basant Krishan Khanna — for Appellant.

Amar Nath Chopra — for Respondent.

Judgment. — The only question that arises for determination in this appeal is whether the application for execution submitted by the decree-holder more than 12 years after the date of the decree could be proceeded with. The executing Court dismissed it as time-barred merely on the ground that it had been presented more than 12 years after the decree. The Dis-

strict Judge however reversed the order of the Court below relying on cl. (a) of sub-s. (2) of S. 48, Civil P. C., which empowers the Court to proceed with the execution of a decree upon an application presented after the expiration of 12 years where it is found that the judgment-debtor has by fraud prevented the execution of the decree at any time within 12 years immediately before the date of the application. The decree-holder urges that the judgment-debtor had effected a fraudulent alienation in favour of his wife in 1931 and there is ample authority in support of the proposition that a fraudulent transfer amounts to fraud within the meaning of this rule: see A I R 1925 Nag 82¹ and 4 Mad 292,² which has subsequently been followed in several rulings of the same Court including 58 Mad 311.³

All that the counsel for the appellant contends is that this point was not specifically raised in the Courts below nor was the ground of extension of the period of limitation mentioned in the application for execution. It is true that this ground was not stated in the application, but there is no column provided for it under O. 21, R. 11 (2), Civil P. C. It is only under O. 7, R. 6, Civil P. C., that the ground of exemption from the law of limitation should be expressly urged but no corresponding provision is made in the case of applications for execution. This omission therefore cannot be treated as fatal. Further, in the written statement put in by the decree-holder fraud was referred to though the fraudulent alienation was not expressly mentioned. Counsel for the appellant contends that there is no material on the record showing that any fraudulent alienation had been made by the judgment-debtor, but my attention has been drawn to a judgment of the Senior Subordinate Judge, Lahore, in which he had definitely come to the conclusion that the judgment-debtor had effected an alienation in favour of his wife and that that alienation was intended to defeat and delay his creditors including the present decree-holder who was a party to the suit. This being so, it will serve no useful purpose to prolong the case to enable the decree-holder to produce a certified copy of that judgment before me or to

remand the case for letting in the additional evidence under O. 41, R. 28, Civil P. C. I accordingly dismiss this appeal with costs.

D.S./R.K.

Appeal dismissed.

A. I. R. 1940 Lahore 179

ABDUL RASHID J.

Chand Narain and another —

Plaintiffs — Appellants.

v.

Ghasi Ram — Defendant —

Respondent.

Second Appeal No. 806 of 1939, Decided on 4th January 1940, from decree of Senior Sub-Judge, Delhi, D/- 27th March 1939.

Civil P. C. (1908), O. 20, R. 13—Main purpose of suit to determine as to who is rightful heir of deceased—Such suit is not administration suit.

Where a suit is one between rival claimants to the estate of the deceased each one claiming to be her sole heir, such a suit is not a suit for an account of any property and for its due administration under the decree of the Court. Hence, an administration suit cannot be filed by one of the heirs to obtain possession of the property wrongfully withheld by another person claiming to be the heir: *A I R 1935 Cal 39, Rel. on; 10 Cal 713; A I R 1917 L B 3; A I R 1921 Bom 424; A I R 1928 Mad 760 and 29 Cal 260, Disting.*

[P 180 C 1]

Shamair Chand and Parkash Chand —

for Appellants.

Jaggan Nath Aggarwal, Ram Kishore and Madan Lal — for Respondent.

Judgment.—Order 20, R. 13, Civil P. C., makes it clear that administration suits are intended to be filed for the purposes of taking an account of any property and for its due administration under the decree of the Court. I have read the plaint in the present case. If surplusage be excluded it seems obvious that the real dispute between the parties is as to whether Chand Narain and Radhe Mohan are the heirs of Mt. Shamo or whether Ghasi Ram is the rightful heir. Chand Narain and Radhe Mohan are the sons of the brother of Mt. Shamo's husband. Ghasi Ram on the other hand is the first cousin of Mt. Shamo. The property in dispute has come to Mt. Shamo from her father Hardeo. In para. 13 of the plaint it is said that the plaintiffs are the only persons at present entitled to the whole of the estate of Mt. Shamo remaining after the payment of the debts of the deceased, if any. In para. 14 it is alleged that Ghasi Ram claims to be entitled to the estate left by the deceased, but in law he has no right to the estate. Para. 15 asserts that Mt. Shamo was a Brahmin by

1. *Khairulla v. Dhanrup Mal*, (1925) 12 A I R Nag 82=80 I O 905=22 N L R 67.

2. *Visalatchi v. Sivasankara*, (1882) 4 Mad 292.

3. *Ramanathan Chettiar v. Mahalingam Chetti*, (1935) 22 A I R Mad 8=154 I O 688=58 Mad 311=67 M L J 751.

caste and was governed by the Mitakshara Hindu law and that the plaintiffs are the only persons entitled at present to the possession of the estate left by Mt. Shamo. The present suit is one between rival claimants to the estate of Mt. Shamo; each one claimed to be her sole heir. Such a suit is not a suit for an account of any property and for its due administration under the decree of the Court.

The learned counsel for the appellants quoted a large number of authorities such as 10 Cal 713,¹ 41 I C 579,² 45 Bom 75,³ A I R 1928 Mad 760⁴ and 29 Cal 260.⁵ In my opinion, none of these authorities lays down that when the main purpose of the suit is to determine as to who is the rightful heir of a deceased person, an administration suit can be filed by one of the heirs to obtain possession of the property wrongfully withheld by another person claiming to be the heir. Reference may be made in this connexion to 61 Cal 711.⁶ After examining the pleadings in the reported case, the Judges came to the conclusion that the suit against the defendant was really one for wrongful withholding of possession of immovable and moveable properties and such a suit cannot be said to be in the nature of an administration suit at all. In the plaint it is stated that Ghasi Ram has wrongfully taken possession of the moveable property left by Mt. Shamo. It is further stated that the immovable property is either in the custody of the Court or is in the possession of the tenants. I express no opinion as to whether it is possible for the plaintiffs to bring a declaratory suit or whether it is obligatory on them to bring a suit for possession. The present suit is liable to dismissal solely on the ground that it is a suit against a defendant for wrongfully withholding moveable property and for wrongfully denying a claim to the immovable property left by Mt. Shamo. For the reasons given above I dismiss this appeal. Having regard to all the circum-

stances I order that the parties will bear their own costs throughout.

D.S./R.K.

Appeal dismissed.

A. I. R. 1940 Lahore 180

ADDISON J.

*Jubilee Chamber of Commerce Ltd.,
Rawalpindi through Lala Baij Nath
Malhotra, Manager — Defendant
— Petitioner.*

v.

*Lala Amrit Shah, Plaintiff, and others,
Defendants — Respondents.*

Civil Revn. No. 572 of 1939, Decided on 4th November 1939, from order of Sub-Judge, First Class, Rawalpindi, D/- 7th June 1939.

(a) Arbitration — Written contract — Terms must be accepted by both parties either in writing or orally.

A written contract means a contract, the terms of which are expressed in writing. The terms of this contract must be accepted by both the parties either in writing or orally. [P 181 C 1]

(b) Arbitration—Legality—Company — Term of business providing that disputes should be referred to arbitration of certain number of directors held legal.

One of the terms of business of a company was the clause for submission of disputes to the arbitration of certain number of directors :

Held that the fact that the arbitrators had to be chosen from the directors was perfectly legal. [P 181 C 2]

Shamair Chand — *for Petitioner.*

Achhru Ram —

for Respondent (Plaintiff).

Order. — Amrit Shah instituted the present suit against the Jubilee Chamber of Commerce Ltd., Rawalpindi, for Rs. 6000 on 12th October 1938. The defendant company is a registered corporation carrying on business as commission agents at Rawalpindi in accordance with certain rules and terms of business. The plaintiff alleged that he entered personally into eighteen contracts with the defendant company who failed to deliver goods of the proper quality and at the proper time and thereby committed a breach of the contracts. The plaintiff also purchased the claims of defendants 2 to 4, Harnam Singh, Gurdit Singh and Amrik Singh against the same company, their claims being of similar nature to his own. He thereupon sued for Rupees 4950 advances made by the plaintiff and defendants 2 to 4, together with damages amounting to Rs. 948 and interest amounting to Rs. 277, total Rs. 6175, but the sum of Rs. 175 was relinquished. Before the

1. Oriental Bank Corporation v. Gobindoll Seal, (1884) 10 Cal 713.

2. Ma Shwe Thet v. Ma Hla Shin, (1917) 4 A I R L B 3=41 I C 579.

3. Esufalli Alibhai v. Abdealli Gulam Hussein, (1921) 8 A I R Bom 424=59 I C 396=45 Bom 75=22 Bom L R 1117.

4. Amir Bi v. Abdul Rahim, (1928) 15 A I R Mad 760=110 I C 276=55 M L J 266.

5. Rojomoyee Dasse v. Troylukho Mohiney Dasse, (1902) 29 Cal 260=6 C W N 267.

6. Shiv Prasad Singh v. Prayag Kumari Debee, (1935) 22 A I R Cal 39=154 I C 479=61 Cal 711.

suit was instituted the defendant company had already given notice to the plaintiff to refer the disputes to arbitration under cl. 17 of their rules and terms of business. At the very first hearing the defendant company applied under S. 19, Arbitration Act, for stay of the proceedings in the Court. The plaintiff opposed the application to stay on the ground that there was no submission by him to refer the disputes to arbitration. He further opposed the application on the ground that the directors of the company who had to be the arbitrators under this submission clause had personal and private interest in the subject-matter of the suit and therefore were not fit persons to act as arbitrators. The Court directed itself correctly as to law when it stated as follows:

A written contract therefore means a contract, the terms of which are expressed in writing. The terms of this contract must be accepted by both the parties, either in writing or orally.

Gurdit Singh, one of the defendants whose claim was purchased by the plaintiff actually signed the terms of business and there is no dispute as to this. Normally therefore the suit should be stayed so far as his claim is concerned. The trial Judge found that as regards the plaintiff and the other two defendants they have not submitted to the arbitration clause in writing or orally accepted it. It is correct that the submission by them was not in writing. It is however contended before me that they accepted the terms clearly and unequivocally and this is the principal point to be decided.

The trial Court further found that two of the directors had some personal interest in the litigation (apart from the fact that they were directors of the defendant company) as those two were partners in one or other of two firms which purchased the wheat at a public auction at the instance of the defendant company. He added that this was not of much importance in the present case and he declined to stay the suit with respect to any of the four claims including that of Gurdit Singh. In coming to its decision as regards the plaintiff not having orally accepted the submission clause the Court appears to have not referred to unequivocal evidence which establishes that the plaintiff did submit to this clause. Ex. D/15 dated 28th November 1937, a letter written by the plaintiff, is referred to by the Court. In this letter the plaintiff asked the defendant company to send him the form under which they did

business (sharait ka form). The trial Court however did not refer to Ex. D/9 dated 18th February 1938, or D/14 dated 24th February 1938, which are also letters written by the plaintiff. In the first of these the plaintiff writes: "I have received your letter and rules and terms of business (sharait ka form)". He then went on to add that "after reading the sharait ka form, etc. etc." It is thus clear that he got the form and read it. Again, in Ex. D/14 when writing to the defendant company he stated that in explaining something to another person he had the sharait ka form read over to him by one or two literate persons. Nothing can be clearer than these admissions and there is no question but that the plaintiff accepted unequivocally the terms of business under which the defendant company alone was prepared to deal with him. One of these terms was the clause for submission of disputes to the arbitration of two of the directors. It is therefore plain that it must be held that the Court has acted in this respect with material irregularity in the exercise of its jurisdiction.

As regards the second point that two of the directors are personally interested as they are partners in one or other of two firms which purchased the wheat forming the subject-matter of dispute at some of the public auctions held by the defendant company, there is already a decision by Monroe J. who held that that did not matter as there were other directors who could be chosen. The learned counsel appearing for the defendant company before me stated that his company would not object to those two directors being excluded. The fact that the arbitrators had to be chosen from the directors is of course perfectly legal. I therefore decide this point also against the plaintiff. As the onus is always on the plaintiff to show why he should not be bound by an agreement to refer and as he has failed to discharge that onus in this case I have no option but to accept this petition, set aside the order of the trial Judge refusing to stay the suit and order the suit to be stayed. The petitioner will have his costs in this Court from the plaintiff. I might add that in sections (2) and (12) of the plaint, the rules and terms of business of the defendant, that is the sharait ka form, are mentioned and relied upon. They were only repudiated when the defendant company applied for stay of the suit.

D.S./R.K.

Petition accepted.

A. I. R. 1940 Lahore 182

DIN MUHAMMAD J.

Puran Mal — Plaintiff — Petitioner.

v.

Parmeshri Das — Defendant — Respdt.

Civil Revn. No. 916 of 1939, Decided on 10th January 1940, from order of Addl. Sub-Judge, Fourth Class, Rohtak, D/- 24th July 1939.

(a) Civil P. C. (1908), S. 152 — Method of assessment of costs wrong—Decree cannot be amended.

The award of costs to which the party successful may be entitled is not either an arithmetical mistake or an accidental slip or omission. Hence, even if the method of assessment of costs is wrong, a decree cannot be amended under S. 152 : *A I R 1936 Pesh 196, Disapproved; A I R 1929 Lah 400 and A I R 1929 Lah 664, Disting.* [P 182 C 1, 2]

(b) Costs—Witnesses summoned by Court but not examined in Court—Diet money when can be charged stated.

It cannot be laid down as a universal rule that no diet money can be charged for the witnesses who were not examined in Court, even though they had been summoned under the orders of the Court. Where the party had actually paid diet money to the witnesses on two occasions at least when the Court could not examine them, there is no justification in disallowing costs incurred in that manner, especially when the summoning of those witnesses had been necessitated by the false plea raised by the other party : *A I R 1936 Lah 681, Expl.* [P 182 C 2]

(c) Civil P. C. (1908), S. 152—Costs wrongly awarded—Laches of party disentitles him to amendment of decree.

Even if costs were wrongly awarded, the laches of the party disentitles him to the amendment of the decree under S. 152 at such a late stage as revision to High Court : *37 P L R 623, Rel. on.*

[P 182 C 2]

Qabul Chand Mital — for Petitioner.

Parkash Chand Jain — for Respondent.

Order. — This petition must succeed. In the first place, the Court below had no jurisdiction to entertain the respondent's application on the merits in the absence of the applicant. Secondly, the Court could not amend the decree in the manner it has done. The application on which the order for amendment was made was put in under S. 152, Civil P. C.; but, in my view, it could not lie under that Section. S. 152 deals only with clerical or arithmetical mistakes or accidental slips or omissions, but the matter before the Court did not fall under any of these categories. Counsel for the respondent contends that if the method of assessment of costs is wrong, a decree can be amended under S. 152, Civil P. C., and relies in this connexion on *A I R 1936 Pesh 196*;¹ but, with all respect, I consider

that that judgment is wrong. The learned Additional Judicial Commissioner relied on *A I R 1929 Lah 400*² and *A I R 1929 Lah 664*³ in support of his decision, but those judgments proceeded on entirely different grounds. However the language of S. 152 be strained, it cannot be held that the award of costs to which the party successful may be entitled is either an arithmetical mistake or an accidental slip or omission. This leaves us with the word "clerical" alone, but even that word is inapplicable to what had originally been done by the Court of first instance. The ordinary meaning of the word "clerical" as given in the Oxford Dictionary is "in writing out" and even counsel for the respondent had to admit that this mistake did not occur in writing out the decree.

On the merits, counsel for the respondent relies on *1936 P L R 219*⁴ and contends that no diet money could be charged for the witnesses who were not examined in Court, even though they had been summoned under the orders of the Court. It is no doubt stated in the judgment relied on that diet money should not be allowed in respect of those witnesses who were not produced in Court, but no universal rule can be based on this dictum. On the facts of the case before the learned Judge, the decision might have been correct, but it cannot apply in every case. In the case before me, the petitioner had actually paid diet money to the witnesses on two occasions at least when the Court could not examine them and I do not find any justification in disallowing costs incurred in that manner, especially when the summoning of those witnesses had been necessitated by the false plea raised by the respondent that he had not executed the balance in suit. Counsel for the petitioner relies on *1935 P L R 623*⁵ and urges that in any circumstances even if costs were wrongly awarded, the laches of the respondent disentitled him to the amendment of the decree under S. 152, Civil P. C., at such a late stage and I agree with him. I accordingly allow this petition and set aside the order of the Court below reducing the amount of costs to Rs. 44-12-0, in other words, the defen-

2. Ganesh Das v. Kaki Bai, (1929) 16 A I R Lah 400.

3. Rala Ram v. Gobardhan Das, (1929) 16 A I R Lah 664=115 I C 542=30 P L R 363.

4. Kherati Lal v. Janki Parshad, (1936) 23 A I R Lah 681=164 I C 689=(1936) 38 P L R 219.

5. Mohammad Mahmud Khan v. Munshi Ram, (1935) 37 P L R 623.

1. Jagdish Lall v. Secy. of State, (1936) 23 A I R Pesh 196=165 I C 904.

dant will be liable to pay Rs. 71.12-0 as costs. There will be no order as to costs of this petition.

D.S./R.K.

Petition allowed.

A. I. R. 1940 Lahore 183

BHIDE J.

Mangal Singh and another—Defendant
— Appellants.

v.

Ilam Din and another, Plaintiffs and others, Defendants — Respondents.

Second Appeal No. 792 of 1939, Decided on 21st November 1939, from decree of Dist. Judge, Sialkot, D/- 25th February 1939.

Punjab Tenancy Act (16 of 1887), S. 50A—Notice under S. 45 by subsequent mortgagee to prior mortgagee—Prior mortgagee's suit in Revenue Court to contest notice of ejectment dismissed—Suit in Civil Court for possession is barred.

A subsequent mortgagee served notice of ejectment to the prior mortgagee through the revenue authorities under S. 45. The prior mortgagee sued in the Revenue Court to contest the notice of ejectment but the suit was dismissed. Thereafter he instituted suit in Civil Court for possession of the land:

Held that Civil Court had no jurisdiction to entertain suit owing to the provisions of S. 50A: 3 P R 1895 and AIR 1935 Lah 719, Rel. on; AIR 1936 Lah 710, Expl. and Not foll. [P 183 O 2]

Nand Lal Salooja — *for Appellants.*

Mahbub Elahi — *for Respondents.*

Judgment.—The plaintiffs sued in this case for possession of 5 kanals, 6 marlas of land included in khata No. 32/88. The plaintiffs' allegation was that the land had been mortgaged in favour of their father Hasan Mohammad by one Bhagat Singh and certain other cosharers. Subsequently, Bhagat Singh is said to have mortgaged the land in favour of Rai Sahib Chaudhri Sohna Mal who transferred the mortgagee rights to the defendants. In the course of partition proceedings, the possession of the land was obtained by the defendants who got notice of ejectment issued to the plaintiffs through the revenue authorities under S. 45, Punjab Tenancy Act. The plaintiffs sued in the Revenue Court to contest the notice of ejectment but the suit was dismissed as barred by time. Thereafter they instituted the present suit for possession of the land. The suit was resisted by the defendants inter alia on the ground that Civil Courts have no jurisdiction to entertain the suit owing to the provisions of S. 50-A, Punjab Tenancy Act. The Courts

below have held that the suit is entertainable by Civil Courts and have decreed the plaintiffs' claim. From this decision the present appeal has been preferred. The main point argued on behalf of the defendants-appellants was that the Courts below have erred in holding that the suit was entertainable by Civil Courts. S. 50A, Punjab Tenancy Act, runs as follows:

No person whose ejectment has been ordered by a Revenue Court under S. 45, sub-s. (6) or whose suit has been dismissed under S. 50, may institute a suit in a Civil Court to contest his liability to ejectment, or to recover possession or occupancy rights or to recover compensation.

It is admitted that notice of ejectment was issued to the plaintiffs under S. 45, Punjab Tenancy Act, and their suit to contest the notice of ejectment was also unsuccessful. The plaintiffs' case thus comes prima facie under the provisions of the above-mentioned Section. The learned counsel for the plaintiffs however contended that S. 50A should be read with S. 50 and the words "no person" as used in S. 50A should be taken to mean "no tenant." It was contended that notice under S. 45 could only be issued to a tenant as defined in S. 4, Punjab Tenancy Act. This contention has however no force in view of the decision in 3 P R 1895¹ which was followed in 16 Lah 1086.² The latter ruling has apparently been approved by a Division Bench of this Court. The learned counsel for the plaintiffs cited AIR 1936 Lah 710,³ but in this ruling the provisions of S. 50A, Punjab Tenancy Act, and the ruling reported in 16 Lah 1086² do not appear to have been considered. In view of the interpretations placed on S. 50A, Punjab Tenancy Act, in 16 Lah 1086,² the contention of the learned counsel for the appellants that the suit was not cognizable by a Civil Court appears to me to be correct.

I accordingly accept this appeal and dismiss the plaintiffs' suit but in view of all the circumstances I leave the parties to bear their costs throughout.

D.S./R.K.

Appeal accepted.

1. Thakar Gir v. Bisakhi, (1895) 3 P R 1895.

2. Mehar Khan v. Ata Mohammad, (1935) 22 A I R Lah 719=156 I C 592=16 Lah 1086=37 P L R 507.

3. Mehr Singh v. Sohan Singh, (1936) 23 A I R Lah 710=165 I C 521=38 P L R 915.

A. I. R. 1940 Lahore 184

DIN MUHAMMAD J.

Jugal Kishore — Plaintiff — Appellant.
v.*Mt. Shanti Bai and others, Defendants*
and others, Plaintiffs — Respondents.

Second Appeal No. 1000 of 1939, Decided on 8th January 1940, from decree of Additional District Judge, Lyallpur at Jhang, D/- 27th April 1939.

Custom (Punjab) — Jhang District—Unmarried daughters are entitled to succeed as heirs until their marriage—Suit for declaration that they are not entitled to estate of their father and that plaintiffs are entitled to it as owners is not maintainable.

According to the Customary law of the Jhang District, unmarried daughters until their marriage are entitled to succeed as heirs. Thus, they are entitled to inherit the property and to remain in possession so long as they are unmarried and nobody can oust them from the present possession of the property. Hence, a suit for a declaration that the daughters are not entitled to the estate of their deceased father and that they had only rights of residence and maintenance until death or marriage, and for an injunction restraining the daughters from doing any such act as would prove injurious to the plaintiffs' interest is not maintainable: 27 Mad 591; 36 Mad 62; A I R 1915 All 104; A I R 1920 Lah 340 and A I R 1938 P C 73, Disting.; A I R 1916 P C 117; A I R 1923 Lah 403 and A I R 1928 Lah 831, Rel. on.
[P 185 C 1]

Shamair Chand — for Appellant.

Jugal Kishore in person.

Mehr Chand Mahajan—*for Respondents.*

Judgment.—The suit out of which this appeal has arisen was instituted by Tikaya Ram and Jugal Kishore against Mt. Shanti Bai and Mt. Chhankandi Bai alias Khalindi, daughters of M. Heta Ram for a declaration that the defendants were not entitled to the estate of Heta Ram, their deceased father, and that they had only rights of residence and maintenance until death or marriage. They further asked for a permanent injunction restraining the defendants from taking possession of the estate. Their suit was dismissed by both the trial Court and the lower Appellate Court. On an appeal to this Court, Jai Lal J. held in agreement with the Courts below that the reliefs claimed by the plaintiffs could not be legally granted to them but allowed them to amend the plaint. They consequently put in an amended plaint in which they sought a declaration of their own title as owners and heirs of the property left by Heta Ram and further asked for an injunction restraining the defendants from doing any such act as would prove injurious to the plain-

tiffs' interest. They also prayed for the appointment of a receiver of the property left by Heta Ram. This suit has again been dismissed by both the Courts below on a preliminary ground that no such suit is maintainable.

Counsel for the appellant urges that the decision of both the Courts below is wrong and relies in this connexion on 27 Mad 591,¹ 36 Mad 62,² 1 Lah 92,³ 37 All 185⁴ and 19 Lah 63.⁵ These judgments, however, are not in point. In 27 Mad 591,¹ all that was decided was that a declaratory suit was maintainable when the possession of the property was neither with the defendant nor with the plaintiff. In 36 Mad 62,² a Division Bench of the Madras High Court decided that before a suit could be held not maintainable under the proviso to S. 42, it must be shown that the defendant was in possession and that as against him the plaintiff could have obtained an order for delivery of possession. In 1 Lah 92,³ part of the property in suit was in possession of the Court and part of it was occupied by tenants who had not attorned to either party and it was held that the suit for a declaration without consequential relief was maintainable. In 37 All 185⁴ on the death of a mahant, a dispute having arisen as to the right of succession to the math, the Court of Wards took possession of the math and declined to hand it over until someone could establish his right to the mahantship. It was held that, in the circumstances, a suit for a declaration lay. In 19 Lah 63,⁵ their Lordships of the Privy Council laid down that where a defendant is not in possession and no further relief is available against him, a suit for a declaration of title to property without a claim to possession lies.

It would be obvious that all these cases proceeded on their own facts. The bar pleaded in this case is based on different considerations. Here, it is contended that

1. Veda Nayaga Mudaliar v. Vedammal, (1904) 27 Mad 591.
2. Malaya Pillai v. Perumal Pillai, (1913) 36 Mad 62=12 I C 170=21 M L J 1022=(1912) 1 M W N 161.
3. Kaluram v. Piari Lal, (1920) 7 A I R Lah 340=55 I C 953=1 Lah 92=92 P L R 1920.
4. Jagar Nath Gir v. Tirguna Nand, (1915) 2 A I R All 104=28 I C 139=37 All 185=13 A L J 252.
5. Sundar Singh Mallah Singh Sanatan Dharam High School Trust Induara v. Managing Committee Sundar Singh Mallah Singh Rajput High School Induara, (1938) 25 A I R P C 73=172 I C 993=I L R (1938) 19 Lah 63=65 I A 106=32 S L R 350 (P C).

the plaintiffs have no existing right to the property in dispute and consequently their suit is not maintainable. Reference in this connexion may be made to 39 Mad 634,⁶ where their Lordships of the Privy Council held that a reversionary heir under the Hindu law could not maintain a suit for a mere declaration against a widow in possession of her husband's estate. The following passages from their Lordships' judgment may be read with advantage :

The rule of the Hindu law with regard to the nature of the widow's estate may have been subject to various forms of expression, but in substance it is not doubtful. Her right is of the nature of a right of property ; her position is that of owner ; her powers in that character are, however, limited ; but, to use the familiar language of Mayne's Hindu Law, Para. 625, p. 870, 'so long as she is alive no one has any vested interest in the succession' (p. 637). The form of the declaration was that the plaintiff was "the next reversionary heir" In their Lordships' opinion the plaintiff-respondent was not entitled to such a declaration (p. 639).

Similar observations were made in 4 Lah 106⁷ and 9 Lah 467.⁸ The position of the defendants in this case is quite analogous to that of an ordinary Hindu widow. The parties are governed by custom and the answer to question No. 39 in the Customary Law of the Jhang District clearly states that unmarried daughters until their marriage are entitled to succeed as heirs. This being so, they are entitled to inherit the property and to remain in possession so long as they are unmarried and nobody can oust them from the present possession of the property. I have no hesitation in holding therefore that the judgments of the Courts below cannot be assailed on any ground. I accordingly dismiss this appeal but in the peculiar circumstances of the case make no order as to costs before me.

D.S./R.K.

Appeal dismissed.

6. Janaki Ammal v. Narayanaswami (1916) 3 A I R P C 117=37 I C 161=39 Mad 634=48 I A 207 (P O).

7. Lalu v. Fazl Din, (1928) 10 A I R Lah 403 = 78 I C 893=4 Lah 106.

8. Mt. Sharifan Bibi v. Mt. Aishan Bibi, (1928) 15 A I R Lah 831=110 I C 248=9 Lah 467=29 P L R 544.

A. I. R. 1940 Lahore 185

DIN MUHAMMAD J.

Lala Bishambar Sahai — Appellant.

v.

Municipal Committee, Delhi —

Respondent.

Second Appeal No. 604 of 1939, Decided on 1st February 1940.

Punjab Municipal Act (3 of 1911), S. 195 — Building erected without sanction but no encroachment made on Municipal land and no rules of hygiene or sanitation broken — Power of demolition should not be used.

It is true that power is vested in the committee to require the demolition of a building which is erected without the necessary sanction, but this power is vested in the committee to meet extreme cases of defiance or cases in which encroachments are made on Municipal lands or rules framed by the committee on hygienic or sanitary grounds are flagrantly ignored. Where however this is not the case, and the only infringement of the law is a disregard of the provision requiring every person not to erect any building without the sanction of the committee, the law provides an alternative remedy and that is to penalize the offender in such sum as the committee may deem reasonable. [P 185 C 2]

Shamair Chand — for Appellant.

Achhru Ram — for Respondent.

Judgment.—On 5th December 1934, the Municipal Committee, Delhi, issued a notice to Bishambar Sahai under S. 195, Municipal Act, requiring him to demolish some portion of the second storey of his house along with the whole of the third storey on the ground that he had erected those buildings without its sanction. Thereupon, Bishambar Sahai took certain proceedings in the Municipal Committee itself, but, as they proved infructuous, he instituted a suit on 13th March 1936 for a declaration that the notice was ultra vires and illegal and for a perpetual injunction restraining the committee from demolishing any part of his house. The Senior Subordinate Judge dismissed the suit on 31st January 1938 and the District Judge on appeal affirmed that decision on 13th March 1939.

Whatever the merits or the demerits of the case, it cannot be denied that, in the circumstances of this case, the order of the committee requiring the demolition of the structures objected to, if not vindictive, is, to say the least, most unconscionable. It is true that power is vested in the committee to require the demolition of a building which is erected without the necessary sanction, but this power is vested in the committee to meet extreme cases of defiance or cases in which encroachments are made on municipal lands or rules framed by the committee on hygienic or sanitary grounds are flagrantly ignored. Where however this is not the case, and the only infringement of the law is a disregard of the provision requiring every person not to erect any building without the sanction of the committee, the law provides an alternative remedy and that is to penalize the offender in such sum as the committee may

deem reasonable. In the present case, it is admitted that no encroachment has been made on the municipal land. It is further not disputed that no rules of hygiene or sanitation have been broken. It was also admitted by the respondent's counsel that a part at least of the third storey had not been newly built. In these circumstances, I am of the opinion that the committee should not have used its extreme powers and consequently it should have been restrained from demolishing the building objected to. I accordingly allow this appeal, set aside the order of dismissal made by the Courts below and decree the plaintiff's suit. This however will not affect the right, if any, of the committee to levy any sum it may deem reasonable by way of compensation. In the peculiar circumstances of the case, I leave the parties to bear their own costs throughout.

D.S./R.K.

Appeal allowed.

* A. I. R. 1940 Lahore 186

YOUNG C. J. AND TEK CHAND J.

*Raminder Singh — Defendant —**Appellant.*

v.

Mohinder Singh, Plaintiff and another,
Defendant — Respondents.

First Appeal No. 4 of 1939, Decided on 18th December 1939, from decree of Sub-Judge, 3rd Class, Amritsar, D/- 31st August 1936.

* (a) Jurisdiction — Pecuniary suit valued at amount less than Rs. 5000 decreed—Appeal to District Judge—Amount to be decreed beyond District Judge's jurisdiction — He should not return appeal for presentation in High Court but should himself submit record to High Court.

Where a suit valued at an amount less than Rs. 5000 is decreed, the District Judge in appeal from such decree cannot pass a decree for payment of a sum larger than Rs. 5000 as it is the maximum pecuniary jurisdiction of District Judge. When he finds that the amount to be decreed is beyond his jurisdiction, he should not return the memorandum of appeal to the appellant for presentation in High Court, but he should himself submit the record to High Court with the recommendation that the appeal be transferred to its own file and a decree passed accordingly: 16 P R 1908 (F B); 19 P R 1908 (F B); AIR 1926 Lah 376 (F B); AIR 1934 Lah 488 (F B) and A I R 1934 Lah 545 (F B), Rel. on. [P 189 C 1, 2; P 190 C 2]

(b) Arbitration — Appellate Court properly seised of appeal and competent to make reference to arbitration making reference—Fact that award is for amount in excess of pecuniary jurisdiction of Appellate Court would not render award or arbitration proceedings invalid.

Where an Appellate Judge properly seised of the appeal and competent to make the reference to

arbitration has made reference to arbitration, the mere fact that the award directed that the sum payable by one party to the other was more than the pecuniary jurisdiction of Appellate Court would not retrospectively, render all previous proceedings invalid. [P 189 C 2]

(c) Arbitration—Award dealing with subject matter of suit — Mere fact that relief given is different cannot be said to make award as one beyond scope of suit.

Where an award has clearly dealt with the subject-matter of the suit referred, the mere fact that the relief given by the award is different from what either party claimed does not make the award invalid on the ground that it went beyond the scope of the suit: A I R 1925 P C 293, Disting. [P 190 C 1, 2]

(d) Civil P. C. (1908), Sch. 2, Para. I — Person being pro forma party and having no interest in suit—His agreement to reference is not necessary.

Where a person is merely a pro forma party to the suit and has no dispute either with the plaintiff or defendant he is not a party interested in suit within the meaning of Sch. 2, Para. I and hence his agreement to reference is not necessary: A I R 1926 All 261, Rel. on. [P 191 C 1]

(e) Arbitration — Arbitrator need not record separate findings on various points on which parties are at issue.

An arbitrator is not bound by the technical rules of procedure which the Court must follow, nor need he record separate findings on the various points on which the parties are at issue, or write a reasoned judicial decision. All that he is required to do is to give an intelligible decision which determines the rights of parties in relation to the subject matter of the reference: 14 I C 371 and 16 I C 478, Rel. on. [P 191 C 2]

(f) Arbitration — Arbitrator selected by parties by reason of his special knowledge of their affairs—Award made by him after taking broad view of case is not bad.

Where an arbitrator has been selected by reason of his special knowledge of the affairs of the parties to decide dispute, he is entitled to take a broad view of the case and give an award, which he conceives to be just and equitable in the circumstances: 70 P R 1891, Rel. on. [P 192 C 1]

(g) Arbitration — Omission of direction by arbitrator regarding costs does not vitiate award.

Costs are a matter for decision by the Court, and the omission of a direction by the arbitrator regarding costs does not vitiate the award: 35 P L R 1906 and 19 I C 611, Rel. on. [P 192 C 1, 2]

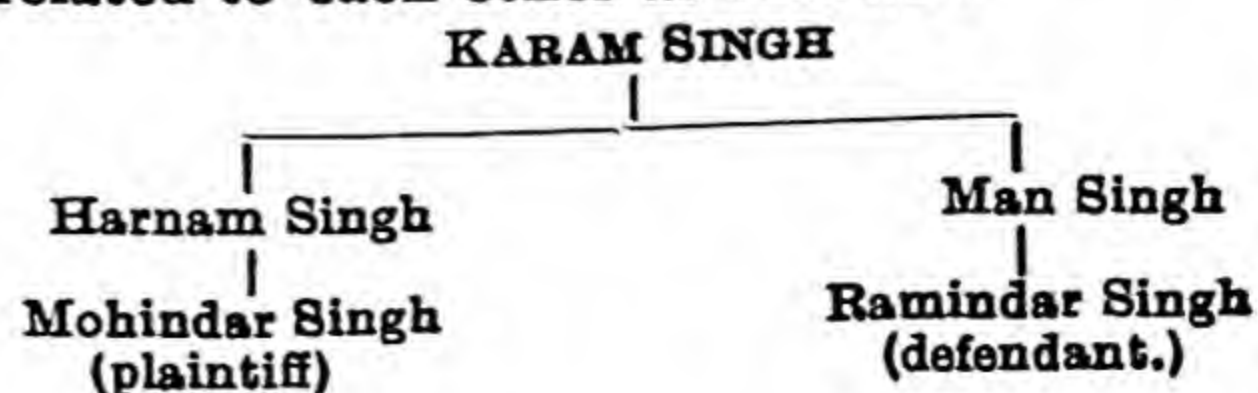
J. N. Aggarwal and Yashpal Gandhi

— for Appellant.

Mehr Chand Mahajan, Barkat Ali and
Asa Ram Aggarwal —

for Respondents.

Young C. J. — The parties to this litigation are residents of Amritsar and are related to each other as follows:



In May 1931, the defendant Raminder Singh executed five sale deeds (Exs. P.5 to P.9) relating to five different parcels of land situate in mauza Tung Bala, a suburb of Amritsar, in favour of Ujagar Singh of mauza Sarih, Jullundur District. Two of these deeds were executed on 2nd May, two on 12th May and one on 13th May 1931. The aggregate consideration for these sales, as mentioned in the deeds, was Rs. 15,500, which was stated to have been paid in cash before the Sub-Registrar. On 3rd October 1931, the plaintiff Mohinder Singh instituted a suit against Raminder Singh for possession of the lands transferred by the abovementioned deeds, alleging that the sale transactions had really been effected by the defendant with him, that he alone had paid the entire consideration of Rs. 15,500, but that the deeds had been executed benami in the name of Ujagar Singh, who had acquired no personal interest in the lands in dispute. It was averred that in spite of repeated demands the defendant had failed to deliver possession of the lands to the plaintiff. It was, accordingly, prayed that a decree for possession be passed in his favour against the defendant. The suit was valued for purposes of jurisdiction at Rs. 1500, being 30 times the land revenue.

Originally, Raminder Singh alone was impleaded as the sole defendant in the suit. But subsequently Ujagar Singh also was added as a defendant. Raminder Singh resisted the suit on various grounds. He denied that the sale transactions had been entered into with the plaintiff, or that the plaintiff was the real beneficiary under them. He further pleaded that, at the time of the execution of the sale deeds, he was a young and inexperienced person, just come of age, and that by fraud and misrepresentation he was persuaded to sell the lands to Ujagar Singh at very much less than their real value, that the entire consideration as stated in the deeds was not really paid to him, but a large sum was presented before the Sub-Registrar "for the purposes of show," the major part of which was subsequently taken back by Ujagar Singh. He further averred, that very soon afterwards, the defendant realized that he had been deceived and was about to take criminal proceedings against Ujagar Singh, when the latter voluntarily reconveyed the properties to him (Raminder Singh) by a deed executed on 11th June 1931, receiving back Rs. 3700 which was the amount actually paid to him by Ujagar Singh at the time of the sales.

He maintained that Ujagar Singh had never obtained possession of the lands, which had all along remained with him. On these pleadings the learned Sub-Judge framed the following issues:

1. Whether Ujagar Singh defendant is a benamidar and the real purchaser is the plaintiff?
2. Whether Ujagar Singh had cancelled the alienation in dispute; if so, how does it affect the plaintiff's claim?
3. Relief.

After a lengthy trial before several Judges, extending over a period of five years, the suit eventually came up before Mr. Shiv Charan Singh, Subordinate Judge, 3rd Class, who gave judgment on 31st August 1936. He found that the sales had really been effected in favour of the plaintiff who had advanced the entire consideration, Rs. 15,500, that Ujagar Singh was merely a benamidar for the plaintiff and had no interest of his own in the property sold and that he was not competent to cancel the sales and reconvey it to Raminder Singh. The learned Judge accordingly passed a decree for possession of the lands in favour of the plaintiff against Raminder Singh, leaving the parties to bear their own costs.

From this decree, the defendant Raminder Singh preferred an appeal in the District Court, Amritsar, and the plaintiff filed cross-objections claiming costs in the trial Court. The appeal came up for hearing before Mr. Sewa Singh, Additional District Judge, on 27th November 1937, when an application signed by Raminder Singh, Mohinder Singh and Mr. Attar Singh, pleader for Ujagar Singh, was presented stating that the parties had, of their own accord, appointed S. Amar Singh, Inspector C. I. A., Railway Police, Lahore, as sole arbitrator for settlement of all their disputes in this case. They therefore prayed that "the appeal case" be handed over to the said arbitrator and that the award given by him shall be accepted by them without any objection. The learned Judge granted the application and referred the case to the arbitrator, directing him to submit his award in writing before 13th December 1937. The arbitrator filed his award on 11th December 1937, as follows:

I have fully heard both the parties who are my cousins. Neither party now wants to produce any other evidence. I have thoroughly considered over all the facts. My award is that the entire land may be given to Raminder Singh, appellant, who should pay Rs. 15,000 in cash to S. Mohinder Singh, respondent, that is Rs. 5000 within two months from today and the balance Rs. 10,000 within eight months thereafter, that is within ten months from today and that thereafter with interest at the rate of Re. 1 per cent. per mensem.

To this award the plaintiff, Mohindar Singh, filed lengthy objections, which are printed at pages 34 to 36 of the paper-book, and which may be summarized as follows: (1) That the reference to arbitration was bad as the pleader who purported to sign the application for Ujagar Singh had not been authorized by him. (2) That the arbitrator was guilty of misconduct inasmuch as (a) he did not give the parties time to produce their evidence; (b) he did not even send for the record of the case, including the evidence recorded by the Sub-Judge, from the Court; (c) he based the award on personal knowledge; and (d) he was partial to the defendant. (3) That the award was bad as no finding had been given separately on the various issues which arose in the case. (4) That the award was void and ultra vires inasmuch as it went beyond the scope of the suit and the appeal in which the reference was made. The dispute related to title and the prayer was for possession of the land, but the award gave the plaintiff money instead. (5) That the award was incomplete as it did not decide the question of the costs of the suit and the appeal. (6) Under the award the plaintiff had been awarded Rs. 15,000 but this sum was beyond the pecuniary jurisdiction of the trial Judge as well as the Appellate Court neither of whom was competent to pass a decree for it. For this reason, the reference to arbitration and the award were ultra vires and null and void.

To prove these objections the plaintiff examined the arbitrator, and he himself went into the witness-box. In rebuttal, the defendant, Ramindar Singh, appeared as his own witness. On this evidence, the Additional District Judge, Mr. Falshaw, recorded his findings that no misconduct had been proved against the arbitrator and that the award was not bad because the arbitrator had failed to decide the question of costs, which is a matter for decision by the Court. The objection as to the reference being bad because Ujagar Singh had not joined in making it does not appear to have been pressed before the learned Judge and he gave no specific finding on it. On the question of jurisdiction, the learned Judge held that he was competent to entertain the appeal and to make the reference; but as the award was for payment of Rs. 15,000 and his appellate jurisdiction was limited to Rs. 5000, he could not pass a decree for the amount awarded. He therefore returned the memoranda of appeal and cross-objec-

tions to the parties for presentation in the High Court. This order is dated 1st December 1938. On 16th December 1938, Ramindar Singh presented the memorandum of appeal in this Court (R. F. A. No. 4 of 1939). He also presented a petition for revision (C. R. No. 164 of 1939) urging that the Additional District Judge had acted illegally in returning the memorandum of appeal for presentation to this Court but that, on the finding that he was incompetent to pass a decree for the sum awarded, he himself should have submitted the record to the High Court for a proper decree being passed.

The plaintiff, Mohindar Singh, also filed a petition for revision (C. R. No. 171 of 1939) contending that the Additional District Judge, being properly seised of the appeal, should have decided the appeal and the cross-objections on the merits and should have left "the question of the award aside." It was further urged that the learned Judge had no jurisdiction to decide the objections against the award. The appeal and the two petitions for revision have been heard together. Before us, counsel for the defendant-appellant supports the reference and the award and prays that a decree be passed in accordance with it. The only objection raised on his behalf relates to an irregularity in the procedure followed by the learned Additional District Judge. He contends that the learned Judge should not have returned the memorandum of appeal for presentation in this Court but should have himself made a reference direct to this Court. Counsel for the plaintiff-respondent, on the other hand, has attacked the reference and the award on the grounds mentioned above and has also urged that, apart from these objections, the learned Judge should have decided the appeal on the merits and ignored the award altogether. As the points raised on behalf of the plaintiff-respondent go to the root of the case, it will be convenient to deal with them first.

The learned counsel for the plaintiff-respondent strenuously urged that as the appellate jurisdiction of the Additional District Judge was limited to Rs. 5000, the reference to arbitration and the award which followed thereon, involving payment of a sum of Rs. 15,000 were "both ultra vires and illegal," and therefore the Additional District Judge should have ignored them altogether and decided the appeal on the merits. We have no doubt that this contention is without force. As has been

stated above, the property, which is the subject-matter of the suit, is agricultural land, on which the land revenue assessed is Rs. 50 per annum. The value of such a suit for purposes of jurisdiction is determined by the rules framed under S. 3, Suits Valuation Act, and is thirty times the land revenue assessed, i. e., Rs. 1500. The Subordinate Judge, who decided the suit, had been invested with powers of a Sub-Judge of the Third Class, the maximum limit of whose pecuniary jurisdiction is Rs. 2000 (see High Court Notification No. 4, dated 3rd January 1923). The Sub-Judge, therefore, had jurisdiction to entertain the suit. At the conclusion of the trial, the Sub-Judge granted the plaintiff a decree for possession of the land without payment of any money, and it is not denied that he was competent to do so. The forum of appeal from the decree passed in such suits is determined by S. 39 (b), Punjab Courts Act, which lays down that an appeal from a decree of a Subordinate Judge, where the value of the original suit does not exceed Rs. 5000, lies to the District Court. In the present case the value of the suit being Rs. 1500, the appeal against the decree of the Subordinate Judge was properly presented in the District Court. The Additional District Judge was thus seized of the case and when, on an application signed by two of the parties and the pleader for the third, he passed an order referring the appeal to the arbitration of S. Amar Singh, he was fully competent to do so (Sch. 2, paras. 1 and 3, Civil P. C.). The arbitrator was thus properly appointed and he filed his award in Court within the time fixed.

It has been conceded by Mr. Mehr Chand that there was no defect of jurisdiction in the proceedings before the Additional District Judge up to this stage. His objection is to what followed. The learned Judge gave the parties time to file objections to the award and then proceeded to enquire into the objections as to the alleged misconduct of the arbitrator. After recording the evidence produced by them, he overruled the objections. He had then to pass a decree in accordance with the award, but as the award was to the effect that the land in dispute be given to the defendant Raminder Singh who was to pay Rs. 15,000 in cash to the plaintiff, the question arose whether the learned Judge, the maximum limit of whose pecuniary jurisdiction is Rs. 5000 could pass a decree for payment of Rs. 15,000. This question has been the

subject of much discussion and difference of opinion in the Courts in India. The view which has prevailed in this Court and the Punjab Chief Court for over sixty years is that in such cases the Court, even though it has jurisdiction to entertain the suit, or appeal, cannot pass a decree for payment of a larger sum than its maximum pecuniary jurisdiction. It is not necessary to refer to all the cases bearing on the point. It will be sufficient to mention the Full Bench decisions in 16 P R 1908¹ and 19 P R 1908² the rule laid down in which has been more recently reaffirmed by three Full Benches, each composed of five Judges, in 7 Lah 570³ at p. 576, 15 Lah 151⁴ at p. 166 and 15 Lah 512.⁵ As stated already, this view is not in accord with that taken by several other High Courts; but neither counsel who appeared before us for the contending parties has challenged the correctness of these rulings. They both are agreed that the learned Additional District Judge could not have passed a decree for payment of the sum of Rs. 15,000 as it exceeded the limits of his pecuniary jurisdiction.

Mr. Mehr Chand for the respondent, while accepting this proposition as correct, has argued that as the award was for a sum in excess of the appellate jurisdiction of the learned Judge, this circumstance automatically rendered the entire arbitration proceedings and the award invalid. He was, however, unable to cite any authority or put forward any cogent argument in support of his contention. It has been shown above, and is indeed conceded, that the Additional District Judge was properly seized of the appeal, that he was competent to make the reference to arbitration and that the arbitrator was authorized to give an award on the matter in dispute between the parties. It is, therefore, difficult to see how the mere fact that the award directed that the sum payable by one party to the other was Rs. 15,000 would retrospectively render all previous proceedings invalid. It may be mentioned that the present

1. Mahomed Afzal Khan v. Nand Lal, (1908) 16 P R 1908=146 P L R 1908 (F B).
2. Abdur Rahman v. Charag Din, (1909) 19 P R 1908 (F B).
3. Jaswant Ram v. Moti Ram, (1926) 13 A I R Lah 376=96 I C 890=7 Lah 570=27 P L R 605 (F B).
4. Kalu Ram v. Hanwant Ram, (1934) 21 A I R Lah 488=151 I C 641=15 Lah 151=86 P L R 391 (F B).
5. Gangaram v. Hakim Rai, (1934) 21 A I R Lah 545=151 I C 703=15 Lah 512=36 P L R 361 (F B).

suit was not one (like suits for rendition of accounts) in which the law permits a tentative value for purposes of jurisdiction to be fixed in the first instance, which is liable to be changed as a result of subsequent enquiry and findings. This was a suit for possession of land, of which the jurisdictional value is fixed, once and for all, under the Suits Valuation Act and the rules framed thereunder. In such a case the Court, which has rightly entertained the suit or appeal and has seisin of it, if it finds that the amount due is higher than its pecuniary jurisdiction, may not be competent to pass a decree for that amount. But this has no effect on the proceedings which have validly been taken by it in the course of the trial. We hold, therefore, that the reference and the award did not become void for this reason.

The next contention of Mr. Mehr Chand was that the award went beyond the scope of the suit. He pointed out that in the plaint the plaintiff had claimed that he was the real owner of the property in dispute and had prayed that a decree be passed directing the defendant to surrender possession to him. The defendant, on the other hand, denied the plaintiff's ownership and pleaded that the land belonged to himself and, therefore, he was entitled to retain possession. Mr. Mehr Chand urged that the arbitrator should have either decreed the suit as prayed or dismissed it: he could not pass a money decree in favour of the defendant. But this is an entirely erroneous view of the matter. In the award the arbitrator has rejected the plaintiff's claim for possession and has upheld the defendant's right to retain possession of the disputed property, on the condition that he shall pay the sum of Rs. 15,000 to the plaintiff. In other words, he has merely put the defendant on terms, and in doing so he can by no means be said to have gone beyond the scope of the suit. The award clearly deals with the subject-matter of the suit and nothing else. It is only the relief given which is different from what either party claimed; it is partially in favour of one party and partially in favour of the other. In this connexion, Mr. Mehr Chand relied largely upon the decision of their Lordships of the Privy Council in 53 Cal 258.⁶ But the facts of that case were entirely different. There, a pending suit between some

members of a family was, on their own application, referred to arbitration. The application, however, comprised not only matters which were the subject of the suit but also some others which were outside it, and in which another person, not a party to the suit, was interested. The arbitrators made an award on all these matters, without discriminating between those which were the subject-matter of the suit and those which were not. Their Lordships held that the award was invalid. Admittedly, this is not the case here. As pointed out above, in this case, the dispute was limited to five parcels of land, referred to in the opening part of this judgment, and the award also relates to them; only it does not give the relief in the particular form in which it was asked by either party. In doing so, the arbitrator has not offended against any rule of law, and for this reason alone the award cannot be held to be *ultra vires* or invalid.

The award having been properly filed in the Court of the Additional District Judge, he was bound to receive and decide the objections raised against it. He could not, as suggested by Mr. Mehr Chand, have "ignored the award" altogether and proceeded to decide the appeal on the merits, as if no reference and award had been made at all. The procedure followed by the learned Judge was correct, except that, when he found that the amount to be decreed was beyond his jurisdiction, he should not have returned the memorandum of appeal to the appellant for presentation in this Court, but he should himself have submitted the record to this Court with the recommendation that the appeal be transferred to its own file and a decree passed accordingly. It seems that in this matter the learned Judge was misled by the final order passed by the Full Bench in 15 Lah 512⁵ at p. 529. He failed to notice that that was an appeal in a suit for dissolution of partnership and rendition of accounts in which a tentative value had been fixed, as provided in the Suits Valuation and the Court-fees Acts, whereas in the present case the value for purposes of jurisdiction was permanently fixed under the rules framed under the former Act. This irregularity is however immaterial and it is not necessary to send the case back to the learned Judge for passing a formal order submitting the record to this Court. The memorandum of appeal and the record are before us and we can condone the irregularity, which does

6. *Ram Protap Chamria v. Durga Prasad*, (1925) 12 A I R P C 293=92 I C 633=55 I A 1 = 53 Cal 258 (P C).

not affect the merits of the case, and treat this appeal as having been transferred to our file on submission by the Judge, and not as presented by the appellant.

Coming now to the other objections to the award: it is urged that the reference was bad by reason of Ujagar Singh not having joined in making it. It appears that Ujagar Singh had appointed Mr. Attar Singh as his pleader on 3rd May 1937 by executing a formal vakalatnama in his favour which inter alia gave him authority to refer the suit to arbitration. This document was duly signed and dated by him and the necessary court-fee stamp, bearing date 3rd May 1937, was affixed on it. But by an oversight, Mr. Attar Singh omitted to file it in Court on that date. He however actually appeared at the hearing on 3rd May and on subsequent hearings on behalf of Ujagar Singh, and was also present on 27th November 1937 when he made a statement agreeing that the appeal be referred to the sole arbitration of S. S. Amar Singh. It appears that on 13th December 1937, after the award had been filed, it was discovered that the vakalatnama had not been filed, and, on that date, he presented it in Court stating the circumstances in which it had not been filed before. It does not appear necessary for the decision of this case to decide whether in the circumstances the pleader could act on behalf of Ujagar Singh in agreeing to the reference, for it is quite clear that Ujagar Singh was a mere pro forma party to the suit and had no real interest in the dispute. The plaintiff himself had not impleaded him as a defendant in the plaint as originally framed and his whole case was, and has always been, that Ujagar Singh was a mere benamidar for him and had no personal interest in the property sold by Ramindar Singh. Similarly, the defendant Ramindar Singh had alleged that though Ujagar Singh was the real purchaser, he had subsequently reconveyed the property to Ramindar Singh and was no longer interested in it. Thus, there was no dispute between Ujagar Singh and the plaintiff or Ramindar Singh and therefore he was not a "party interested" in the suit, within the meaning of Sch. 2, Para. 1, Civil P. C., whose agreement to the reference to arbitration was necessary: 48 All 236⁷ at p. 241. The reference was therefore not bad for this reason.

The remaining objections relate to the alleged misconduct of the arbitrator. The record of the arbitrator shows that on 6th December the plaintiff and Ramindar Singh, defendant, were present before him and they were told to appear on 8th December 1937. On that date, they both actually came and the arbitrator has noted that they "made their respective statements and stated the facts" and, further, that "they did not want to produce any other evidence." The arbitrator, accordingly, "allowed them to go away" saying that he would "file the award in Court after further consideration." The arbitrator has been examined as a witness before the Additional District Judge and he has deposed that he heard the parties for 3½ hours, that though the original record of the Subordinate Judge was not before him, both parties had the briefs of their counsel with them, including copies of the statements of witnesses, that they both read out to him portions of the evidence and stated all the facts on which they relied and that they said that they had no further evidence to call. These being the facts, it is difficult to see how it can be said that the plaintiff was not given proper opportunity to lead evidence, or otherwise put forward his case, before the arbitrator.

It was next urged that the award of the arbitrator is very brief; he has not referred to the evidence recorded by the lower Court, nor has he given findings on the various issues; and for this reason the award is bad. This contention, too, is devoid of all force. The reference did not require him to record separate findings on the issues which had been framed by the Court. On the other hand, the parties in their application had asked for a reference in general terms for settlement of "all our disputes in the case" and they had agreed to accept his award without any objection. It is hardly necessary to say that an arbitrator is not bound by the technical rules of procedure which the Courts must follow, nor need he record separate findings on the various points on which the parties are at issue, or write a reasoned judicial decision. All that he is required to do is to give an intelligible decision which determines the rights of parties in relation to the subject-matter of the reference: 14 I C 371⁸ and 16 I C 478⁹ at p. 481. Further, the arbitrator in this case

7. *Faujdar Mahto v. Emperor*, (1926) 13 A I R All 261=91 I O 815=27 Cr L J 143 = 48 All 286=24 A L J 289.

8. *Narpal Rai v. Devi Das*, (1912) 13 P W R 1911 = 14 I O 371.

9. *Nanjappa v. Nanjarao*, (1912) 23 M L J 290=16 I O 478.

is a near collateral of the contesting parties equally related to them, and it appears that he had been selected by reason of his special knowledge of their affairs to decide the dispute, which had been pending in Courts for a period of six years and of which the end was not in sight. Obviously, it was not the intention that he should record a formal judgment like an Appellate Court on the evidence which had been produced by the parties in the Court below. He took a broad view of the case and gave an award, which he conceived to be just and equitable in the circumstances. This he was perfectly entitled to do. If any authority is required for this obvious proposition, reference may be made to the decision of their Lordships of the Privy Council in 70 P R 1891¹⁰ where an award given by an arbitrator selected by reason of his special knowledge of the affairs of the family, and not based upon strict rules of law, but on a "broad view" of the dispute, was upheld, it being observed that the arbitrator "was within his rights in so doing." In such cases, as remarked by Lord Cockburn C. J. in the well-known case in (1867) 8 B & S 100¹¹:

We must not be over ready to set aside awards when the parties have agreed to abide by the decision of a tribunal of their own selection, unless we see that there has been something radically wrong and vicious in the proceedings.

Obviously, this has not been shown in this case. The next objection was that the arbitrator has shown partiality to the defendant. There is however not a scintilla of evidence to support this allegation and all that counsel could point out to us was the statement of the plaintiff that the defendant had lived with the arbitrator for two days between the reference and the delivery of the award. It is significant however that neither the arbitrator nor the defendant Ramindar Singh was questioned on this point. In these circumstances, the bare word of the plaintiff cannot be accepted as sufficient proof of the allegation. We must therefore hold that no misconduct of any kind on the part of the arbitrator has been proved. The last objection was that the award was incomplete as it did not decide the question of costs. In such a case however costs are a matter for decision by the Court, and the omission of

a direction by the arbitrator does not vitiate the award: 35 P L R 1906¹² and 19 I C 611.¹³ The award is therefore not open to objection on any of the grounds urged. For the foregoing reasons, we accept the appeal and pass a decree in accordance with the award, which will be incorporated in the decree. Having regard to all the circumstances, we leave the parties to bear their own costs in both Courts. The cross-objections filed by the plaintiff-respondent fail and are dismissed. The revision petitions, filed by the plaintiff and the defendant respectively, necessarily fail and are dismissed, each party bearing his own costs.

D.S./R.K.

Appeal allowed.

12. Kartar Singh v. Faquir Singh, (1906) 35 P L R 1906.

13. Gurdinomal v. Wadhu Mal, (1912) 6 S L R 226 = 19 I C 611.

A. I. R. 1940 Lahore 192

MONROE J.

*Lala Ghansham Das Birla and others—
Accused — Petitioners.*

v.

*Suraj Bhan — Complainant —
Respondent.*

Criminal Misc. No. 314 of 1939, Decided on 25th November 1939.

Criminal P.C. (1898), S. 561 A—High Court, on transfer application, directing de novo trial ordering that trial Magistrate was not to be bound by any order of first trial Magistrate — Application to make order clear on ground that it was obscure—High Court held had no power to amend its order by way of explanation.

On a transfer application the High Court directed a de novo trial directing that the trial Magistrate was not to be bound by any order of the first trial Magistrate. The order was made after a long discussion and was, except in form, a consent order. An application was made on the ground that the order was obscure and that it should be made clear:

Held that the High Court had no power to amend its order by way of explanation or otherwise. [P 193 C 1]

N. C. Pandit — *for Petitioners.*Chhotay Lal Bhargwa—*for Respondent.*

Order.—A transfer application was made in this matter and by my order of 12th September 1939 I directed a de novo trial and that the trial Magistrate was not to be bound by any order of the first trial Magistrate. The order was made after a long discussion and was except in form a consent order. The petitioner has now made a further application on the ground that the order is obscure and seeks to have it made clear. The petitioner took this step, because it was represented in the trial Court that

10. Muhammad Nawaz Khan v. Alam Khan, (1891) 18 Cal 414=70 P R 1891=18 I A 73 = 6 Sar 26 (P C).

11. In re Hopper, (1867) 2 Q B 367 = 36 L J Q B 97=8 B & S 100=15 L T 566 = 15 W R 443.

the order of the Magistrate at Hansi dated 22nd April 1939 remains intact and Mr. G. D. Birla ought to have attended the Court in person.

I do not think that I have power now to amend my order by way of explanation or otherwise: but at the same time I cannot refrain from expressing the opinion that the conduct of the respondent's counsel who so represented the effect of my order to the Magistrate has, to say the least, been uncandid. I have no doubt that my order was based on the understanding between the parties expressed in open Court that all proceedings, orders and steps of any kind already taken in the trial Court, save only the filing of the complaint, were to be treated as not having taken place. I have no option but to dismiss this application, but in the circumstances I award no costs.

D.S./R.K. *Application dismissed.*

A. I. R. 1940 Lahore 193

BHIDE J.

J. B. Jacob — Plaintiff — Appellant.

v.

Co-operative Society and another — Defendants — Respondents.

Second Appeal No. 421 of 1939, Decided on 8th December 1939, from decree of Senior Sub-Judge, Sialkot, D/- 21st November 1938.

Co-operative Society—Affairs of Society not carried on in regular manner and register produced by it being fabricated—Person merely because of his taking loan cannot be deemed to be member of society.

It is true that ordinarily a Co-operative Society lends money only to its members, but where the affairs of the Society have not been carried on in regular manner and the register produced by the Society is a fabricated one, it cannot be held merely on the basis of the alleged loan taken by a person that he must have been a member on the date on which he took the loan. [P 194 O 1]

Shamair Chand — for Appellant.

Achhru Ram — for Respondent (No. 1).

Judgment.—The plaintiff in this case sued for a declaration that a certain award which was obtained by the defendant Co-operative Credit Society, Pasrur, was not binding on him. He also sued for a permanent injunction restraining the Society from executing the award. The main contention of the plaintiff was that he was not a member of the Co-operative Credit Society and therefore the award based on an arbitration under the Co-operative Societies Act was illegal and therefore not binding on him. The Society pleaded that the plaintiff was a member of the Society. The

trial Court found that the plaintiff was not a member of the Society and granted him the declaration and injunction prayed for. On appeal the learned Senior Subordinate Judge has come to a contrary finding and dismissed the plaintiff's suit with costs throughout. From this decision the present appeal has been preferred by the plaintiff.

The main point for decision in the case was whether the plaintiff was a member of the defendant Society. The best evidence on the point would have been the register of the members of the Society but the register produced by the Society has been found to be fabricated. The learned counsel for the Society apparently admitted before the learned Senior Subordinate Judge that the original register of members did not bear the signature of the plaintiff. The learned Senior Subordinate Judge, however, went on to hold that the plaintiff was estopped from denying that he was a member. There was no issue on the question of estoppel and it seems to me that the learned Senior Subordinate Judge was not justified in raising this point when the parties had not joined issue on the point and the plaintiff had no opportunity of meeting it. The learned counsel for the Society however urged before me that the documents which the learned Senior Subordinate Judge has taken into consideration in connexion with the question of estoppel can nevertheless be used as admissions of the plaintiff and as such would be relevant for the decision of the question whether the plaintiff was a member of the Society. The learned Senior Subordinate Judge has referred to four documents in this connexion, namely (1) the bond dated 14th January 1928, from which it appears that the plaintiff had borrowed a loan from the Society; (2) copy of the plaintiff's account with the Bank showing that he had been making payments towards the loan raised by him; (3) copy of the order of the Subordinate Judge in execution proceedings taken against the plaintiff showing that he raised an objection that he was not a member of the Society but the objection was overruled; (4) an application by the plaintiff made to the arbitrator, Ghulam Qadir, in which he admitted that he had borrowed a certain debt and was making payments towards the debt; (5) letter to the Inspector of Co-operative Societies dated 17th June 1937 in which he stated that he was not a member of the Society at the time but is alleged to have become a member subsequently.

Out of the documents referred to, the first four do not appear to me to contain any clear admission that the plaintiff was a member of the Society. It is true that ordinarily a Co-operative Society lends money only to its members, but the affairs of this Society do not appear to have been carried on in regular manner, and in view of the finding of the Court that the register produced by the Society was a fabricated one I do not feel justified in holding merely on the basis of the alleged loan taken by the plaintiff that he must have been a member on the date on which he took the loan. As regards the execution proceedings in which the plaintiff raised an objection that he was not a member, the objection seems to have been overruled merely on the ground that the executing Court had no jurisdiction to go into the matter. The last document, namely the letter to the Inspector of Co-operative Societies dated 17th June 1937, no doubt appears to be important inasmuch as the plaintiff admitted that he had become a member of the Society. But this letter also does not show that he was a member at the time when the award in dispute was given against him. The letter is dated 17th June 1937, while the award was given on 2nd June 1936. In my opinion it was incumbent on the defendant Society to prove clearly that the plaintiff was a member of the Society at the time when the reference to arbitration was made. On the record as it stands in this case, it seems to me that this fact has not been established satisfactorily. I therefore accept this appeal and setting aside the decree of the learned Senior Subordinate Judge, restore that of the trial Court. In view of all the circumstances however I leave the parties to bear their costs throughout.

D.S./R.K.

*Appeal allowed.***A. I. R. 1940 Lahore 194**

DALIP SINGH AND SALE JJ.

Dera Sadh Bishnois through Puran — Plaintiffs — Appellants.

v.

Basti Ram—Defendant—Respondent.

First Appeal No. 202 of 1939, Decided on 23rd January 1940, from decree of Senior Sub-Judge, Hissar, D/- 29th May 1939.

Practice — Suit by trustee on behalf of institution and other trustees premature when instituted — Suit ceasing to be premature in appeal — Discretion of decreeing suit should be exercised in favour of institution.

Where a suit when instituted was premature but has ceased to be premature in appeal, the question whether the suit should be decreed is a question of discretion. If the suit is by trustee on behalf of an institution and other trustees the discretion should be exercised in favour of the institution whatever might be the merits against the trustee in his personal capacity. [P 195 C 1]

Shamair Chand and Prakash Chandra —
for Appellants.

Amar Nath Grover — *for Respondent.*

Dalip Singh J. — This appeal can be disposed of shortly. The Dera Sadh Bishnoian situate at Ratta Khera through one trustee Puran son of Bir Bal, on behalf of himself and two other trustees, Bawa Hari Haranand and Bawa Dewa Nand, brought this suit against one Basti Ram for possession of land in the possession of the defendant and for the ejection of the defendant from a part of the Dera building shown red and marked as A. B. C. D. in the plan. The allegation of the plaintiff was that the last mahant Mani Ram had against the interests of the Dera voluntarily and deliberately made a gift of Dera property amounting to 10 biswas estate of mauza Ratta Khera to his alleged adopted son the defendant Basti Ram and that the said mahant had no right to do so. A suit had been previously brought by mahant Hari Haranand, now a trustee and then a mahant of the parent shrine of Dera Kant, in which this gift had been challenged and by a compromise in the High Court the decree of the lower Court declaring the gift ineffectual against mahant Hari Haranand had been maintained on the clear understanding that Basti Ram would continue in possession of the land gifted until the death of mahant Mani Ram or his removal from the mahantship. Secondly the plaintiff alleged that during the proceedings in the first suit and the appeal therefrom another suit had been brought by four persons, of which mahant Hari Haranand and Dewa Nand were two, against Mani Ram relating generally to the removal of Mani Ram from the mahantship and in that suit which was again compromised, mahant Mani Ram had been left to be the mahant of the Dera so far as its internal management and religious duties were concerned, but that all the property of the Dera was to be managed by the three trustees appointed in the compromise, of which the present appellant mahant Hari Haranand and mahant Dewa Nand were so appointed, and all the alienations made by mahant Mani Ram were declared to be illegal and the trustees were directed to

recover possession of all that property, that Basti Ram defendant had brought a suit to contest this compromise alleging that it should not bind his rights to the property after the death of Mani Ram but that suit had been dismissed. Hence the present suit which claimed immediate possession of the property gifted to Basti Ram and his ejection from the house where he had been put by Mani Ram on the ground that it belonged to the Dera. The trial Court dismissed the suit on the ground that it was premature by reason of the compromise entered into by Mahant Hari Haranand in the suit already referred to, where Basti Ram's possession was confirmed during the lifetime of Mahant Mani Ram.

In appeal it is contended by the learned counsel for the appellant that Mani Ram is now dead and the learned counsel urges that though the suit might have been premature when brought, as it has now ceased to be premature by reason of the death of Mani Ram, the only ground on which the suit was dismissed by the trial Court having ceased to exist, this suit should now be decreed. Various authorities have been cited. It is clear that this matter is a question of the discretion of the Court. Counsel for the respondent contends that it is alleged that Mani Ram has met a violent end under circumstances that point to the complicity of Puran, trustee appellant, and therefore in the circumstances the discretion of the Court should not be exercised in favour of the present appellant. In reply to this, counsel for the appellant points out that the suit is really on behalf of the institution and that one trustee is suing on behalf not only of himself but of two other trustees. One of them, Dewa Nand, is no doubt dead but the other, Hari Haranand, is still alive and therefore he contends that this eminently is a case where the discretion of the Court should be exercised in favour of the institution whatever might be the merits as against Puran, appellant, in his personal capacity.

After considering the matter, I am of opinion that in the circumstances the discretion should be exercised in favour of the shrine because after all it is an institution which is concerned in the matter and the merits or demerits of one of the trustees of that institution, whatever they may be, should not affect either the institution or the other trustees. It is clear that Mahant Hari Haranand applied in the Court below to be made a party as plaintiff in this suit.

No order appears to have been passed on this application but it shows that Hari Haranand supported the suit of Puran, appellant. The learned counsel for the respondent raises a further point that the Court below has given no finding on the question whether the defendant should be ejected from the house in the Dera. This contention is correct and we should have been obliged to remand the case for this purpose. But fortunately counsel for the parties have agreed that the defendant Basti Ram will give up his claim to reside in the house and the appellant will give up his costs of the present appeal.

The result therefore is that I would accept this appeal on the ground that the appeal now is no longer in a premature suit by reason of the death of Mani Ram and whatever might have been the rights of Basti Ram up to the death of Mani Ram, he has now no right to remain in possession of the property which has been held to belong to the Dera. I would therefore accept this appeal and grant a decree for possession of the property in dispute to the shrine through its trustees Hari Haranand and Puran Bishnoi, leaving the parties to bear their own costs throughout. On the question of mesne profits, the Court will decide the right to mesne profits with reference to the above remarks holding that Basti Ram was entitled to be in possession of this property until the death of Mani Ram.

Sale J. — I agree.

D.S./R.K

Appeal allowed.

A. I. R. 1940 Lahore 195

MONROE J.

Balkrishan and Co., through Balkrishan Sood — Appellant.

v.

Ram Nath Saigal — Respondent.

First Appeal No. 158 of 1939, Decided on 6th December 1939, from order of Dist. Judge, Delhi, D/- 27th February 1939.

Pakka Artia — Relation between constituent and his pakka artia is not that of principal and agent — Suit by constituent for accounts does not lie against pakka artia.

Where an order has been given and accepted the constituent and pakka artia stand to one another in the relation of principals; there is no relationship of principal and agent such as would justify a demand by the constituent of an account. The only claim which can be made by a constituent against a pakka artia is for a liquidated sum. The calculation of the sum in no sense involves accounting by the pakka artia: it is a matter of the application of simple arithmetical methods to facts within the knowledge of both sides: *Case law referred.*

[P 196 C 1, 2; P 197 C 1]

Shamair Chand and Harbans Singh
Gujral — *for Appellant.*

Achbru Ram — *for Respondent.*

Judgment. — This suit was instituted by the plaintiff, claiming "rendition of accounts and compensation." It was pleaded that the defendants carried on business as pakka artias, which allegation is not disputed and further that according to the usual practice and to the agreement between the parties it was the duty of the defendants to purchase or sell immediately at the rates at which the orders were placed were available or touched and in case of defendants' failure or their refusal to buy or sell in the circumstances they were liable to pay compensation to the plaintiff.

The learned trial Judge held that the defendants as pakka artias were not liable to render accounts although they were under an obligation to pay to their principals the amount due, if any. On appeal the learned District Judge held that a pakka artia in India probably corresponds to that of a *del credere* agent in England. In support of his view he cited A I R 1937 Lah 389,¹ where, however, it was clearly laid down that when a transaction has taken place between the pakka artia and the constituent, the transaction must be regarded as a contract between principal and principal. He also referred to 1938 P L R 166² where it was held although the legal relationship between the constituent and the pakka artia was that of vendor and purchaser, there was this additional incident to the contract that the artia is entitled to charge commission and brokerage in addition to the price. It is obvious that neither of these cases contains anything to indicate that the contract between the constituent and the artia is one of agency. In argument before me, it was not suggested for the respondent that there was any express agreement (such as that pleaded) or that the relationship between the parties was anything but the normal relationship between a pakka artia and his constituent. What then is that relationship? The question is discussed at length in 30 Bom 205³ and from that it seems clear that where an order has been given and accepted, the parties stand to one

another in the relation of principals. That case was referred to in 42 Bom 373⁴ as showing the customary incidents of the relationship. 45 Bom 386⁵ is to the same effect. These cases have been cited and relied on by two Division Benches of this Court, A I R 1937 Lah 389¹ and A I R 1937 Lah 581.² In the former case Abdul Rashid J. (with whom Addison J. agreed) in discussing the effect of the acceptance of an order by pakka artias said :

It was open to them not to buy any cotton at all or if they wanted to cover themselves to buy cotton either at Bombay or at Lahore. They were not bound to deliver to the plaintiff 200 bales of cotton at the rate at which they accepted the order on the due date at Bombay. If the delivery to the plaintiff of the required amount of cotton on the due date entailed any loss, the defendants were bound to bear the loss themselves. If however it resulted in any profit, they would be entitled to recover it.

In the latter case Tek Chand J. quoted a part of what he justly described as the lucid judgment of Macleod J. in 15 Bom L R 750⁶ :

The legal relationship between the client and the arti is that of a vendor and purchaser whether the contract is written or oral or whether an order is sent by telegram and accepted by the arti As between him and his client the business is finished when an order for purchase or sale is accepted.

It seems to me clear from these cases that there is no relationship of principal and agent such as would justify a demand by the constituent of an account. For the respondent, 134 I C 489⁷ was cited as an example in which a suit for account was brought against a pakka artia, but the question was not raised whether the suit lay. Reference was also made to A I R 1932 Lah 633,⁸ where the point was touched on but not decided. The suit which was brought for an account against a pakka artia was dismissed but not on the ground that a suit for an account did not lie against a pakka artia. These cases cannot be taken as showing that a suit for an account lies. If the question is considered from a practical point of view, it is difficult to see of what avail a suit for an account is. From the

4. Bhagwandas Parasram v. Burjorji Ruttanji, (1917) 4 A I R P C 101=44 I C 284=45 I A 29=42 Bom 373 (P C).

5. Manilal Raghu Nath v. Radhakissen Ramjiwan, (1921) 8 A I R Bom 238=62 I C 361=45 Bom 386=22 Bom L R 1018.

6. Chhogmal v. Jainarayan, (1913) 15 Bom L R 750=20 I C 882.

7. Parmeshridas Bhagwan Prasad v. Raghbadas Beni Prasad, (1931) 134 I C 489.

8. Jot Ram Sher Singh v. Jiwan Ram Sheolimal (1932) 19 A I R Lah 633=139 I C 637=33 P L R 985.

1. Gopal Das Parma Nand v. Mul Raj, (1937) 24 A I R Lah 389=173 I C 444=39 P L R 723.

2. Ganpat Mal Sundar Das v. Kehr Singh Balwant Singh & Co., (1937) 24 A I R Lah 581=174 I C 827=I L R (1937) Lah 683=(1938) 40 P L R 166.

3. Bhagwan Das v. Kanji, (1906) 30 Bom 205=7 Bom L R 611.

nature of the relationship between the parties, as explained in the cases to which I have referred, the only claim which can be made by a constituent against a pakka artia is for a liquidated sum. The calculation of the sum in no sense involves accounting by the pakka artia : it is a matter of the application of simple arithmetical methods to facts within the knowledge of both sides. I allow this appeal and I restore the decree of the trial Judge dismissing the suit. The plaintiff will pay the defendants' costs throughout.

D.S./R.K.

*Appeal allowed.***A. I. R. 1940 Lahore 197**

DIN MUHAMMAD J.

Ram Partab—Plaintiff — Appellant.

v.

Shib Lal—Defendant — Respondent.

Second Appeal No. 590 of 1939, Decided on 23rd November 1939, from decree of Addl. Dist. Judge Rohtak at Hissar, D/- 13th February 1939.

Practice—Pleading—Suit on mortgage—Plea by mortgagor that consideration for mortgage was not in cash but consisted of bahi accounts does not amount to plea of want of consideration.

Where the only plea raised on the question of consideration for mortgage was that no cash was paid but it was admitted that the transaction relating to some other land took place in lieu of old bahi accounts, this does not amount to a plea of want of consideration. [P 197 C 2]

*Fakir Chand Mittal — for Appellant.**Qabul Chand Mittal—for Respondent.*

Judgment.—The appellant, Ram Partab, instituted a suit for recovery of Rs. 500 against Shib Lal by the sale of the mortgaged property as well as of the other property belonging to the mortgagor or from his person. It was alleged that a simple mortgage had been effected in his favour and that nothing had been paid on that account. The defendant stated in reply that a mortgage had been effected in favour of the plaintiff but it did not relate to the land detailed in the plaint and that the consideration of the mortgage was not paid in cash but consisted of bahi accounts. He further added that the personal relief against him was time-barred. On the pleadings of the parties the material issues framed were :

(1) Whether the defendant mortgaged the land in suit in favour of the plaintiff? (2) Whether the relief against the person of the defendant has been sought within time.

The Subordinate Judge, First Class, came to the conclusion that the mortgage related

to the land described in the plaint but he held that the personal relief was time-barred. He accordingly granted a preliminary decree for Rs. 500 with costs under O. 34, R. 4, Civil P. C., against Shib Lal. On appeal, the District Judge agreed with the finding of the Court below so far as the land under mortgage was concerned but held that no consideration had passed. He further observed that no decree under O. 34, R. 4, Civil P. C., could be passed against the defendant as he was a statutory agriculturist and, under S. 16, Land Alienation Act, his land could not be sold. He accordingly allowed the appeal and reversed the decree of the Court below. Ram Partab has appealed.

Counsel has urged that the District Judge was not competent to go into the matter of consideration inasmuch as want of consideration had not been pleaded by the mortgagor Shib Lal. On going through the record, I find that this contention is not without force. As stated above, the only plea raised on the question of consideration was that no cash was paid but it was admitted that the transaction relating to some other land took place in lieu of old bahi accounts. This does not amount to a plea of want of consideration. His plea that some other land was mortgaged was not accepted by both the Courts below and what remains does not amount to a denial of consideration. In these circumstances, the District Judge was not justified in allowing a question of fact to be raised for the first time before him and deciding it against the appellant. It is true that no decree for sale of the mortgaged property can be made against Shib Lal as he is a statutory agriculturist, but the suit cannot be dismissed on that ground. It may be observed that the appellant too is a statutory agriculturist. I accordingly allow the appeal, set aside the decree of the District Judge and pass a decree for Rs. 500 against Shib Lal declaring the same to be a charge on the land mortgaged. The decretal amount will be payable on or before 26th February 1940; otherwise it will be recovered in accordance with law. There will be no order as to costs before me but the defendant will pay the plaintiff's costs in both the Courts below.

D.S./R.K.

Appeal allowed.

* A. I. R. 1940 Lahore 198

DIN MUHAMMAD J.

*Firm Man Singh Moti Ram Maliwara,
Delhi—Defendant — Appellant.*

v.

*B. N. Sinha and another, Defendants
and another, Plaintiff—Respondents.*

Second Appeal No. 640 of 1939, Decided on 23rd January 1940, from decree of Dist. Judge, Delhi, D/- 23rd February 1939.

(a) Transfer of Property Act (1882), S. 53—Creditor occupying position of defendant — Six years time limit to challenge transfer does not affect his defence.

It is true that the creditor has to challenge the transfer only within six years, but where the creditor has occupied the position of a defendant, no time limit affects his defence and he can consequently challenge the transfer even though six years had expired. [P 198 C 2 ; P 199 C 1]

*** (b) Transfer of Property Act (1882), S. 53 — Bona fide transferee even from fraudulent transferee is protected.**A bona fide transferee, even from a fraudulent transferee, is protected under S. 53 : *A I R 1923 Mad 558 ; A I R 1928 All 29 ; A I R 1929 Lah 1 ; A I R 1936 Lah 286 and A I R 1938 Lah 73, Rel. on.* [P 199 C 1]Bishan Narain — *for Appellant.*

J. L. Kapur —

*for Respondent (Plaintiff).*Bhagwat Dayal—*for other Respondents.*

Judgment. — This appeal has arisen in the following circumstances: On 19th March 1926, Mr. Sinha raised a loan of Rs. 2000 from the firm Man Singh Moti Ram and on the same date his wife, Mrs. Sinha, deposited the title deeds of the immovable property in dispute by way of collateral security (Exs. D-5 and D-6). On 8th April 1926, Mrs. Sinha borrowed on her own account Rs. 1000 from the firm (Ex. D-3). On 18th June 1927 Mrs. Sinha made a gift of the property in dispute to her husband, Mr. Sinha, and on 20th June the deed of gift in relation thereto was registered. On 30th October 1929, the firm instituted two suits for recovery of the moneys due from Mr. Sinha as well as Mrs. Sinha. In one suit Mr. Sinha was sued as the principal debtor and Mrs. Sinha as a surety and in the other suit Mrs. Sinha was sued alone. Both these suits were decreed on 11th October 1930. In the suit in which Mrs. Sinha had been impleaded as a surety she was discharged. It may be remarked that this order was confirmed by a Division Bench of this Court on 27th February 1935, with the result that the firm obtained only a money decree against Mr. Sinha.

On 19th August 1931, Mr. Sinha mortgaged with possession the gifted property

to Zia-ud-Din (Ex. P-2). On 13th May 1934 Mr. Sinha redeemed the mortgage (Ex. P-6), and on 26th September 1934 mortgaged the property once more to Sangham Lal for Rs. 1000 (Ex. P-3). He did not deliver physical possession to the mortgagee on this occasion but executed a deed of rent in his favour. On 4th October 1935, he created a further charge of Rs. 99 on this property (Ex. P-5). This mortgage, however, was not registered. The firm took out execution proceedings against Mrs. Sinha in the course of which the property in suit was put to auction on 26th April 1936 and purchased by the firm itself. On 22nd June 1936, Sangham Lal instituted a suit for recovery of Rs. 1132-12-0 on the foot of his own mortgages and further sought a declaration that the firm had no right, title or interest in the property in suit. During the pendency of this suit Mr. Sinha was adjudged an insolvent and the property in suit was taken possession of by the Official Receiver and sold in due course. The suit instituted by Sangham Lal was resisted by the firm. The Subordinate Judge came to the conclusion that the gift was intended to defeat and delay the creditors and was consequently invalid. He further found that the second mortgage in favour of Sangham Lal was inadmissible for want of registration. Holding, however, that the first mortgage in his favour could not be touched inasmuch as he being a transferee in good faith and for consideration, was protected under S. 53, T. P. Act, he decreed the suit. On appeal, the District Judge went the length of saying that even the gift was valid inasmuch as it had not been challenged by any creditor within six years. It is mainly with a view to challenge this finding of the District Judge that the present appeal has been preferred.

Counsel for the appellant contends that no doubt the creditor could challenge the gift only within six years but inasmuch as the creditor in the present suit occupied the position of a defendant, no time limit affected his defence and he could consequently challenge the gift even though six years had expired. He further argues that Sangham Lal was guilty of gross negligence and that consequently it could not be held that he was a transferee in good faith although it cannot be disputed that he was a transferee for consideration. On the point of limitation, counsel for the respondents frankly concedes that the firm could raise an objection in the present suit even though

limitation had expired and the position so conceded is in my view sound in law. I have no hesitation in holding therefore that the decision of the District Judge that the gift could not be challenged by the firm in the present suit is entirely wrong. This, however, does not materially affect the decision of the case as the appeal fails otherwise.

On the second contention raised by the appellant's counsel he has urged that it was the duty of Sangham Lal to have made an inquiry into the title of his mortgagor and he should have in this connexion called upon the mortgagor to produce the original title deeds relating to the property in suit which could establish a valid title in his donor and as he failed to do so, his transaction cannot be maintained in law. In this connexion he has relied on 33 Bom 1¹ and A I R 1923 P C 211.² These authorities no doubt lay down that transferees are bound to ascertain whether the title deeds are already pledged in places where mortgages by deposit of title deeds are legal but they do not come into operation in the present case. In my view, the only title deed which Sangham Lal had to look into was the deed of gift which conferred title upon his mortgagor to transfer the property and as it is not disputed that the deed of gift did exist and that the period for challenging the deed had also expired at the time when the mortgage was executed in favour of Sangham Lal, he cannot but be held a transferee in good faith. It is well settled that a bona fide transferee, even from a fraudulent transferee, is protected under S. 53. If any authority is needed for this proposition, reference may be made to 46 Mad 478,³ A I R 1928 All 29⁴ at p. 32, 10 Lah 447⁵ at p. 462, A I R 1936 Lah 286⁶ and A I R 1938 Lah 73.⁷ Holding, therefore, that San-

gham Lal's transaction cannot be assailed even if the original gift by virtue of which his mortgagor came to hold the property mortgaged to him is declared to be fraudulent, I dismiss this appeal. In the peculiar circumstances of the case, however, the parties will bear their own costs before me.

D.S./R.K.

Appeal dismissed.

A. I. R. 1940 Lahore 199

BHIDE J.

Wasu Ram and another — Defendants
— Appellants.

v.

Mohammad Ramzan and others, Plaintiffs and others, Defendants —

Respondents.

Second Appeal No. 717 of 1939, Decided on 12th January 1940, from preliminary decree of District Judge, Multan, D/- 17th March 1939.

Transfer of Property Act (1882), Ss. 63 and 63A — Mortgage with possession — Improvements made by mortgagee yielding rent — Mortgagee can claim cost of improvement with interest but mortgagor must be given credit for rents received by mortgagee even if no condition to that effect is inserted in mortgage deed.

In case of a mortgage with possession although no condition is inserted in the deed about crediting rents and profits to the mortgagor, this condition is always implied owing to the relationship of mortgagor and mortgagee between the parties. The property is mortgaged only as a security for the mortgage debt and whatever rents and profits are received, must obviously be applied towards the mortgage debt. If the mortgagee has incurred the cost of the improvements which have yielded the rents and profits, he is of course entitled to claim the cost with interest. But the mortgagor should be given credit for the rents received by the mortgagee. [P 200 C 2]

Achhru Ram — for Appellants.

Shabir Ahmad — for Respondents.

Judgment. — This is a second appeal arising out of a suit for redemption of certain urban immovable property which was mortgaged with possession by one Kaura in favour of one Remal Das on 1st March 1889 for a sum of Rs. 130. This sum was payable with interest at the rate of Re. 1-4-0 per cent. per mensem after deducting four annas per mensem as rent for the mortgaged property. The mortgaged property apparently consisted of an open site with four walls surrounding it. By the terms of the mortgage deed, the mortgagee was authorized to construct a building on the land and in the event of such construction he was also entitled to claim interest at Re. 1-4-0 per cent. per mensem on the amount spent by him. Defendants 1 and 2 in the case were des-

1. Bank of Bombay v. Suleman Somji, (1909) 33 Bom 1=1 I C 369=35 I A 139=10 Bom L R 1065 (P O).

2. Imperial Bank of India v. U Ray Gyaw Thu, (1923) 10 A I R P C 211=76 I C 910=50 I A 283=1 Rang 637=51 Cal 86 (P O).

3. Pothani Puthan Vittil v. Adrasserri Raru Nair, (1928) 10 A I R Mad 558=72 I C 727=46 Mad 478=44 M L J 527.

4. Shikar Chand v. Jagmandar Das, (1928) 15 A I R All 29=106 I C 519=25 A L J 873.

5. Maharajah of Farid Kot State v. Anant Ram, (1929) 16 A I R Lah 1=114 I C 62=10 Lah 447=31 P L R 521.

6. Malan Devi v. Amritsar National Bank Ltd., (1936) 28 A I R Lah 286=37 P L R 787.

7. Basharat Ali Shah v. Ram Rattan, (1938) 25 A I R Lah 78=181 I C 301=ILR (1938) Lah 439=40 P L R 1000.

cendants of Ramel Das, the original mortgagee. They had mortgaged their mortgagee rights to defendants 3 to 5 by a mortgage deed dated 5th September 1927. These latter defendants had only paid Rs. 200 as part of the consideration and had executed a mortgage deed for the balance in favour of defendants 1 and 2.

Various issues were framed on the pleas raised by the defendants. The trial Court passed a preliminary decree for redemption under O. 34, R. 7, Civil P. C., declaring that the amount due on the mortgage on the date of the suit was Rs. 1889.3-0 and directing the plaintiffs to pay that amount with future interest by a certain date. On appeal the learned District Judge has held that the amount due to the mortgagee worked out as follows :

1. Rupees 130 principal.
2. Rupees 749 interest at the rate of Re. 1 per cent. per mensem.
3. Rupees 138-3-9 cost of improvements effected by the mortgagee.
4. Rupees 806 interest on the cost of improvements.

The learned District Judge reduced the rate of interest from Re. 1-4-0 to Re. 1 per cent. per mensem on account of the provisions of the Punjab Relief of Indebtedness Act. The learned Judge further found that the mortgagee had realized Rs. 1728 by way of rent of the building constructed by him. He therefore held that the interest and the rent may be taken to counter-balance each other. Leaving aside the interest and the rent he passed a decree for redemption on payment of Rs. 268-3-9. From this decision the present appeal has been preferred. The learned counsel for the appellants has not challenged the reduction in the rate of interest under the Punjab Relief of Indebtedness Act. He has however contended that the mortgagee was entitled to claim interest on the cost of improvements according to the terms of the mortgage deed and there was no provision in the mortgage deed for any reduction on account of rent realized by the mortgagee. He further contended that in any case the rent realized by the mortgagee could only be set off as against the interest due on the cost of improvements on the principle embodied in Ss. 63 and 63A, T. P. Act. There was no justification for not allowing the interest on the principal mortgage amount. In the alternative he said that his client would even be prepared to forgo the amount due on the cost of improvements and the interest thereon, because the amount

due to him would still be more than the amount decreed by the learned District Judge, if the rent is left out of consideration.

After carefully considering the principles embodied in Ss. 63 and 63A, T. P. Act, and the facts of the case, I do not see any good reason why the plaintiff should not be given credit for the rents received by the mortgagee. According to the principle of S. 76, cls. (g) and (h), T. P. Act, it was incumbent on the mortgagee to keep clear accounts of all sums spent and received by him as a mortgagee and to credit the receipts towards the discharge of the mortgage debt. The mortgagee did not care to keep or produce any accounts and in the circumstances I do not see any good reason to interfere with the estimate of the rent received by the mortgagee made by the learned District Judge on the basis of such evidence as was available. It is true that the mortgage deed allowed the mortgagee to construct a building and charge the mortgagor with the cost thereof with interest. But although no condition was inserted in the deed about crediting rents and profits to the mortgagor, this condition is always implied owing to the relationship of mortgagor and mortgagee between the parties. The property is mortgaged only as a security for the mortgage debt and whatever rents and profits are received, must obviously be applied towards the mortgage debt. If the mortgagee has incurred the costs of the improvements, which have yielded the rents and profits, he is of course entitled to claim the cost with interest. But he has been allowed these items and he has therefore no grievance in the matter.

It was urged by the learned counsel for the appellant mortgagee that his client was prepared to give up the costs of improvement and the interest thereon. But I do not see why he should be allowed to do so. As stated above, the mortgaged property was in his possession only by way of security and not as an investment and there seems to be no justification for allowing the mortgagee to retain anything more out of the profits made by him, over and above his outlay on the improvements and interest thereon. I therefore see no good reason to interfere with the decree of the learned District Judge and dismiss the appeal with costs.

D.S./R.K

Appeal dismissed.

A. I. R. 1940 Lahore 201

BHIDE J.

Har Dial — Defendant — Appellant.

v.

*Chaudhri Gurditta Ram and another,
Plaintiffs and others, Defendants —
Respondents.*

First Appeal No. 9 of 1939, Decided on 14th November 1939, from order of Addl. Dist. Judge, Lyallpur, D/- 31.10.1938.

(a) Transfer of Property Act (1882), Ss. 60 and 92 — Subsequent mortgagee given right to redeem prior mortgage—Equity of redemption transferred to another person and prior mortgage redeemed by him — Suit by subsequent mortgagee for redemption of prior mortgage held did not lie and S. 92 was inapplicable.

According to the terms of a subsequent mortgage, the mortgagee was given a right to redeem a prior mortgage on payment of certain sum out of the mortgage money. Subsequently the equity of redemption was transferred to another person who redeemed the prior mortgage. The subsequent mortgagee thereupon instituted a suit for possession by redemption of prior mortgage:

Held that the suit for redemption did not lie and the rule of subrogation laid down in S. 92 was not applicable to the case. [P 201 C 2]

(b) Pleading—Amendment—Prior mortgage redeemed by purchaser of equity of redemption—Suit by subsequent mortgagee for redemption of prior mortgage—Amendment of plaint so as to turn it into suit for possession should be allowed.

Where a prior mortgage has been redeemed by the purchaser of the equity of redemption and the subsequent mortgagee brings a suit for redemption of the prior mortgage instead of suit for possession as mortgagee, the defect in the frame of the suit is a technical one and the plaintiff should be allowed to amend the plaint. [P 201 C 2]

Inder Dev — *for Appellant.*

J. L. Kapur — *for Respondent 1.*

Judgment.—The plaintiffs claimed that the land in dispute along with some other land had been mortgaged in their favour for a sum of Rs. 1700 and according to the terms of the mortgage the land in dispute which had already been mortgaged in favour of Mohan Ram was to be redeemed from him on payment of Rs. 545 out of the mortgage money. The previous mortgage was for a term of 10 years and was not redeemable till the expiry of that term. In the meantime, the equity of redemption had been transferred to one Har Dial, who redeemed the prior mortgage in favour of Mohan Lal. The plaintiffs thereafter instituted the present suit for possession of the land in dispute by redemption of the prior mortgage on payment of Rs. 545. The defendants resisted the suit, inter alia, on the ground that the prior mortgage was redeemed and was no longer in existence and therefore a suit for redemption was not

competent. This contention was upheld by the trial Court and the suit for redemption being held to be incompetent, was dismissed. On appeal, the learned District Judge has taken a contrary view and remanded the suit for trial. From this decision the present appeal has been preferred.

It is not disputed before me that the prior mortgage was redeemed by Har Dial who stood in the shoes of the original mortgagee by transfer of the equity of redemption. In the circumstances, I do not see how any suit for redemption can now lie. The plaintiffs, as second mortgagees, were no doubt given the right to redeem the prior mortgaged land that was on the assumption that the first mortgage was in existence. A mortgagor has always a right to redeem his property and on such redemption the mortgage ceased to exist: *cf.* S. 60, T. P. Act. The rule of subrogation laid down in S. 92, T. P. Act, has no application to the circumstances of the case. The learned counsel for the respondent was unable to cite any authority in support of the contrary view taken by the learned District Judge. He merely urged that the land was mortgaged in plaintiffs' favour and no partial redemption was permissible. But there was no question of any partial redemption in this case, as the whole of the land in dispute was mortgaged in favour of Mohan Lal and that mortgage has been entirely redeemed.

The learned counsel for the appellant did not dispute that the plaintiffs would be entitled to sue for possession of the land in dispute as mortgagees but he merely contended that a suit for redemption does not lie. The learned counsel for the plaintiff offered to amend the plaint. The defect in the frame of the suit is a technical one and I think the plaintiff should be allowed to amend the plaint and the suit should be tried on merits. I accordingly accept the appeal and setting aside the orders of the Courts below remand the case to the trial Court with the direction that the plaintiffs be permitted to put in an amended plaint within a time to be fixed by that Court, subject to payment of Rs. 50 as costs to the appellant. It will be of course open to the appellant to raise any objections to the amended plaint he may have on the ground of court-fees, non-joinder of parties, etc. Parties are directed to appear before the trial Court on 4th December 1939.

D.S./R.K.

Case remanded.

A. I. R. 1940 Lahore 202

TEK CHAND J.

Rup Chand and others — Petitioners.

v.

Kanhaya and others — Respondents.

Civil Revn. No. 147 of 1939, Decided on 4th December 1939, for revision of order of Sub-Judge, First Class, Rohtak.

Decree—Enforcibility—Partition suit—Final decree directing plaintiffs to be put in possession of their shares but not allotting shares to defendants in suit—Application by defendants for preparation of decree sheet is incompetent.

It is true that in a partition suit every party, whether arrayed as a plaintiff or as a defendant, is substantially a plaintiff in a suit and is entitled to a decree, and that he can move the Court, on payment of the proper stamp duty to take steps to put him in possession of the share allotted to him. It is also true that the preparation of decree sheets in such cases is merely a ministerial act to which the provisions of Art. 181, Limitation Act, do not apply. But where the final decree passed in the partition suit did not allot shares to the defendants but merely passed a decree in favour of the plaintiffs and directed that the plaintiffs be put in possession of their shares, an application by defendants for preparation of a decree sheet is incompetent. [P 202 C 2; P 203 C 1]

F. C. Mital — *for Petitioners.*

Parkash Chandra Jain for Shamair Chand and Shamair Chand —

for Respondents.

Order. — This is a petition for revision of the order of the Subordinate Judge, First Class, Rohtak, dismissing the defendant-petitioners' application for preparation of a decree sheet in a suit for partition of certain abadi land. The facts briefly are that on 23rd December 1929, Kanhaya and Bakhtawar instituted a suit for possession by partition of their share in abadi land measuring 7073 square yards. To this suit 57 persons were impleaded as defendants. Subsequently, by an order under O. 1, R. 8, Civil P. C., four persons, namely Bhaga, Har Lal, Rup Chand and Molar, were appointed to represent the defendants. By consent of parties a preliminary decree, defining the shares of the various parties, was passed on 29th July 1930. On 6th October 1930, the plaintiffs applied that a final decree be passed. The Court accordingly appointed a local commissioner to suggest the mode of partition of the land in dispute. While these proceedings were pending, several of the defendants, including the present applicants Rup Chand, Harnath, Sher Singh and Ratan Singh, who were defendants 1 to 4 in the suit, applied that their shares also be separated. The Court granted this application and directed

the local commissioner to suggest the shares which should be allotted to these defendants. The commissioner submitted his report in which certain plots were allotted to the plaintiffs, and Khasra Nos. 10 and 12 to defendants 1 to 4. This report was considered by the Subordinate Judge on 17th August 1931, when he passed an order granting the plaintiffs a final decree for possession of the plots allotted to them by the commissioner in the plan attached to his report. He further ordered that a decree sheet be prepared "strictly in accordance with the law on the point." It will be noted, that the final decree did not order that possession of the plots allotted to defendants 1 to 4 was also to be given. The plaintiffs took out execution of this decree but the proceedings were not followed up and the execution was consigned to the record room.

On 6th October 1936, the present application was made by Rup Chand, Harnath, Sher Singh and Rattan Singh, defendants 1 to 4 in the original suit, praying that a decree sheet be prepared and on payment of the requisite stamp duty they may be put in possession of the shares allotted to them. The application was resisted by the plaintiffs and some of the other defendants in the suit on three grounds: (1) that the application was barred by time; (2) that the applicants, other than Rup Chand, had no locus standi to move the Court; and (3) that subsequent to the passing of the final decree on 17th August 1931, a new compromise had been effected between the parties by which the arrangement for the allotment of shares made by the local commissioner during the proceedings in the previous suit had been superseded, that plots had been allotted to the various co-sharers afresh and that the various co-sharers, including the applicants, were in possession of the plots allotted to them in this new arrangement. The trial Court held that the application was barred by time under Art. 181, Limitation Act, that Rup Chand alone was a party to the previous suit and therefore of all the applicants he alone was entitled to maintain the present application and further that the alleged compromise had not been proved. On these findings he dismissed the application.

On revision, it is contended by the learned counsel for the petitioners that the view of the lower Court that Art. 181 bars the present application is erroneous inasmuch as in a partition suit every party, whether

arrayed as a plaintiff or as a defendant, is substantially a plaintiff in the suit and is entitled to a decree, and that he can move the Court, on payment of the proper stamp duty, to take steps to put him in possession of the share allotted to him: 16 Lah 901.¹ It is further argued that the preparation of decree sheets in such cases is merely a ministerial act to which the provisions of Art. 181, Limitation Act, do not apply: A I R 1937 Oudh 409.² These contentions are correct so far as they go, but in this case the final decree passed by the Court on 17th August 1931 did not allot shares to the present applicants in the land in dispute in accordance with the report of the local commissioner. It merely passed a decree in favour of the plaintiffs and directed that the plaintiffs be put in possession of their shares. What the applicants therefore now really want is an amendment of the decree. For this however they have not made any prayer in the application. Once the decree is amended so as to direct that the applicants also be put in possession of their shares according to the report of the local commissioner, it will be open to these applicants to have a decree-sheet prepared on payment of the requisite stamp duty, and then they can seek the assistance of the Court for being put in possession of the plots allotted to them. Admittedly, this has not been done. The present application is therefore incompetent.

Mr. Fakir Chand Mital asked for permission to amend the application so as to include a prayer for the amendment of the decree in the manner mentioned above. But I am unable to allow amendment at this stage of the case. The plaintiffs and the other defendants have had no opportunity of meeting this new case and I cannot possibly adjudicate upon it on the materials on the record. I must therefore dismiss the present application, leaving it open to the petitioners, if so advised, to apply to the lower Court for amendment of the decree. Before concluding, I think it necessary to observe that the decision of the learned Judge on issue 2 is erroneous. In the suit Rup Chand was one of the persons who had been appointed under O. 1, R. 8 to represent the other defendants. Therefore, all the persons, whom he represented are enti-

tled to the benefit of the decree and they can either in their own name or through Rup Chand, take such further steps as may be necessary in the suit. In view of my decision that the present application is incompetent, I do not think it necessary to consider the third point, that is, whether the parties had, by a legal and binding arrangement, superseded the final decree by mutual agreement. The petition for revision fails and is dismissed, but in the circumstances, the parties are left to bear their own costs.

D.S./R.K.

Petition dismissed.

A. I. R. 1940 Lahore 203

BLACKER J.

Jai Ram—Appellant

v.

Emperor.

Criminal Appeal No. 692 of 1939, Decided on 30th October 1939, against complaint filed by Sessions Judge, Gujranwala, D/- 5th May 1939.

(a) Criminal P. C. (1898), S. 476 — S. 476 does not require that Court making complaint can only act on statements made before it on oath.

All that S. 476 lays down is that it should "appear" to the Court that an offence has been committed and if a responsible officer in the position of a Senior Subordinate Judge makes a report that certain statements made on oath are false it would be sufficient to make it "appear" for the purposes of this Section that an offence of perjury has been committed. There is nothing whatever in the language of S. 476 to suggest that a Court making a complaint can only act on statements that are made on oath before it. [P 204 C 1]

(b) Criminal P. C. (1898), S. 476 — **Accusation of corruption made against responsible officer prima facie false — There should be enquiry into offence under S. 193, Penal Code.**

Where an allegation about a responsible officer amounting to an accusation of corruption against him appears prima facie to be false, it is in the highest degree expedient in the interests of justice that there should be an enquiry into it and the Court is justified in filing a complaint under Section 193, Penal Code, against the person making the accusation. [P.204 C 1]

Bashir Ahmad—*for Appellant.*

Nazir Hussain, Assistant Legal Remembrancer and Qabul Chand (for Manak Chand, Decree-holder) —

for Respondent.

Judgment. — In the course of proceedings in the Court of the Senior Subordinate Judge at Gujranwala the present appellant put in an application for transfer of the case. With this application he filed the usual affidavit and in that affidavit he made certain allegations against the im-

1. Maqbul Ahmad v. Afzululnisa, (1936) 23 A I R Lah 1=160 I C 206=16 Lah 901=37 P L R 878.

2. Abdul Wahid v. Rahmat Ullah, (1937) 24 AIR Oudh 409=166 I C 718=1937 O W N 124=18 Luck 185.

partiality of the Senior Subordinate Judge. As is usually the case, the District Judge before whom this application was made called for the report of the Senior Subordinate Judge on these allegations. The Senior Subordinate Judge denied them and the learned District Judge on the basis of this denial filed a complaint against the appellant under S. 193, Penal Code. The appellant has now come up on appeal against this complaint under S. 476 B, Criminal P. C. The main point taken by his counsel is that the statement of the learned Senior Subordinate Judge was not on oath. There appears to me to be nothing whatever in the language of S. 476 to suggest that a Court making a complaint can only act on statements that are made on oath before it. No doubt it could be argued that if the Court concerned had decided to hold an enquiry before making the complaint, such enquiry would be by means of taking evidence on oath. That may be so or may not be so. As the learned Judge in this case did not hold such an enquiry, I do not have to consider this point. All that S. 476 lays down is that it should "appear" to the Court that an offence has been committed and it seems to me to be impossible to deny that if a responsible officer in the position of a Senior Subordinate Judge makes a report that certain statements made on oath are false it would be sufficient to make it "appear" for the purposes of this Section that an offence of perjury has been committed.

The next point to be considered is whether it is expedient in the interests of justice that there should be an enquiry on this point. It has to be noted in this case that one of the allegations made about this Senior Subordinate Judge practically amounts to an accusation of corruption against him. It seems to me impossible to deny that in such circumstances if such an allegation appears *prima facie* to be false it is in the highest degree expedient in the interests of justice that there should be an enquiry into it. It appears to me that the action of the learned District Judge in making a complaint was fully justified and that there is no force in this appeal which is hereby dismissed. At the request of the learned counsel for the appellant I may remark in conclusion that I think that the learned trial Magistrate will obviously not let himself be influenced by the fact that the complaint has been made by the District Judge and will try the case before

him purely on the evidence that is given in his Court.

D.S./R.K.

Order accordingly.

A. I. R. 1940 Lahore 204

TEK CHAND AND BHIDE JJ.

Bir Singh — Appellant.

v.

Kartara and others — Respondents.

Letters Patent Appeal No. 103 of 1939, Decided on 14th December 1939, against judgment of Dalip Singh J., in S.A. No. 1421 of 1938, Decided on 16th March 1939.

Letters Patent (Lahore), Cl. 10 — Mistake apparent on face of record can be corrected for first time in Letters Patent appeal.

The point that the mistake apparent on the face of the record and not noticed by oversight of all concerned should be corrected, can be allowed to be raised for the first time in appeal under the Letters Patent. [P 205 C 1,2]

Mela Ram Aggarwal — *for Appellant.*

Dr. Nand Lal — *for Respondents.*

Tek Chand J.—This is an appeal under Cl. 10 of the Letters Patent from the judgment of Dalip Singh J. sitting in Single Bench, dated 16th March 1939. The material facts are that Gajjan Singh, defendant 2, mortgaged ancestral houses in favour of Bir Singh. Subsequently, Bir Singh instituted two suits for recovery of the amount due on foot of these mortgages and obtained decrees thereon. In execution of these decrees he took proceedings for sale of the mortgaged houses. The plaintiffs, who are the sons of Gajjan Singh, mortgagor, instituted a suit for a declaration that the houses were ancestral property, that the mortgages had been effected without consideration and necessity and that they and the decree obtained thereon were not binding on the plaintiffs and that the houses were "not liable to attachment and sale in execution proceedings and should be released." The defendant decree-holder denied the plaintiffs' claim. The issues framed were :

1. Whether the houses were ancestral qua the plaintiffs ? and

2. Whether the mortgages had been executed for consideration and necessity ?

The trial Judge found both these issues in favour of the plaintiffs and granted them the "declaratory decree prayed for." This judgment was affirmed on appeal by the District Judge, and a second appeal to this Court was dismissed by Dalip Singh J. After the second appeal had been dismissed, Bir Singh, appellant, presented an application before the learned Judge, pointing out

that the suit had been really brought for the protection of the plaintiffs' reversionary rights and that on the pleadings as well as on the findings on the issues, the only decree to which they were entitled was one for a declaration that the mortgages as well as the decrees obtained thereon and the sale in execution of those decrees shall not affect their reversionary rights after the death of the mortgagor. He averred that this point had not been noticed and the decree actually passed went beyond the scope of the suit inasmuch as it declared that the houses were "not liable to attachment and sale in execution of the decrees and should be released." It was urged that the mistake was apparent on the face of the record and should be corrected. The learned Judge felt the force of this objection and granted the appellant a certificate for an appeal under Cl. 10 of the Letters Patent.

Before us Dr. Nand Lal for the plaintiffs-respondents has objected that the point not having been raised in the Courts below or before the learned Judge when the second appeal came up for hearing before him, ought not to be allowed to be raised for the first time in appeal under the Letters Patent. In support of this contention he has referred us to several rulings. These rulings however are inapplicable as they all relate to objections on the merits. In this case, the mistake is apparent on the face of the record and does not appear to have been noticed by oversight of all concerned. There can be no doubt that on the allegations in the plaint and the findings of the Court, the only decree that could have been passed in favour of the plaintiffs was one for a declaration protecting their reversionary rights. Admittedly, the plaintiffs have only a reversionary interest in the mortgaged houses, and the alienation by their father Gajjan Singh is valid for his lifetime irrespective of whether it was effected for necessity or not. It seems that the wording of the prayer as made in the plaint was not noticed by the parties or their counsel at any stage of the trial or when the appeals were pending before the District Judge. Their judgments clearly show that they were granting the plaintiffs a declaration as reversioners, as the property was ancestral and the sales were not proved to have been effected for necessity. Obviously, the plaintiffs have no right to have the property exempted from attachment and sale in the lifetime of their father. The decree is outside the scope of the suit and has been passed in these terms

by inadvertence. The mistake is apparent on the record and must be corrected.

We therefore accept this appeal and in modification of the decree of the Courts below, grant the plaintiffs a decree to the effect that the mortgages in dispute, the decree obtained on the basis of the mortgage by Bir Singh (defendant 1) against Gajjan Singh (defendant 2) and the sale in execution of the decree shall not affect the reversionary rights of the plaintiffs after the death of Gajjan Singh, mortgagor. Having regard to all the circumstances, we leave the parties to bear their own costs of this appeal. The order as to costs in the trial Court and the District Court shall stand.

D.S./R.K.

Appeal allowed.

*** A. I. R. 1940 Lahore 205**

DIN MUHAMMAD J.

Punnun Mal — Appellant.

v.

Bishambar Dayal — Respondent.

Second Appeal No. 1326 of 1939, Decided on 10th January 1940, from decree of Addl. Dist. Judge, Ferozepore, D/- 17th May 1939.

*** (a) Hindu Law — Minor — Joint family business—Minor sole owner—Business managed by guardian—Debts incurred by guardian during course of business—Ancestral property of minor is not liable—Charge created on that property can in no way be described as beneficial to minor—His liability cannot be extended beyond assets of business.**

Where a minor succeeds to the family business as the sole owner and the business is managed by a guardian on his behalf, the ancestral property of the minor is not liable for the debts incurred by the guardian in the course of the business. His liability does not extend beyond the assets of the business. Therefore, if the guardian creates a charge on the ancestral property for payment of the aforesaid debts, the act of the guardian can in no way be described as beneficial to the estate or to the minor: 3 Cal 738; A I R 1918 Cal 448; 19 I C 6; 35 Mad 692 and A I R 1915 Lah 186, Rel. on; 73 P R 1890 (F B); A I R 1932 Lah 293; A I R 1917 Mad 110; A I R 1924 Mad 33 and A I R 1927 PC 121, Disting; A I R 1916 Nag 11, Expl. [P 207 C 2; P 208 C 1]

(b) Civil P. C. (1908), S. 100—Finding that house formed part of joint family property is one of fact.

The finding that a house was no part of the assets of the firm but formed part of the joint family property is a clear finding of fact and cannot be disturbed on second appeal. [P 208 C 1]

(c) Minor—Decree against—Gross negligence of guardian proved—Decree must be set aside.

In a suit by the minor assailing a decree obtained against him if gross negligence of his guardian who conducted the case in which the decree was passed against the minor is proved, the decree must be set aside: A I R 1937 P C 1, Disting.; A I R 1939 Bom 66 (F B), Not Approved.

[P 208 C 2]

J. N. Aggarwal — *for Appellant.*

Achhru Ram — *for Respondent.*

Judgment.—The facts of the case may shortly be stated. On the death of Banwari Lal which took place in 1924, the plaintiff Bishambar Dayal alone succeeded to the joint family business which was working under the name and style of Munna Lal-Banwari Lal. Banwari Lal was then hardly six years of age and the business was continued on his behalf by his mother, Mt. Badamon as assisted by his uncle, Pokhar, and his maternal uncle, Ram Gopal. Pokhar died in 1929 and Ram Gopal continued to manage the business on behalf of the minor. During the life-time of Banwari Lal, the firm had dealings with Punnun Mal and owed Rs. 108 to him in 1924. The dealings continued after Banwari Lal's death and eventually a balance for Rs. 6424 was struck by Ram Gopal in favour of Punnun Mal on 31st March 1931. The plaintiff had not attained majority even then. On 10th August 1932, a mortgage deed of a house was executed on behalf of Bishambar Dyal minor under the guardianship of Mt. Badamon in favour of Punnun Mal for Rs. 4000. It was stated therein that a large amount of money was due from Banwari Lal to Punnun Mal and as the interest was swelling every day, it had become necessary to effect that mortgage. The mortgage was with possession but in order to retain the possession of the property, the mortgagor stipulated that he would pay Rs. 100 per annum as rent thereof. It may be remarked that the recital about the debt being due from Banwari Lal for which the mortgage was being executed was absolutely false.

On 27th January 1936, Punnun Mal instituted a suit against Bishambar Dyal, who was even then a minor, for recovery of Rs. 350 on account of rent and interest thereon. It appears that neither Mt. Badamon nor Ram Gopal consented to act as a guardian of the minor and consequently the Reader of the Court was appointed his guardian. The authority of Mt. Badamon to execute the deed of mortgage was challenged in that suit but the contention was repelled on the ground that the mortgage had been effected for debts due from Bishambar Dyal's father, Banwari Lal, and consequently the mortgage could not be attacked. On 23rd May 1936, the suit was decreed, and on 23rd June 1937, Bishambar Dyal, who was still a minor, instituted a suit against Punnun Mal for cancellation of the

deed of mortgage on the ground that Mt. Badamon had no authority to create a charge on the ancestral property on his behalf and further prayed for the cancellation of the decree mentioned above. The suit was resisted by Punnun Mal and on the pleadings of the parties besides the formal issues the following issues were framed on the merits of the case :

(2) Is the plaintiff estopped by his conduct from bringing the present suit?

(3) Is the present suit barred by *res judicata*?

(4) Was a valid mortgage deed executed in favour of the defendant for consideration?

(5) If so, is the decree in the previous suit not binding on the plaintiff?

It may be remarked that the estoppel contemplated by issue 2 was pleaded on the basis of a statement made by Mt. Badamon in an insolvency case on 17th June 1933. The trial Court decided all the issues against the defendant and decreed the suit. On appeal, the District Judge maintained the decision of the Court below. Hence this appeal. Counsel for the appellant has raised three points before me: (1) that under Hindu Law a *de facto* guardian of a Hindu minor is authorized to execute a *bona fide* mortgage for the benefit of his estate and with due regard to his interests and consequently the mortgage effected by Mt. Badamon could not be challenged by the minor on any account; (2) that, at any rate, the house was a part of the assets of the business and on that ground a valid mortgage could be effected by Mt. Badamon, who was running the family business on behalf of the minor; and (3) that the decree obtained by Punnun Mal in 1936 could not be attacked on the ground of gross negligence of the guardian. In my view however there is no force in any of the contentions raised before me.

Taking first the matter of the authority of a *de facto* guardian to execute a *bona fide* mortgage on behalf of a minor, it is contended by the appellant's counsel that the ancestral business could be continued by the mother or for that matter even by Pokhar or Ram Gopal on behalf of the minor and consequently the family property was liable to discharge the debts incurred in the conduct of that business. In this connexion, counsel has relied on 73 P R 1890,¹ 13 Lah 399,² 37 I C 230,³ 41

1. *Mastu v. Nand Lal*, (1890) 73 P R 1890 (F B).

2. *Kundan Lal v. Beni Pershad*, (1932) 19 A I R Lah 293=137 I C 115=13 Lah 399=32 P L R 861.

3. *Muthaya Pillai v. Tinnevely South India Bank Ltd.*, (1917) 4 A I R Mad 110=37 I C 230.

I C 35,⁴ A I R 1924 Mad 33⁵ and 8 Lah 597.⁶ In 73 P R 1890,¹ a Full Bench of the Punjab Chief Court held that a bona fide incumbrance made by the de facto guardian of a Hindu minor for the benefit of the estate and with due regard to the minor's interests cannot be impeached by the minor on attaining majority on the ground that the guardian who purported to act on his behalf was not a guardian legally constituted under the Guardians and Wards Act. It was not alleged in that suit that the mortgage was collusive or that there was at the time no existing necessity or that the transaction was not for the benefit of the estate. Consequently, the question referred to the Full Bench was :

In a suit to which the parties are Hindus, and in which special custom is pleaded, is a mortgage made by the de facto manager of a minor's estate, which appears to have been entered into for the benefit of the estate and with due regard to the interest of the minor, liable to be impeached by the minor who has attained his majority on the ground that the guardian who purported to act on his behalf was not a guardian legally constituted under the Guardians and Wards Act or otherwise ?

With the principle enunciated in that judgment I am in respectful agreement, but the case is not at all in point inasmuch as here it is denied that the transaction was for the benefit of the estate or that it had been entered into with due regard to the interests of the minor. 13 Lah 399² followed 73 P R 1890¹ and the same remarks apply to this judgment. In 37 I C 230,³ a Division Bench of the Madras High Court observed that in the case of an ancestral business of a Hindu family all the members of the family, including the minor members, are liable for debts incurred in the course of the business and such liability is not confined to their shares in the assets of their business but extends to their shares in the family property. This proposition too is not disputed. But it is irrelevant for the purposes of the present case, inasmuch as here the minor was the sole owner and the principles enunciated in cases in which there are other adult members of the family besides the minor to run the business do not apply to his case. 41 I C 35⁴ goes against the contention of the appellant, inasmuch as it was decided there by Stanyon A. J. C.,

that if a business was conducted on behalf of a minor by a guardian, the minor could not be held personally liable. I may point out in this connexion that head-note is misleading. While in the body of the judgment it is clearly stated that where a Hindu family maintains itself by trade and a minor becomes by inheritance the sole owner of such business, if the trade is thereafter carried on by the guardian, the asset of such business will be liable for debts contracted by the guardian necessarily incidental to or following out of the carrying on of the trade along its normal course, the head-note states, "the minor will be bound by all the acts of the guardian" and this is evidently wrong. A I R 1924 Mad 33⁵ also proceeded on different facts. The minor members of the family were not the sole owners of the family but there were other adult members too who were carrying on the business. In 8 Lah 597⁶ there were other members of the family besides the minors.

The principle applicable to this case was first enunciated in 3 Cal 738⁷ and had since been followed with approval by almost all the High Courts in India: see 22 C W N 488,⁸ 19 I C 6,⁹ 35 Mad 692¹⁰ and 61 P R 1915.¹¹ In 3 Cal 738,⁷ a question arose whether the ancestral property of a minor who was the sole owner of the business could be held liable for the debts of the business even if it was a family business and had been conducted on his behalf by his guardians. The Bench which decided the case was composed of Sir Richard Garth C. J., Markby J., and Romesh Chunder Mitter J. These learned Judges came to the conclusion that the case of a minor in these circumstances was analogous to the case of a minor under S. 247, Contract Act and that although he can be held liable for the debts, his liability cannot be extended beyond the assets of the business. I am in respectful agreement with the principle enunciated there and hold that the ancestral property of the minor could not be held liable for the debts due to Punnun Mal. This being so, it cannot at all be

7. Joy Kisto Cowar v. Nityanund Nundy, (1878) 3 Cal 738=2 O L R 440.

8. Khetramohan v. Aswini Kumar, (1918) 5 A I R Cal 448=45 I C 667=22 O W N 488.

9. Anath Bandhu Shah v. Biplin Behary, (1918) 19 I C 6.

10. Sanka Krishnamurthi v. Bank of Burma Ltd., (1912) 35 Mad 692=14 I C 389=21 M L J 620.

11. Narain Das v. Ralli Brothers, (1915) 2 A I R Lah 186=31 I C 45=61 P R 1915.

4. Jhiti Bai v. Tejmal, (1916) 3 A I R Nag 11=41 I C 85=13 N L R 109.

5. Subbaraya Mudaly v. Thangavelu Mudaly, (1924) 11 A I R Mad 33=72 I O 815=45 M L J 44.

6. Niamat Rai v. Din Dayal, (1927) 14 A I R P C 121=101 I C 373=54 I A 211=8 Lah 597 (P C).

argued that the mortgage effected by the minor's mother was for the benefit of the estate or had been effected with due regard to the minor's interests. The ancestral property in the circumstances mentioned above could not be touched and if a guardian created charge on such property, the act of the guardian could in no way be described as beneficial to the estate or to the minor.

The second question need not detain us long. In the written statement put in by Punnun Mal, it was clearly averred that the house had been inherited by Bishambar Dyal and formed part of the joint family property. It is significant that no issue on this matter was framed in the trial Court. The point was raised before the District Judge and he came to the conclusion that the house was no part of the assets of the firm but formed part of the joint family property. This is a clear finding of fact and it cannot be disturbed on second appeal. On the question whether the rent decree could be challenged by Bishambar Dyal, reliance is placed on I L R (1937) Mad 263¹² and I L R (1939) Bom 340.¹³ In the Madras case, their Lordships of the Privy Council held that the provisions of S. 11, Civil P. C., are mandatory, and a litigant who claims under one of the parties to the former suit can only avoid its provisions by taking advantage of S. 44, Evidence Act, which defines with precision the grounds of such avoidance as fraud or collusion or by showing a want of bona fide in the prosecution of the former suit. The Courts cannot treat negligence or gross negligence as fraud or collusion unless fraud or collusion is the proper inference from the facts. It would appear that this principle was enunciated in relation to S. 44, Evidence Act, and was applied to a case where a former suit had been brought by a set of plaintiffs different from those who had instituted the latter suit. The present case is not covered by S. 44. It was not at all contended in this case that the judgment or decree was not delivered by a Court not competent to deliver it or was obtained by fraud or collusion. All that was contended was that the guardian who had been appointed by the Court had committed gross negligence in the discharge of his functions and that consequently the decree did not bind the

minor. No question of the proof of this decree by the adverse party or of its relevancy under Ss. 40, 41 or S. 42, Evidence Act, arose in this case. The decree itself was being assailed and consequently the principle enunciated by their Lordships of the Privy Council is inapplicable to this case.

In I L R (1939) Bom 340,¹³ a Full Bench of the Bombay High Court no doubt has applied the principles laid down by their Lordships of the Privy Council to the case of a minor who had sued to set aside a decree obtained against him, but, with all respect, I am not convinced of the reasoning advanced by the learned Judges. The trend of authority throughout India so far had been to set aside decrees obtained against the minors if gross negligence of their guardians was proved, and I consider that the Privy Council judgment cited above not being applicable to the facts of that case does not necessitate any change of law in that respect. I accordingly maintain the decision of the Courts below and dismiss this appeal with costs.

G.N./R.K.

Appeal dismissed.

A. I. R. 1940 Lahore 208

BLACKER J.

Kaniya Ram — Complainant —

Petitioner.

v.

Chanan Mal and others — Accused —

Respondents.

Criminal Revn. No. 1165 of 1939, Decided on 1st December 1939, from order of Sess. Judge, Multan, D/- 1st July 1939.

(a) Criminal P. C. (1898), S. 4 (h) — Merely because complaint contains prayer that case be investigated by superior police officers on ground that local police were hostile to complainant, it does not cease to be complaint.

An application addressed to a Magistrate containing an allegation that an offence has been committed and praying that the culprits be suitably dealt with is a 'complaint' within the definition of that term contained in Sec. 4. Merely because the application also contains a prayer that the case should be investigated by a superior police officer on the ground that the local police were hostile to the applicant and under the influence of the principal accused, a complaint does not cease to become a complaint and become an executive application, which can be dealt with in a different manner. [P 209 C 1]

(b) Criminal P. C. (1898), S. 202—Magistrate sending, for report by police officer, complaint in which bona fides of police are impugned is not illegal.

The action of the Magistrate in sending for report by a police officer a complaint in which the bona fides of the police are impugned is under the statute not illegal. [P 209 C 2]

12. Venkata Seshayya v. Koteswara Rao, (1937) 24 A I R P O 1=166 I C 1=64 I A 17 = I L R (1937) Mad 263 (P C).

13. Krishnadas Padmanabha Rao v. Vithoba Annappa, (1939) 26 A I R Bom 66=180 I C 51= I L R (1939) Bom 340=41 Bom L R 59 (FB).

D. N. Aggarwal — *for Petitioner.*

Nand Lal Salooja for Advocate-General
and M. L. Puri — *for the Crown.*

Order. — On 3rd or 4th February last the petitioner presented before the learned District Magistrate of Multan a document. I use the term 'document' advisedly, as there appears to have been some confusion as to its nature. I have been through it and I find that it contains an allegation that an offence has been committed, that it is addressed to a Magistrate, and that it ends with a prayer that the culprits be suitably dealt with. It is therefore manifestly a "complaint" within the definition of that term contained in S. 4, Criminal P. C., and ought to have been dealt with under the provisions of Chaps. 16 and 17 of that Code. The learned District Magistrate appears however to have considered it to be executive application. Counsel for the Crown has explained this attitude by saying that the document also contains a prayer that the case should be investigated by a superior Police Officer on the ground that the "local" police were hostile to him and under the influence of the principal accused. It is difficult however for me to see that because such a prayer is added to a complaint it ceases to become a complaint which can only be dealt with under the Criminal Procedure Code, and becomes an executive application, which can be dealt with in a different manner. In consequence of this mistake it would appear *prima facie* that that complaint has never been disposed of according to law, and that all that has happened is that another Magistrate has "cancelled" this case on a report by the police after investigation.

The complainant however put in another "complaint" on 27th February 1939. This is the subject of the present revision petition. It seems to me however that this document is not really a fresh complaint, but a reminder to the previous complaint with an added prayer that the Magistrate held an enquiry himself under S. 202, Criminal P. C. On this view the learned District Magistrate's order dismissing this 'complaint' would really have the effect of dismissing the original complaint, and the situation would therefore have regularised itself. In any case the mere omission by the District Magistrate to pass any formal order dismissing the complaint of 4th February 1939 does not appear to me to have occasioned any failure of justice, and is no ground for revision.

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What the petitioner really contests however is the action of the learned Magistrate in sending for 'report' by a Police Officer a complaint in which the bona fides of the police are impugned. I am quite aware that, as counsel for the petitioner has pointed out, there is a string of authorities in support of the proposition that this is generally undesirable. These authorities however are not based upon any provision of the statute, but upon general ground of policy. The statute still remains and under the statute it is not illegal to send such a complaint for inquiry or investigation by a Police Officer. Before, therefore, this would be a ground for revision it would have to be found in the words of S. 435 that this particular order was in fact incorrect or improper. In considering this question, it must be remembered that the complaint was only against the 'local' police, actually against a particular Sub-Inspector. As pointed out by the learned Sessions Judge the Police Department itself took action and at a very early stage the investigation was taken over by another Sub-Inspector, and very soon after that by the Deputy Superintendent of Police, Mr. Phillips. It will be seen then that the supplementary prayer in the original complaint of 4th February 1939 though not granted by the District Magistrate, was in fact given effect to by the police themselves.

At the time that the second "complaint" was filed this investigation was practically complete and I see no reason to doubt that it was the knowledge that the original complaint had been exposed as false, and that the complainant was in danger of prosecution under S. 182, I. P. C., that led to its being filed in this way. As the investigation was practically complete, I consider that the learned District Magistrate took a very proper course in asking the Superintendent of Police to report, in other words to send up the result of the investigation before deciding whether to hold an inquiry himself under S. 202, Criminal P. C. The learned District Magistrate on perusing the papers came to the conclusion that there was no case and dismissed the complaint. It would probably have been more satisfactory if he had dealt with the specific prayer that he should hold an inquiry himself, and have distinctly rejected this prayer instead of merely dismissing the complaint as a whole, but I cannot hold that his failure to do so is even an irregularity, as the rejection of the specific prayer must be

held to be implied in the dismissal of the complaint.

The only point that remains is whether the learned District Magistrate was justified on the merits in holding that there was no case. The learned Sessions Judge has pointed out that the main investigation was carried out by the A. S. P. (A. S. I.?) and the D. S. P. and that the complainant had nothing to say against either of these officers. Nor had counsel for the petitioner anything to say against them before me, except some sort of vague general objection that they are Police Officers. The suggestion appeared to be, though counsel fought shy of actually asserting so, that because they are Police Officers it must be presumed that they would connive at any dishonest action of another member of their department. I can see no real grounds for such a presumption. The learned Sessions Judge has also pointed out that it was not denied before him that all the available evidence produced by the complainant was not taken by the police. Before me counsel was only able to suggest very vaguely that there might have been some more evidence which the police did not take. The learned Sessions Judge has also pointed out that it was also not denied before him that due consideration was paid to the injuries alleged to have been sustained by the complainant's sons in the alleged dacoity.

In conclusion the learned Sessions Judge after considering the report of the police investigation considered that it would be a waste of public time to order any further inquiry. I have also considered his report and I agree with him. I accordingly dismiss this petition.

D.S./R.K.

Petition dismissed.

*** * A. I. R. 1940 Lahore 210**

YOUNG C. J.

Chaman Lal — Convict — Appellant

v.

Emperor.

Criminal Appeal No. 619 of 1939, Decided on 6th February 1940, from order of Magistrate, First Class, Multan, D/- 5th June 1939.

(a) Criminal Trial — Evidence — Offence committed by jail official in jail premises against convict — Evidence of other convicts is not unreliable.

Where an offence is committed by a jail official in jail premises against a convict the evidence of other convicts cannot be said to be unreliable. There is no reason to believe that those convicted

of crimes of violence should be more untruthful than other persons. A person convicted of a crime of violence may be a man of admirable character.

[P 213 C 2; P 214 C 1]

(b) Criminal P. C. (1898), S. 174 — Object.

The procedure under S. 174 is for the purpose of discovering the cause of death. [P 214 C 1, 2]

*** (c) Evidence — Several persons tried on same indictment — Witness called by one of them may be cross-examined by other if he gives testimony tending to incriminate them — Such evidence is admissible.**

When two or more persons are tried on the same indictment and are separately defended any witness called by one of them may be cross-examined on behalf of the others, if he gives any testimony tending to criminate them. His testimony is therefore admissible : 21 Cal 401, Rel. on. [P 215 C 1]

(d) Criminal Trial — Jail administration — Illegal and unauthorized beating or torture cannot be administered for insubordination.

Whipping for insubordination may be legally administered in jails under proper precautions and in accordance with the rules given in the jail manual. In prisons where habitual and other long term convicts are confined such a whipping for the purpose of enforcing discipline may at times be a regrettable necessity, but an illegal and unauthorized beating or torture cannot afford a defence in case of alleged insubordination. [P 215 C 1]

(e) Penal Code (1860), S. 325 — Beating and torture of convicts by jail officer resulting in death of some of convicts — Jail officer was sentenced to seven years' rigorous imprisonment.

When an officer in control of helpless prisoners beats and tortures them, the severest sentence known to the law should be inflicted. [P 216 C 1]

Where beating and torture had resulted in the death of some of them, the accused was sentenced to seven years' rigorous imprisonment, the most severe sentence possible under S. 325. [P 216 C 1]

*** (f) Penal Code (1860), S. 76 — Convict warder beating and torturing convicts under orders of superior officer cannot plead defence of Section 76.**

A convict warder must be knowing that merciless beating of the convicts is contrary to law. Hence, where he has beaten and tortured convicts under orders of superior officers he cannot plead defence of Section 76. [P 216 C 2]

*** * (g) Criminal Trial — Soldier killing other under illegal order of superior officer is not excused — Obedience to illegal order can only be used in mitigation of punishment.**

Even when a soldier obeys the orders of a superior officer if the order is obviously improper or illegal, the soldier is not excused even though he may be put in the awkward predicament of choosing whether he will risk being shot by order of a Court Martial for not obeying the orders or being hanged by the Criminal Court for murder for obeying it. Obedience to an illegal order can only be used in mitigation of punishment : 17 P R Cr 1883, Rel. on. [P 216 C 2]

S. K. Dar, R. N. Gurtu, B. R. Puri and P. N. Kaul — *for Appellant.*

Mohammad Monir, Assistant Advocate-General — *for the Crown.*

Order. — In this case Chaman Lal has been found guilty under S. 325, I. P. C., of inflicting grievous hurt upon two prisoners under his control so that they died. He has appealed to this Court. It is obvious to me as at present advised and without hearing counsel on the point that if Chaman Lal is guilty of this offence, the sentence which he has received, namely one year's imprisonment in class B is wholly insufficient to meet the ends of justice. Mr. Monir for the Crown has pointed out that if a notice is issued at the end of the hearing of this appeal to show cause why the sentence should not be enhanced it will be open to the appellant to reargue the whole case. It is difficult to understand in this case why an enhancement petition has not been filed before this appeal came on for hearing. Therefore without expressing any opinion on the merits of this appeal, I issue notice to Chaman Lal to show cause why the sentence inflicted upon him should not be enhanced.

With regard to the other appellants, assuming that they are also guilty for the purpose of this order they were acting, it is alleged, under the orders of Chaman Lal and therefore I do not think that it would be proper to issue notices of enhancement of sentence to them. Chaman Lal is already on bail, and in view of the notice for enhancement of the sentence having issued I think the security should be increased. I therefore order the appellant to furnish security of Rs. 7,500 instead of the present figure of Rs. 5000, with one surety. The bond to be attested by the Deputy Registrar.

Judgment.—Chaman Lal, Sawan Ram, Desa Singh, Siraj Sardara Singh, Man Singh, Atma Singh, Saudagar Singh and Dula Singh were tried in the Court of the Additional District Magistrate, Montgomery, who was exercising the powers of a Magistrate 1st Class with enhanced powers under S. 30, Criminal P. C., in the Multan District. These persons were tried under Ss. 304 (Part 2)/149 (two counts), 147 and 323 read with S. 149, I. P. C. The learned Magistrate found all the accused guilty under Ss. 147, 323 read with S. 149 and 325 read with S. 149 (two counts) and sentenced them all, except Atma Singh, to 6 months' rigorous imprisonment each under Ss. 147 and 323 read with S. 149 and to one year's rigorous imprisonment under each count of S. 325 read with S. 149; the sentences to run concurrently. He ordered Chaman Lal, the chief accused, to be placed

in "B" class in Jail. He gave Atma Singh 6 months' rigorous imprisonment under Ss. 147 and 323 read with S. 149 and five years' rigorous imprisonment under each count of S. 325 read with S. 149, I. P. C.; but directed that the sentences should run concurrently with the sentence which he was already undergoing in jail. All these convicts appeal to this Court. Chaman Lal in particular has been very badly advised in doing so. A preliminary point was raised by counsel for Chaman Lal that the sanction given by Government for the prosecution of Chaman Lal was defective. There was nothing in this point and it was abandoned.

The New Central Jail Multan is a prison in which long-term and habitual prisoners are confined. While this class of convict may be difficult to deal with, the discipline maintained by those in charge of this jail has been very poor. On 8th January 1939, in the early morning, Hari Singh and Bana, two convicts, died in that jail. An inquiry was held with the result that the 9 appellants were put on trial. The evidence discloses a deplorable state of affairs in the Multan Jail and on a preliminary view of the evidence I felt it my duty to serve a notice on Chaman Lal to show cause why his sentence should not be enhanced. Chaman Lal was the Deputy Superintendent of the Jail who, according to the evidence, was mainly responsible for the death of these convicts. As the other appellants were under the control and orders of Chaman Lal, I did not think it necessary to serve a notice to show cause upon them. Although Shahzada Alamgir, who tried this case in the lower Court, signally failed to give a suitable sentence to Chaman Lal this is the only weak point in an otherwise admirable judgment.

The facts disclosed are that four convicts, Jalloo, Kartar Singh, Hari Singh and Inder Singh, who up to 4th January 1939, had not been given hard labour because of the state of their health, were given hard and medium labour on that date. These persons on 5th January protested against this change as they alleged that they were still unfit. Kartar Singh and Hari Singh had been suffering from tuberculosis, Jalloo had an old fracture of the leg and Inder Singh had been considered too old and infirm for hard labour. On 5th January these four refused to do the work allotted to them and offered to go to the punishment cells instead. It is alleged by the defence

that on the night of the 5th they were in a 'rebellious' mood, and that they took off their clothes and spent a cold night in January in their cold cells without their clothes. On the morning of the 6th, three of them were said by Chaman Lal to be beating their heads against the walls of their cells. These actions appear to me to be based on despair and not on rebellion. A rebel tries to damage those over him not himself. It is now admitted by counsel for Chaman Lal that he, together with other convict warders and convict officials, at 11 o'clock in the morning on the 6th went to the cells where these prisoners were confined and administered a severe beating to them. Chaman Lal and his counsel have been forced to admit this in view of a note in the Deputy Superintendent's Journal made by Chaman Lal himself. It is Ex. P Q/3. It reads as follows :

At about 10-30 A. M. I was informed that convicts Kartar Singh Sansi and his three companions were abusing in a most filthy manner every one whom they could see, and that three of them were striking their heads against the cell walls. Thinking that they may not injure themselves seriously, I went there myself. Chief Head Warder Sawan Ram and Mr. Haidar Ali Tur and some convict officers (orderlies) were with us. On our reaching their cells, they began to abuse us in the most filthy manner. On my trying to appease their anger, they again abused me to their hearts content and threatened me with worst consequences. Upon hearing such degrading words I asked my orderlies and the Chief Head Warder to bring them under control as by this time they had again begun striking their heads against the floors and walls. They were brought under control with some force and struggle as they were very unruly with assaulting attitudes.

It does not appear to me that there can have been much fear of danger to Chaman Lal and the other warders and orderlies from men who had spent the night in the manner indicated in the Journal. The force used consisted of a serious beating of all these four unfortunates. The bastinado (or beating in the soles of feet, one of the worst forms of torture) was used, and all of them were also severely beaten on the buttocks and backs. The medical evidence confirms this. It is to be noticed that Chaman Lal, although he admits his presence in this report, does not admit that any form of beating was given. This however is now admitted in this Court by counsel on his behalf. The defence story now that these convicts were at that time dangerous and turbulent appears to be contradicted by the fact that they had not been put on hard labour before because of their bad health, and by their conduct in

injuring themselves rather than those under whose control they were. After the beating these convicts were placed in the punishment cells (block 14).

As a result of this beating, considerable trouble occurred in the jail. It is not to be wondered at that even convicts should protest against treatment of this sort being given to some of their fellows. Four others who were related to, or interested in, the four convicts who had been beaten commenced a hunger strike and asked to see Chaman Lal, the Deputy Superintendent of the jail. Chaman Lal ordered a special guard of 15 to be in attendance. He also called the jail officials together and after some consultation received these four protesting convicts in the chakkar or office of the jail. In addition to these four, two other convicts, namely Shian Singh and Sarwan Singh, also came with the deputation. The protesting convicts asked the Deputy Superintendent to take those who had been beaten that morning out of the punishment cells or, in the alternative, to send the deputation to the punishment cells as well. Chaman Lal adopted the second alternative, and it is said by the Crown that he together with the Chief Head Warder and other convict lambardars and officials took the six protesting convicts to block No. 14; that on the way, on the orders of Chaman Lal, Kartar Singh (P. W. 1), Raja Hari Singh and Bana were thrown on the ground near block No. 14 and that Chaman Lal and all the jail officials with him commenced to give the same kind of beating to them as they had already given to the four in the morning. Shian Singh and Sarwan Singh, it is alleged, on seeing the beating being administered to their companions gave up the idea of a hunger strike and they were not put in block No. 14 but returned to their ordinary cells.

On the night of the 6th, these four, in their injured condition, remained in the punishment cells. On the morning of the 7th the matter having been reported to the Superintendent of the Jail, Major Mohammad Sarwar Khan, he visited the eight convicts who had been beaten. He was accompanied by Chaman Lal, Head Warder Sawan Ram and others. He visited the cell of Raja first and found that he could not get Raja to answer him; but Dr. Allah Bakhsh said that he was malingering. I am not impressed with the ability or medical knowledge of this officer in view of the circumstances and his actions. Kartar Singh

Sansi, who had been beaten in the first batch on the 6th, was found in his cell attempting to grind corn. It is necessary for a convict put on this hard labour to grind the corn in a standing position. The Superintendent found Kartar Singh sitting, in which position it was impossible for him to do his work. Kartar Singh said that he could not stand owing to the injuries to the soles of his feet. The Superintendent stopped him working. Kartar Singh could hardly walk owing to the swelling of his feet and ankles. These prisoners stated in the presence of Chaman Lal that the "jail-walas had beaten them." On the night of the 7th, the condition of Bana and Hari Singh became worse, and early in the morning of the 8th at 1.30 Hari Singh died and at 3.30 Bana died.

On the morning of the 8th, the jail was in a state of considerable commotion. Early that morning the Superintendent came to the jail. He found Chaman Lal in his office with some convicts who were using abusive language and Chaman Lal was "attempting to pacify them." The Superintendent was angry with Chaman Lal for bringing the convicts to the office and Chaman Lal said that he had brought them there to "cool them." From 8th to 10th January a magisterial inquiry was held under S. 174, Criminal P. C. On 20th January, a police investigation commenced and on 21st January Chaman Lal was suspended. Dr. Munshi Singh, Sub-Assistant Surgeon of the Central Jail, Multan, was the first to examine Hari Singh and Bana. The description he gave of the injuries in the case of Hari Singh is as follows:

Feet swollen with contusion marks on the heels and soles of both the feet and multiple contusion marks on the buttocks which were swollen and of dusky red colour.

On Bana he found the following injuries:

Multiple contusions on the buttocks which were swollen, contused wound 2" X 1" on the middle of right shin skin deep, and feet as well as ankle joints were swollen with marks of contusion.

Major Smyth, I. M. S., Civil Surgeon, Multan, performed post-mortem examinations on the two convicts and gave evidence at the hearing in the Court below. His description of the injuries on Hari Singh is as follows:

A bruise 5" X 3½" on the back of left shoulder blade, a bruise 4" X 3" on the back of the right shoulder blade, a bruise 2" X 1½" on the right buttock, a bruise 3" X 1½" on the left buttock, a bruise 3" X 1½" on the back of the upper third right thigh and a bruised area 4" X 2" on the back of the lower part of the right thigh; and several smaller bruises.

He found that the mucous membrane of the stomach and of the small intestine, the liver, spleen and kidneys were congested. In his opinion the cause of death was heart failure due to shock following multiple injuries. The description of the injuries found by this officer on Bana is as follows:

A bruise 3" X 5" on the left buttock, an abrasion 1½" X ½" on the upper part of left buttock, a verticle abrasion 2½" X ½" just below the last, a transverse abrasion above the last, another abrasion near these injuries, a bruised area 7" X 5" on the lower part of the left buttock, an abrasion on the back of the left knee, an abrasion on the left anterior superior iliac spine, a contused wound through the skin on the inner side of the middle right shin, an area of abrasion 3" X 1½" on the upper part of the right buttock, an abrasion 1" X 1½" just above the last injury, a bruise 7" X 4½" covering the right buttock, an abrasion ½" X ½" on the back of the right elbow, an abrasion just above the last injury, a bruise 7" X 3" on the inner side lower half left thigh, swelling of the left foot, and both ankles, swelling and discolouration in an area 3" X 3" on the inner side of the right ankle and an abrasion 1" X ½" just in front of the right knee.

The cause of death was heart failure due to shock following multiple injuries. Major Smyth was also of opinion that the blows inflicted on both the deceased must have been considerably more than the number of injuries and that the natural result of such a beating was shock. The dead convicts were healthy men of good physique which emphasizes the nature of the beating which killed them. It appears from the description of the injuries given above that it could be said that the injuries were inflicted with the intention of causing bodily injury and that the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death, and that therefore Chaman Lal and his co-accused in this case might well have been charged under S. 302, I. P. C., that is for murder. It is also difficult to understand why Chaman Lal and at least some of the accused were not charged with the earlier beating given to the four other convicts. (After stating certain evidence his Lordship proceeded further.) I have read the evidence of all the seven eye-witnesses and I agree with the estimate of the learned Magistrate that it is worthy of belief. A criticism of all these witnesses has been made by counsel for the appellant that all the eye-witnesses are convicts and that therefore their evidence is unreliable. I can find no force in this argument. In the first place, in an offence of this kind committed in a jail it is obvious that the only evidence likely to be produced would be that of convicts. If a rule was laid down that evidence

was unreliable because it was that of a convict, jail officials would have complete immunity for the commission of any offence against a convict. In addition, I see no reason to believe that those convicted of crimes of violence should be more untruthful than other persons. The vice of untruthfulness would be more associated with those convicted of deceit, fraud or perjury. A murderer may have some good qualities such as courage and initiative. I see no reason why he should not be as truthful as the bulk of his compatriots.

It has been objected by counsel for the appellant that in the Magisterial inquiry, which was held under S. 174 into the cause of death of the convicts, some of these prosecution witnesses gave evidence, and that some did not mention the presence of Chaman Lal, and that Gulzara Singh and Kartar Singh said that they were beaten under the orders of Chaman Lal but did not say that Chaman Lal himself beat them. This criticism might be of some weight in an ordinary criminal case. At the date of this inquiry, however, Chaman Lal had not been suspended, and it may well be that some of the convicts then giving evidence would be loth to implicate the Deputy Superintendent too clearly as they might be still, or be placed later on, under his power and authority. Other witnesses in the actual trial clearly implicate Chaman Lal in these proceedings as well. The procedure under S. 174 is for the purpose of discovering the cause of death, and the evidence taken was very short. Mr. Teal, Additional District Magistrate, Multan, gave evidence and said that he had told the Magistrate who inquired into the case that the proceedings were intended not to ascertain the names of the assailants, that being the work of the police; that the object was to ascertain the cause of death, and that he directed the Magistrate to confine his inquiry to the object of S. 174, Criminal P.O. He said the witnesses were not too fully examined in detail with regard to the manner of the beating and the names of the assailants. I do not think that such discrepancies as there are in the evidence of some of the witnesses in the S. 174 proceedings and in the trial Court are of very great importance. Nor do I see why these witnesses would falsely implicate the Deputy Superintendent unless he had taken part in the beating. It has been argued by counsel that Chaman Lal having taken part in the beating of the four convicts in the morning, they, at any

rate, would have a motive to accuse Chaman Lal of the beating in the afternoon; but it is interesting to note that of all these only one, Jalloo, accuses Chaman Lal. If there had been an intention falsely to accuse Chaman Lal or to strengthen the case against him, it might have been arranged for the three other convicts also to have implicated him as regards the beating in the afternoon.

There are the statements of the two confessing accused, Desa Singh and Sardara Singh. Both these implicate themselves as well as Chaman Lal. Their statements are therefore admissible against Chaman Lal. I am particularly impressed with the statement of Desa Singh. He originally was imprisoned for life for murder and had been in Multan jail for a very long period. His life sentence expired in February 1939. Throughout his long career in jail he has received nothing but praise from all those in charge of him. 'Faithful,' 'loyal,' 'very reliable,' 'useful,' 'industrious,' 'of exemplary character,' 'diligent' and 'a very good office orderly' are some of the remarks made about him in his history sheet. In addition, at the risk of his own life he rescued a man from a well into which he had fallen; and he also rescued another convict who attempted to commit suicide. He received the maximum amount of remission of his sentence for good conduct. He was elevated to the position of orderly to the Superintendent himself. This man's career and character emphasize the point made earlier in this judgment that a person convicted of a crime of violence may be a man of admirable character. I give full weight to Desa Singh's confession. He says that Chaman Lal was present and the whole party was under Chaman Lal's orders; that Chaman Lal was beating the convicts with a khunda, and that he himself took part in the beating.

With regard to Sardara Singh, he also, although not of such an exceptional character as Desa Singh, had a creditable career in jail and was a convict lambardar. His conduct in jail has been excellent. He was on duty at the office and therefore his statement as to what occurred there is valuable. He says that Chaman Lal accompanied the four convicts to block No. 14 and that Chaman Lal ordered them to be searched and thereafter ordered them to be beaten. He admits his own part in the beating. I place great reliance upon these two confessions. Ram Singh and Udham Singh gave evidence in defence for some of the accused

They say that they were also in the party which administered the beating under the orders of Chaman Lal and that he took part in it. It has been objected by counsel for Chaman Lal that this evidence is inadmissible against Chaman Lal. It is, however, part of the record and could have been subjected to cross-examination by the other accused whom it implicates and therefore is admissible. This is the law in England and there is nothing in the Evidence Act to the contrary. An opportunity was given to counsel for the other accused to cross-examine these witnesses. In 'Taylor on Evidence,' para. 1430, the law is stated to be as follows :

When two or more persons are tried on the same indictment and are separately defended, any witness called by one of them may be cross-examined on behalf of the others, if he gives any testimony tending to criminate them. The counsel, too, for the other prisoners are entitled in such a case to reply upon his evidence.

In 21 Cal 401¹ a Bench of the Calcutta High Court decided that :

One accused person may cross-examine a witness called by another co-accused for his defence when the case of the second accused is adverse to that of the first.

With this decision I agree. The only reason for allowing one accused to cross-examine the witness of another co-accused is that the evidence of the witness may be used against the co-accused. Counsel for the appellant in this Court argued that the beating administered to the deceased must have been the result of gross insubordination. This argument is wholly irrelevant. Whipping for insubordination may be legally administered in jails under proper precautions and in accordance with the rules given in the Jail Manual. In prisons where habitual and other long term convicts are confined such a whipping for the purpose of enforcing discipline may at times be a regrettable necessity, but it is not arguable that an illegal and unauthorized beating or torture can afford a defence in this or any other case. In any event it is unlikely, in view of the overwhelming force of jail officials with the convicts on this occasion, that they could have resisted.

To sum up: There is the evidence of seven eye-witnesses against Chaman Lal the majority of whom I see no reason to disbelieve. This evidence is strongly corroborated by: (a) The admission of Chaman Lal himself in his own Journal, and by his own counsel in this Court, that he took part in the beat-

ing of the four convicts on the morning of the 6th, which beating led directly to the beating in the afternoon. (b) The entries in the Journal Ex. P/Q and in particular Ex. P. Q-4. (c) The fact that Chaman Lal has not disclosed what those entries in the history sheets were which he has obliterated. (d) His failure to make an inquiry into the beating of the four prisoners when ordered to do so by the Superintendent. (e) His attempt to pacify the convicts when he called them to the office on the morning of the 8th. (f) The two confessions especially that of Desa Singh. (g) The implication of Chaman Lal by the two defence witnesses.

Some defence evidence was called on behalf of Chaman Lal but the learned Magistrate gives very excellent reasons for discarding it. Counsel for Chaman Lal in this Court did not rely upon this evidence. There is one point about it to which I ought to allude. Lt. Col. Chopra, I. M. S., Deputy Inspector-General of Prisons, was appointed in February 1939, to the position of Superintendent of the Multan Jail, after the death of the two convicts. He gave evidence for Chaman Lal. He said that Desa Singh, the confessing accused, visited him about the fourth week of February 1939, when he was released on bail, and that Desa Singh told him that he was present at the beating but that neither Chaman Lal nor Sawan Ram—the Head Warder—was present. Desa Singh, however, was not released on bail until April. When the attention of Colonel Chopra was drawn to this fact, he altered the date of Desa Singh's visit to April. He was cross-examined by the Public Prosecutor and questioned by the Court. He admitted that although he was in charge of the jail and had this very important information given to him, he did nothing about it. He did not report the matter to the Inspector-General of Prisons: he did not mention it to the District Magistrate or to the Superintendent of Police in Multan although he knew that both Chaman Lal and the Head Warder were being prosecuted. He said that he informed some people but could not remember their names. If Desa Singh had told Colonel Chopra that Chaman Lal was innocent, he would hardly have implicated Chaman Lal in his confession. The learned Magistrate did not rely upon this evidence and it is difficult to see how any one could place the slightest reliance upon it. Counsel for Chaman Lal and Sawan Ram in this Court have not even mentioned it, though—if true—it was of

1. Ram Chand Chatterjee v. Hanif Sheikh, (1894) 21 Cal 401.

the greatest importance to their clients. The obvious inference is that Colonel Chopra was a too willing victim of *sifarish* on behalf of Chaman Lal.

I am satisfied that Chaman Lal has been properly convicted in the lower Court. I consider that he has been extremely fortunate not to have been charged under S. 302, Penal Code, for murder. If he had been convicted of murder on this evidence, I would have upheld the conviction. Chaman Lal was given only one year in B class in the lower Court because; (a) he would be dismissed from Government service, and (b) he was an M. Sc. of the Punjab University. Neither reason is sound and the latter aggravates his offence. It is difficult to understand why this Court was not moved by Government for enhancement of his sentence. Counsel for the Crown however says that he is instructed to support enhancement. When an officer in control of helpless prisoners beats and tortures them, the severest sentence known to the law should be inflicted. In addition, the treatment accorded to these unfortunate convicts has resulted in the death of two of them. Counsel for this appellant has pleaded for mercy, but Chaman Lal himself has shown that he had no mercy for others. In addition, an example must be made in order to show conclusively to others, who may be similarly inclined to ill-treat those in their custody, that the Courts cannot tolerate such cruelties. I sentence Chaman Lal on both counts to seven years' rigorous imprisonment, the most severe sentence possible under S. 325, Penal Code; the sentences to run concurrently. It is with considerable hesitation that I order that the sentences should run concurrently and not consecutively. I am inclined to make this order on the ground that both the offences were part of the same transaction and that as this offence involves moral turpitude of a gross character, Chaman Lal cannot, according to the rules, be placed in class B in jail. The sentences under Ss. 323/149 and 147 are maintained and they will also run concurrently.

All the seven eye-witnesses implicate Sawan Ram the Head Warder and what I have said about the oral evidence in the case of Chaman Lal applies to this case also. Sawan Ram too was not suspended when the inquiry was being held under S. 174 and—as in the case of Chaman Lal—this fact disposes of the only criticism of this evidence. One of the confessing accused

also implicates Sawan Ram and both the defence witnesses, Ram Singh and Udham Singh, also implicate him. I am satisfied that Sawan Ram is guilty. He was acting under the orders of Chaman Lal and counsel has contended that this fact amounts to a complete defence for his client. I cannot agree. S. 76, Penal Code, is relied upon by counsel. It reads as follows:

Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it.

Section 76 does not afford any defence to any of these appellants. It is obvious that all of them knew that they were engaged in an illegal act. There was no question either of a mistake of fact, or mistake of law, or of good faith. All of them had been in jail for some time and must have known that the merciless beating of the convicts was contrary to law. The analogy of a soldier who fires on a mob in accordance with the lawful command of a superior officer has been relied upon by counsel but it has no application to this case. There was no lawful command, and even when a soldier obeys the orders of a superior officer it has been held that if the order is obviously improper or illegal, the soldier is not excused even though he may be put in the awkward predicament of choosing whether he will risk being shot by order of a Court-Martial for not obeying the order, or being hanged by the Criminal Court for murder for obeying it. Obedience to an illegal order can only be used in mitigation of punishment. See also 17 P R Cr 1883.² I am satisfied that Sawan Ram is guilty. Desa Singh is the accused whose character and confession I have already discussed. His counsel in this Court has argued that he acted on the orders and through fear of his superior officer. As pointed out in the case of Sawan Ram, this is no defence. Desa Singh has undergone nine months' imprisonment. I consider this period enough in this case. He will be released.

The case of Dula Singh is however a little different. Desa Singh, on whom I have placed great reliance, says in his confession that he did not see Dula Singh among the accused. In addition, there is the positive evidence of Mohammad Ali, Head Warder, D. W. 10, who says that Dula Singh was with him from 5-15 P. M., for about an hour engaged in the duty of counting convicts in barrack No. 9. Dula

2. Niamat Khan v. The Empress, (1883) 17 P R Cr 1883.

Singh is a convict and Mohammad Ali is a Head Warder. This evidence is corroborated by other defence witnesses. This case is not free from doubt. I therefore order that the conviction of and sentence upon Dula Singh be set aside. His bail bond is cancelled. Siraj appeals from jail and is not represented. In addition to the evidence that he was present and took part in the beating, as he was orderly to Chaman Lal he probably would be with him. In addition, defence witnesses 3 and 7, say he was there and took part. I am satisfied that he has been properly convicted.

All the prosecution witnesses say that Saudagar Singh, Atma Singh and Man Singh took part in the beating. I see no reason to doubt that these appellants are guilty. Sardara Singh like Desa Singh confessed his guilt. With regard to the sentences imposed on these appellants, it is argued with some force that they were not really responsible: and in particular I feel that Desa Singh ought to receive all possible consideration. With every desire to be lenient I feel that under the circumstances it is impossible to say that they—with the exception of Atma Singh—have been too severely treated. I reduce Atma Singh's sentence from five years to one year's rigorous imprisonment. With this modification I dismiss all these appeals. Sawan Ram must surrender to his bail bond.

D.S./R.K. *Appeals dismissed.*

*** A. I. R. 1940 Lahore 217**

DALIP SINGH AND SALE JJ.

Mohan Singh Bath and others

Convicts — Appellants

v.

Emperor.

Criminal Appeal No. 388 of 1939, Decided on 1st December 1939, from order of Addl. Sess. Judge, Amritsar, D/- 13th February 1939.

(a) Criminal Trial—Riot—Evidence—Absence of injuries on alleged rioters arrested shortly after occurrence — Evidence partisan and uncertain — Accused should be given benefit of doubt as to participation.

The absence of injuries on the persons of the alleged rioters arrested shortly after the occurrence is a point which in a case where the evidence is partisan and uncertain must operate as a ground for giving the benefit of doubt as to participation.

[P 220 C 2; P 221 C 1]

(b) Evidence Act (1872), S. 123 — Diary of foot constable shadowing movements of suspect held not affair of State.

Under S. 123 it is only when the document deals

with affairs of State that privilege can be rightfully claimed under the Section. The diary of a foot constable who was shadowing the movements of a suspect held could not possibly become an affair of the State within the accepted meaning of the words.

[P 224 C 2]

* (c) Evidence Act (1872), S. 123 — Procedure to be followed before privilege under S. 123 is claimed explained.

The law requires that before privilege is claimed the head of the department should have the document in front of him, should give his attention to the matter, should weigh carefully whether the privilege should or should not be claimed and unless he is satisfied that affairs of State are concerned he should not claim privilege for a document or withhold from a Court the means of judging whether a particular witness's statement is true or not true. It is true that the head of a department has an absolute privilege on the point, it is for him to decide whether the matter is one in which privilege should be claimed or should not be claimed, but it would be good to follow the practice of the English law, namely that some indication should be given to the Court as to why privilege is claimed or what affairs of State are involved in the matter. Without such indication, there is always a danger that the Court may draw an adverse inference from the non-production of the document. The Court is entitled, according to the circumstances of each particular case, to draw an inference adverse to the party claiming the privilege: *A I R 1931 P C 254, Ref. ; A I R 1914 Cal 396, Disting.*

[P 224 C 2; P 225 C 1]

A. R. Kapur, and Sham Lal and F. C. Mital — *for Appellants (Lachhman Singh, and other Accused respectively).*

N. A. Siddiqi, Public Prosecutor —

for the Crown.

Sale J. — On 13th March 1938 a riot occurred at Fatehwal in the Amritsar District following a political meeting held at that village under the auspices of the Congress. In the course of this riot, one man Hiro was killed outright and his brother Mohammad Shafi died of injuries received. Three other brothers, Fazal Rahim Bakhsh and Fauju, received simple injuries. Six other persons unrelated to this family but among the opponents of the Congress received simple injuries. Forty-eight persons were placed before the committing Magistrate on trial in connexion with these disturbances. The case against three was withdrawn and twelve were discharged. Thirty-three persons were committed to Sessions charged with murder and rioting. After a trial lasting two months the learned Additional Sessions Judge found that a riot had been proved the common object of the rioters being to give a severe beating to Hiro and his brothers as a result of a prolonged attempt to ruin the Congress meeting. He acquitted twenty-six of the accused holding that their participation in the riot was not

proved. He held that the participation of six persons in the riot is proved, viz. Jogindar Singh, Mohan Singh Bath, Lachhman Singh Sufian, Ganda Singh, Sadhu Singh and Harbans Singh. Of these he found that Jogindar Singh, in addition to participating in the riot, was guilty of an individual act in participating in the murder of Hiro, and he convicted him under S. 302, Penal Code, sentencing him to transportation for life. He convicted Mohan Singh Bath, Lachhman Singh Sufian, Ganda Singh, Sadhu Singh and Harbans Singh under S. 148 and S. 325 read with S. 149, Penal Code, and sentenced them to concurrent sentences of two years' rigorous imprisonment. He also found Shiv Dev Singh guilty of taking a subsidiary part in the riot by causing hurt to one witness, Karam Din, P. W. He convicted him under Ss. 148 and 323, Penal Code, and sentenced him to six month's rigorous imprisonment. Against these convictions and sentences all the convicts have appealed while an appeal has been filed on behalf of the Crown against the acquittal of one Bachan Singh on the ground that the evidence against this accused is the same as that against the other accused whom the learned Additional Sessions Judge has convicted, and on the reasoning adopted by the learned Additional Sessions Judge, this accused should also have been held guilty of participating in the riot.

The material facts are that a meeting organized by the Congress had already been held at Fatehwal on 5th February. In the course of this meeting objections were voiced by Hiro, deceased, and Teja Singh, P. W. A riot is said to have occurred as a result of which 16 congressmen were prosecuted including five of the accused in the present case. Teja Singh and Hiro were important prosecution witnesses. This case — we are informed — is still pending in the Court of a Magistrate. Following the result of this meeting, it was decided to hold a second meeting at Fatehwal on 13th March. The intention to hold this meeting had been advertised and there is some evidence that congressmen, knowing that this meeting was likely to be again interrupted, asked for police assistance. No police however were present at the meeting except one Des Raj a foot constable (since resigned) who had been ordered to watch the movements of Achhar Singh, an absconder, who attended the meeting. This meeting was duly held at Fatehwal on the 13th in a field belonging to Mula Singh, father of Fateh Singh

(accused acquitted by the Sessions Judge) General Secretary, Fatehwal Congress Committee. A pandal had been erected in this field at a distance of about 200 karams from the village abadi, on the outskirts of which is situated the house of Teja Singh, P. W., a local opponent of the Congress, who was regarded by congressmen as mainly responsible for the interruptions in the previous meeting of 5th February.

The meeting of 13th March was attended by a number of leading congressmen including Mian Iftikhar-ud-din, M. L. A. These Congress leaders reached the pandal by car from Amritsar at about 12-30 to 1 P. M.; but prior to their arrival, it is alleged by the prosecution, that a procession of Congress sympathisers led by Achhar Singh Chhina, absconder, held a mock mourning ceremony in front of the house of Teja Singh, presumably to intimidate Teja Singh and prevent him from again interrupting the meeting. In any case, Teja Singh did not attend the meeting but remained throughout in his house, the courtyard and baithak of which subsequently became the scene of the main riot. It is alleged by the prosecution that some of these processionists were musicians who played flutes and other instruments, thereby, it is said, giving offence to some of the Mahomedan opponents of the Congress who were present, on the ground that this playing of music was a desecration of this particular day which happened to be the last day of Muharram. It is further alleged by the prosecution that while the meeting was in progress, and after the arrival of the Congress leaders, Jota Singh, accused, came up on horseback with a bundle of chhavis and dangs, which were distributed among Congress supporters in the audience. During the course of the meeting, speeches were made and the temper of the audience became excited. According to the evidence of Ibrahim Khan (P. W. 3) and Khurshaid Alam Zaildar (P. W. 5) who were among a crowd of 50 or 60 persons, mostly Mahomedans, gathered on the outskirts of the meeting, protests were made against desecration of the day by music and the display of arms. The Congress leaders attempted to pacify the audience; and Ibrahim Khan (P. W. 3) says that between 2 and 3 P. M. he advised some of the Mahomedans to go and say their prayers and a number of Mahomedans accordingly left for this purpose.

At about 3-30 P. M. the meeting was closed by the President. Afterwards, while

the Congress leaders were talking among themselves near the pandal a clash occurred between the opponents and sympathisers of the Congress at a place not far from the pandal. This clash subsequently developed into an attack on Hiro and his four brothers, Rahim Bakhsh, Fazal, Fauja and Mohammad Shafi. These five persons ran away towards the village abadi, pursued by some 40 or 50 Congress sympathisers, and took refuge on the roof of the baithak of Teja Singh. The number of pursuers, according to the prosecution evidence, gradually swelled to 200 or 250. This crowd of rioters, some of them armed with chhavis and dangs, surrounded the baithak, some in the lane outside and some forcing their way into the courtyard through doorways which were damaged in the process. Eventually, a body of 30 or 35 rioters (among whom were, according to the finding of the learned Additional Sessions Judge, all the appellants except Shiv Dev Singh) swarmed up on to the roof of the baithak where Hiro and his brothers had taken refuge. Here Jogindar Singh, appellant, has been found by the learned Additional Sessions Judge to have grappled with Hiro, while Achhar Singh, absconder, struck him a fatal blow on the head from behind with a chhavi. Meanwhile the other rioters caused injuries to Hiro's brothers, of whom Fauju escaped from the roof of the baithak by running along an intervening wall on to another projection on the other side of Teja Singh's house. He was followed by certain of the rioters and injured. When the news spread that Hiro was dead, the rioters dispersed.

The Congress leaders had in the meantime been talking among themselves near the pandal, and after the riot was over they left in motors and lorries for Amritsar. According to the evidence of Mian Iftikhar-ud-Din, M. L. A., (D. W. 32) the Congress leaders left Fatehwal after the disturbance had finished; and although they were aware that a free fight had taken place in the open at a distance of 100 karams from the pandal it was not known to them that Teja Singh's baithak had been rushed and Hiro had been killed on the roof and that other persons had been injured. The leaders state that they considered it was not their business to acquaint themselves with the nature or result of the disturbances and left without making inquiries. Meanwhile, information had been given to the police by Ibrahim Khan, P. W. 3, by means of the rukka Ex. P. N. which he says he wrote while on

horseback before the main attack started, and sent to the police station Ajnala by the hand of Mahmud Ahmad, P. W. 11, who happened to be in the neighbourhood with his bicycle. This letter was received at Ajnala police station, which is about three miles from Fatehwal, by Hazara Singh, Muharrir, Head Constable, who has noted in the record 4.30 P. M. as the time of receipt. The rukka mentions that congressmen armed with sticks, chhavis and kirpans "fell upon the public and a good many men had been injured." There is no mention in this rukka of the attack in Teja Singh's baithak and death of Hiro and injuries to his brothers on the roof. This omission is explained by Ibrahim Khan by saying that he wrote the rukka before this attack. But having regard to the time of the receipt of the rukka at the police station and the indication from the evidence that the attack in the baithak was probably over by 4 P. M., it is urged on behalf of the appellants that the omission shows that Ibrahim Khan who is now among the witnesses of the attack in the baithak, is not a true witness of the injuries to Hiro and his brothers.

Chaudhri Shahab-ud-Din, Assistant Sub-Inspector, reached Fatehwal at 7 P. M. and at once commenced investigation. He deposes that he found Hiro's body lying on the roof of Teja Singh's baithak in a pool of blood, Rahim Bakhsh was also found lying injured on a charpoy; and the brothers Shafi, Fauju and Fazal were found lying in the courtyard of Teja Singh's baithak with one Karam Din, P. W. The presence of brickbats and clods of earth on the roof of the baithak and surrounding it, indicated that it had been the scene of a riot. Mohammad Shafi was unconscious and was immediately sent to Ajnala hospital where he died later without recovering consciousness in spite of an operation. The statements of the main prosecution witnesses, whose testimony has to be considered in this case, were recorded by the Assistant Sub-Inspector at Fatehwal the same night. It is not denied that as a result of these statements, the police must have been in possession at once of the names of all the present appellants as alleged rioters; and in these circumstances it is material to note here when the appellants and Bachan Singh were arrested. Joginder Singh was notified as an absconder and was not found until July 1938 when he was arrested at Patna on 26th July 1938. Sadhu Singh was arrested on 5th May 1938, Lachhman Singh Sufian

on 7th May 1938, Bachan Singh on 21st April 1938, Ganda Singh on 12th April 1938, Mohan Singh Bath on 7th April 1938, Harbans Singh Chhina on 22nd March 1938, and Shiv Dev Singh on 15th March. When the committal proceedings were started on 1st April 1938, an order was made by the committing Magistrate under S. 512, Criminal P. C., which notified all these persons as absconders except Harbans Singh Chhina and Shiv Dev Singh.

The medical evidence proves that Hiro received three injuries: (1) An incised wound on the top of the head under which the skull was clean cut. This injury, which is proved to have been inflicted from behind, caused his death. (2) A punctured wound on the outer side of the left thigh and (3) a lathi mark six inches long on the left side of the chest. Mohammad Shafi who died from compression of the brain, had seven contused injuries on the head, as well as other minor injuries. Rahim Bakhsh, Fauju and Fazal had numerous contusions and bruises. In all these five brothers received as many as 44 injuries between them, most of which must have been inflicted on or near the roof of Teja Singh's baithak. Six of the other prosecution witnesses also received minor injuries, but not necessarily in this area, for example, Karam Din says that he received his injury near a pond which was some little way away from the baithak. The injuries of the other witnesses are not in fact important for the consideration of this case. None of the appellants appeared to have been injured; nor is there any evidence to show whether any of the participants in this riot other than Hiro or the prosecution witnesses received any injuries.

The evidence in this case can conveniently be divided into three main categories: (1) The material evidence afforded by the testimony of Assistant Sub-Inspector Chaudhri Shahab Din of his inspection of Teja Singh's baithak and its surroundings on his arrival at 7 P. M. (2) The oral testimony of eye-witnesses which can be subdivided into four categories: (a) The testimony of eye-witnesses relating to events prior to the meeting of happenings during the meeting as well as of subsequent events culminating in the attack in Teja Singh's baithak. Of these the most important are Ibrahim Khan (P. W. 3) and Chaudhri Khurshaid Alam (P. W. 5). (b) The evidence of eye-witnesses who took refuge with Teja Singh in his baithak when the riot started. These

are what the learned Sessions Judge has described as jharokha witnesses since they witnessed the attack on the roof of Teja Singh's baithak from a jharokha or bay window of Teja Singh's house. These witnesses are Tej Singh himself (P. W. 6), Gopal Singh (P. W. 7), Raghbir Singh (P. W. 8), Mohammad Sharif (P. W. 17) and Ghulam Rasual (P. W. 18). (c) The testimony of the three surviving brothers of Hiro, deceased, who were pursued to, and attacked on the roof of the baithak. These witnesses are Fazal (P. W. 10), Rahim Bux (P. W. 12) and Fauju (P. W. 13). (d) The evidence of identification parades, given by witnesses relating to accused whom they did not know before. These witnesses are Gopal Singh (P. W. 7), Fazl (P. W. 10), Karim Bakhah (P. W. 12), Taj Din (P. W. 14) and Karam Din (P. W. 22). (3) Lastly, there is the evidence afforded by the subsequent conduct of individual accused such as the admitted fact of absconding of Jogindar Singh, appellant. (After examining certain evidence his Lordship proceeded further.) It is now necessary to refer to certain findings of the learned Additional Sessions Judge in regard to the happenings on the roof of Teja Singh's baithak, which have been attacked by counsel for the prosecution. On page 117 of the judgment the learned Judge observes as follows:

The fact that the prosecution witnesses as a body have chosen to state that when Hiro and his brothers took refuge on the roof of Teja Singh's baithak there was an exchange of missiles lasting for half to three quarters of an hour followed by the storming of the baithak by a crowd of 30-35 rioters raises serious difficulties regarding the value of the evidence of the identification of the individuals who are said to have invaded the roof.

According to the measurements given by the learned Sessions Judge who visited the scene of occurrence, the roof of the baithak in question measures 26 feet by 13 feet, that is roughly 36 square yards in area, though, according to the site plan which we have examined in this connexion, it would seem to be slightly larger. The learned Sessions Judge was of opinion that this roof was too small to permit the simultaneous entry of 30 to 35 active rioters; and he goes on to express surprise that, although many of the accused who were identified amongst the rioters at this place, were arrested within a day or two of the occurrence, not one of them bore any mark of injury. The absence of injuries on the persons of the alleged rioters arrested shortly after the occurrence is a point which, in a case of

this nature where the evidence is partisan, must operate as a ground for giving the benefit of doubt as to participation, where the evidence is uncertain. But it appears that the learned Sessions Judge has not properly appreciated the prosecution evidence when he doubts the reliability of these jharoka witnesses, merely because he thinks that the 23 persons in all alleged to have been identified by them as rioters, could not stand on the roof at the same time with Hiro and his brothers simultaneously and wield weapons.

The prosecution do not allege a fight on the roof of the baithak, in which 35 to 40 persons took part. Their case is that a unilateral attack on Hiro was made by pursuers who would come, not all in a bunch but more probably in a stream. There is no reason to reject the prosecution evidence that Hiro and his four brothers escaped on to the roof of the baithak pursued first by a comparatively small gang, which subsequently swelled to perhaps 200 to 250 rioters who swarmed round the baithak. It must be remembered that Hiro was a registered bad character who with his brothers (and possibly other persons) had come to the meeting bent on obstructionist tactics. These five brothers seem to have been strong men and were armed with dangs; and having escaped on to the roof, might be trusted to give a good account of themselves, unless taken by surprise or rushed. The roof of the baithak is some 9 feet from the ground; and to get on to the roof the rioters would have had either to swarm up the wall or burst open the door into the courtyard and climb up by means of a plank. In these circumstances Hiro and his brothers should certainly have been able to keep the rioters at bay for some time; and it was during this time no doubt (an exact estimate of which must inevitably be uncertain) that there was an interchange of missiles. From the fact that, unlike his brothers, Hiro had only three injuries, the most serious of which, a chhavi blow on the head, appears to have been dealt with from behind, it would seem as though Hiro must have been surprised and struck down by an attack from behind, by a single assailant rather than overcome by a rush. This leader may have been followed by others who would be gradually swarming on to the roof; and in the meanwhile Fauju escaped by an intervening wall to another portion of the house where he was followed by six or seven rioters and attacked. It is

not therefore necessary to suppose (as the learned Sessions Judge seems to have done) that at any one time there were 30 to 35 persons standing on the roof of the baithak wielding weapons simultaneously; nor do we see any difficulty in accepting the story that Fauju ran along the intervening wall and was beaten in another part of the house.

But, as the learned Judge assumes that there must have been a far smaller number of rioters than 30/35 on the roof, he appears to conclude that there would be no difficulty for the jharoka witnesses to identify the actual assailants of Hiro. Nevertheless, if we accept the prosecution evidence on the question of numbers as true, there is a real difficulty in accepting the attribution of particular acts to particular individuals in the general melee. Assuming, as appears to be the case, that Hiro was the first to be struck down by a surprise attack, it is certainly peculiar that while the jharoka witnesses and others agree in saying that it was Joginder Singh who "grappled" with Hiro while Achhar Singh struck him from behind, they are silent as to how Hiro got his contused injury which according to the medical evidence consisted of a lathi mark on the left side. As regards the punctured wound on the outer side of the left thigh, the learned Sessions Judge has given good reasons for rejecting the attribution to Harbans Singh Chhina appellant of responsibility for this wound, and there is no evidence at all to explain how Hiro sustained the lathi mark on his left side. These considerations lend point to the criticism which the learned Sessions Judge has himself made in another part of his judgment, viz., that some of these eye-witnesses in attributing definite parts to Joginder Singh or others have stated things which probably they did not see. It would appear therefore that while Teja Singh and his companions may have had a good view of the general course of events from the jharoka (window), and may very well have been able to distinguish in the general melee the persons whom like Joginder Singh they knew before, it is difficult to rely on their testimony in so far as it assigns particular acts like grappling to particular individuals.

From this conclusion it would follow that it is impossible to accept the decision of the learned Sessions Judge, in so far as he finds Joginder Singh guilty of participating in the actual murder of Hiro by grappling with him, and thus placing him on a different footing from the other rioters whom he

has convicted under Ss. 148 and 325, Penal Code, only. As regards the attack on Fauju elsewhere, the learned Sessions Judge doubts the reliability of the evidence of the jharoka witnesses on the ground that the story that this group of witnesses withdrew en masse and went upstairs to another part of the house is not a natural one in itself and does not ring true in the circumstances (p. 118 of the judgment).

The explanation given by Teja Singh himself for this withdrawal is that on seeing Fauju pursued and attacked in a different part by the rioters, they moved towards that part because Teja Singh's womenfolk were living on that side. It is an admitted fact that Teja Singh had two wives who in all probability occupied different portions of his house; and it is therefore easily intelligible that if Teja Singh thought that a portion of the house where one of his wives was living was threatened, he would move towards that portion for purposes of protection. At the same time it is not clear why Teja Singh and his companions instead of going into the actual rooms where the womenfolk would be in residence, went up on to the roof so as to get a clear view of the attack on Fauju. From this aspect, I would agree with the learned Sessions Judge that it would be safer not to rely on the evidence of the jharoka witnesses in so far as they attribute the attack on Fauju to particular individuals. The question here arises at what point the unlawful assembly came into existence. It would appear that following the conclusion of the meeting while the crowds were dispersing, the two hostile parties came to blows; and in the course of this free fight some persons may have received injuries. It is difficult to hold that there was any common object at that time, among the various persons who took part in this free fight. An unlawful assembly with a common object to beat Hiro and his brothers, was clearly formed when some of the Congress sympathisers concentrated their attack on Hiro and his brothers and pursued them from the field to Teja Singh's baithak. The learned trial Judge is right in holding that the common object of the rioters from this point was to give a severe beating to Hiro and his brothers; and any person whose identity has been satisfactorily established amongst the assailants of Hiro and his brothers from this point, must be held to be guilty of participating in the riot.

The learned Sessions Judge has convicted Shiv Dev Singh not because he was identi-

fied amongst the rioters at or near the baithak but because he caused an injury to Karam Din, P. W. 22, by a pond, someway from the village abadi, into which this accused is said to have pushed Karam Din. But Karam Din does not now identify his assailant and since there is no evidence to connect him with the unlawful assembly, it follows that the conviction of Shiv Dev Singh cannot be sustained. I would, therefore, accept his appeal and acquit him. Summarizing the essential prosecution evidence bearing on the question of the participation of the other appellants, there is first the material evidence which fixes the roof of Teja Singh's baithak and the surrounding area as the main scene of the riot. Since I am satisfied that Teja Singh and his companions in particular Gopal Singh (P. W. 7) and Raghbir Singh (P. W. 8) did in fact take shelter in Teja Singh's house at the time of the riot it follows that they were well placed to see the events that occurred on or near the baithak and would, therefore, be in a position to identify among the rioters at least such persons as they knew before. It is true that for reasons given, their evidence must be received with caution and it is necessary, therefore, to test their evidence by such considerations as whether they have any motive to implicate falsely the accused against whom they are testifying, and to weigh this evidence against the accused's defence, considered in the light of their subsequent conduct. (His Lordship then considered the cases of the individual accused and proceeded.) It remains to consider the offence committed by Jogindar Singh, Sadhu Singh and Bachan Singh who have been held guilty of participation in the riot. The learned Additional Sessions Judge, holding that the common object of the rioters was only to give a severe beating to Hiro and his brothers, convicted the participants under Ss. 148 and 325, I. P. C., read with S. 149, except Jogindar Singh whom he found guilty of an individual act of participation in the murder of Hiro, and convicted under S. 302, I. P. C. I have already given reasons for holding that it is not possible to maintain the finding of the learned trial Judge in respect of the particular act assigned to Jogindar Singh and that there is no reason to differentiate between the case of Jogindar Singh and the other rioters. It may be that on a strict construction of S. 149, I. P. C., this alteration in finding should make little difference. It has been established in this case that

Hiro was pursued on to the roof of Teja Singh's house and murdered thereon by a blow from a chhavi. Any person who participated in the proved common object of the rioters to beat Hiro must have known that some of the rioters were armed with dangerous weapons like chhavis and that the offence of murder was in the circumstances one which was likely to be committed in prosecution of the common object. If so, every person who is held proved to be amongst the rioters at Teja Singh's baithak would constructively be guilty of murder. In this case, however, the Crown has accepted the decision of the learned trial Judge in respect of convicts other than Jogindar Singh whose case, in my view, is indistinguishable from the other appellants. It is true that the learned Public Prosecutor in the course of his arguments, at the end of a week's hearing of this appeal, mentioned that though he had no instructions to press the point, the Court has itself jurisdiction to alter the conviction to a more serious offence. No doubt the Court has the power to do so; but this is not a case in which the Court would be disposed to take such action *suo motu*. Enough has been said already to show that much of the evidence produced in this case is unreliable. As the learned trial Judge has pointed out, there is no clue to the identity of the assailants of the other victim Mohammad Sharif, who must have received his injuries about the same time and place as Hiro; and it is impossible on this evidence to attribute even to Jogindar Singh any direct connexion with the assault on Hiro. Certainly to none of these three accused is the use of a lethal weapon attributed even by the prosecution witnesses. In the circumstances, this Court cannot *suo motu* take a more serious view of the constructive liability of these accused than has been taken by the learned trial Judge.

In the circumstances I would accept the decision of the learned trial Judge to apply to the cases of these three accused Ss. 148 and 325 read with S. 149, I. P. C. To this extent the appeal of Jogindar Singh is accepted and his conviction is altered to one under S. 148 and S. 325, I. P. C., read with S. 149, I. P. C. The conviction of Sadhu Singh is maintained under these Sections and the appeal of the Crown against the acquittal of Bachan Singh is accepted and he is convicted under Ss. 148 and 325 read with S. 149, I. P. C.

As regards sentence, it is necessary to

take into account the fact that Jogindar Singh has been in jail since July 1938 and I would accordingly reduce his sentence to one year's rigorous imprisonment under each Section, the sentences to run concurrently. It is true that the other two convicts have been on bail during the pendency of this appeal; but there is nothing to show that they took a prominent part in the riot. I would therefore reduce the sentence of Sadhu Singh to one year's rigorous imprisonment under each Section, the sentences to run concurrently. Bachan Singh, on conviction for the same offences, i. e. Ss. 148 and 325, read with S. 149, I. P. C., is also sentenced to one year's rigorous imprisonment under each Section, the sentences to run concurrently. The appeals of the remaining convicts are accepted and they are hereby acquitted.

Dalip Singh J.—Des Raj, ex-foot constable police, was produced as a defence witness in this case. The object of producing him was to prove generally the falsity of the prosecution story that the men concerned in the murder of Hiro were Jogindar Singh and Achhar Singh. It is proved by the statement of Des Raj as well as *aliunde* that Des Raj was deputed to shadow Achhar Singh and on the date in question he was shadowing Achhar Singh. Des Raj came into Court and deposed that he had duly followed Achhar Singh as it was his duty to do and had submitted a report noted in his daily diary of the movements of Achhar Singh on 13th March, the date in question. He stated that this diary correctly represented what had in fact happened and therefore the story of the prosecution that Achhar Singh had taken part in the procession that went to Teja Singh's house previous to the meeting was incorrect. Further, that it was false that Achhar Singh had taken part in any riot because, according to Des Raj, Achhar Singh had not left the pandal to go towards the village and had left the pandal in the company of the Congress leaders who left either at the termination of the riot or towards its close about 3.45 or 4 P.M. Naturally, the defence wanted to produce this diary of Des Raj in order to corroborate his deposition in Court to this effect.

At a very early stage of the proceedings before the committing Magistrate, the Public Prosecutor then in charge of the case, stated that the diary existed and he intended to claim privilege for the same. Subsequently, at the trial the defence again

asked for this diary and the first report was that the diary could not be traced but that efforts were being made to trace it and that privilege was to be claimed for this document. Subsequently, a list of the documents required by the defence to be produced was put in and privilege was claimed for this document. It is to be noted that it was not denied that it existed. Before us in appeal for the first time it was contended that as a matter of fact there was no such document at all, but, in view of the previous admission made by the Public Prosecutor in charge of the case and by the letter from the Inspector-General of Police accompanying the list of documents for which privilege was claimed, it is clear to me that the inference must be that this document did exist though privilege was claimed for it under S. 123, Evidence Act.

As to the propriety of the claim made, I wish to make a few observations. The English law on the question of privilege has been admirably stated by their Lordships of the Privy Council in A I R 1931 P C 254.¹ Under the English law their Lordships point out that it is for the Court to determine the question whether a particular document is privileged on the ground that it concerns itself with affairs of State. Their Lordships point out that in certain cases the Court would be willing to take the word of a responsible Minister from whose department the document was to be produced that the said document was privileged. In other cases, their Lordships point out that they would demand an affidavit from the Minister. Not, as their Lordships were careful to point out, that the Minister's word on the point would not be sufficient without the affidavit but to be sure that the Minister's attention had duly been directed to the subject and after due consideration he had come to the conclusion that the document should be excluded from evidence as a privileged document. Their Lordships point out that even in such cases some indication should be given to the Court of the nature of the document and why it is necessary to claim privilege for it. The Indian law is of course different and under S. 123, Evidence Act, the matter is left to the discretion of the head of the department concerned. There is however nothing to show that in this particular case the

attention of the Inspector-General was really directed to the document as to whether privilege should be claimed for it or not having regard to its contents. Indeed from what was endeavoured to be argued in the appeal it would seem that the Inspector-General never had the document before him at all. While it is entirely for the head of the department to claim privilege for a document and the Court is bound to allow the claim if made, it does not follow from this that the Court is not entitled according to the circumstances of each particular case to draw an inference adverse to the party claiming the privilege.

In this connexion the learned counsel for the Crown drew our attention to 23 I C 25,² a Full Bench of the Calcutta High Court. The privilege there claimed however was under S. 125 and it was further pointed out that it was not a party to the case that was claiming privilege but the Crown which was not a party to the case and therefore that no adverse inference could or should be drawn against the party who had nothing to do with the question of the claim of privilege. That case therefore does not help at all in deciding this question in the present case where privilege is claimed under a different Section and where the considerations influencing the matter are entirely different to the considerations arising under S. 125. It is obvious that S. 125 is intended to cover the source of information received by a certain department, and it is equally obvious that to disclose the names or to disclose the machinery by which certain information is acquired by Government might be highly prejudicial to the State at large. Under S. 123, it is only when the document deals with affairs of State that privilege can be rightfully claimed under the Section. I fail to see however how the diary of a foot constable who was shadowing the movements of a suspect could possibly become an affair of the State within the accepted meaning of the words. No case arose here of disclosing the source of information. The fact that the man was being shadowed is admitted and proved *aliunde* without any question of privilege arising and even if the diary stated certain names which the Government might not wish to disclose it was perfectly easy to claim privilege for those names, secure the co-operation of the Court in withholding

1. Henry Greer Robinson v. State of South Australia, (1931) 18 AIR P C 254=135 I C 625= (1931) A C 704=100 L J P C 183=145 L T 408=75 S J 458=47 T L R 454 (P C).

2. Weston v. Peary Mohan Das, (1914) 1 A I R Cal 396=23 I C 25=18 C W N 185=40 Cal 898 (F B).

those names and yet revealing the diary to the extent to which it corroborated or contradicted the statement of Des Raj as to the movements of Achhar Singh on the date in question.

In these circumstances, it seems to me that it was distinctly open to the Court to draw the inference that when Des Raj deposed that he had stated, what he stated in Court, in his diary previously recorded at or about the time of the occurrence, that that statement was true and the fact that the Government who had the means of contradicting him by a reference to his previous statement did not use that statement to contradict him showed that there was nothing in that previous statement of his which contradicted his present statement. To that extent, it seems to me it was open to the Court to draw an inference adverse to the Crown in this respect. I would therefore like to draw the attention of the Inspector-General of Police and other heads of departments to the matter should it arise again that the law requires that before privilege is claimed the head of the department should have the document in front of him, should give his attention to the matter, should weigh carefully whether the privilege should or should not be claimed and unless he is satisfied that affairs of State are concerned he should not claim privilege for a document or withhold from a Court the means of judging whether a particular witness's statement is true or not true. It is true that the head of a department has an absolute privilege on the point, it is for him to decide whether the matter is one in which privilege should be claimed or should not be claimed, but as pointed out by their Lordships of the Privy Council, it would be good to follow the practice of the English law, namely that some indication should be given to the Court as to why privilege is claimed or what affairs of State are involved in the matter. Without such indication, there is always a danger that the Court may draw an adverse inference from the non-production of the document.

I do not say that the Court should draw it in all cases. I can well imagine cases where it is obvious that the document contains affairs of State such as negotiations carried on with foreign powers or matters dealt with by high officials in the course of their duties which obviously might concern affairs of State. But the question is what are the circumstances of each case and I do not consider that the Court is debarred

from drawing an adverse inference from the non-production of a document in all cases whatsoever, and I would again point out that in the circumstances of this particular case I cannot imagine, nor has the learned counsel for the Crown been able to suggest what affairs of State could possibly be involved in the diary of the ex-foot constable. For the rest I agree with the conclusions of my learned brother and have nothing to add.

D.S./R.K.

Order accordingly.

A. I. R. 1940 Lahore 225

DIN MUHAMMAD J.

Khushi Ram — Plaintiff — Appellant.
v.

Munshi Lal and another — Defendants
— Respondents.

Second Appeal No. 1420 of 1939, Decided on 26th January 1940, from decree of Dist. Judge, Gurgaon at Hissar, D/- 1st June 1939.

(a) Limitation Act (1908), Arts. 113 and 144 — Specific performance — Art. 113 and not Art. 144 applies.

A suit for specific performance of a contract of lease is governed by Art. 113 and not by Art. 144.
[P 226 C 1]

(b) Lease — Contract of — No date of delivery of possession fixed — Contract cannot be specifically enforced.

Contracts of lease in which no date for delivery of possession is fixed cannot be specifically enforced:
A I R 1921 P C 71, Rel. on. [P 226 C 2]

(c) Civil P. C. (1908), S. 100 — Finding that party was never in possession is one of fact.

The finding that a party never came into possession of the suit property being a finding of fact cannot be disturbed on second appeal. [P 226 C 2]

(d) Civil P. C. (1908), S. 153 and O. 6, R. 17 — Suit for specific performance of contract — Amendment as suit for possession cannot be allowed.

Not only that permission to amend plaint cannot be allowed in second appeal, no power has been given to Courts to enable one distinct cause of action to be substituted for another nor can the subject-matter of a suit be changed by an amendment. Therefore a suit for specific performance of a contract cannot be allowed to be amended as a suit for possession : *A I R 1922 P C 249, Rel. on.*
[P 226 C 2]

N. C. Pandit — *for Appellant.*

Achhru Ram and Inder Dev Dua, and Sardar Partap Singh — *for Respondents 1, and 2 respectively.*

Judgment. — On 26th November 1932, the appellant Khushi Ram took on lease a godown and four shops from Rai Bahadur Makhan Lal, the predecessor-in-interest of Munshi Lal. On 20th January 1938 Khushi

Ram instituted suit for a perpetual injunction prohibiting Munshi Lal from interfering with his possession of the godown and for specific performance of the contract relating to the shops. One Girdhari Lal was also impleaded as a defendant in whose favour it was alleged that the property in suit had been leased out in 1935. The appellant alleged that the property in suit was on the date of the execution of the lease in his favour in possession of some other tenants and that it was vacated on 8th April 1934, when he took possession of the godown and that later in 1935, when the property was demised to Girdhari Lal, the key of the godown too was taken away from him. His suit was resisted by Munshi Lal on various grounds. The Subordinate Judge came to the conclusion that the suit was barred by time, that the plaintiff had never come into possession of the godown and that even otherwise as there was no express mention in the deed executed in his favour as to when possession would be delivered to the plaintiff, the agreement to grant the lease could not be specifically enforced. On these findings, he dismissed the suit. On appeal, the District Judge besides agreeing with the trial Court on the points stated above upheld its decision on an additional ground that the plaintiff was disentitled to any relief under the Specific Relief Act on account of laches.

Counsel for the appellant contends that the decision of the Courts below on all the points found against the appellant is legally erroneous, but I do not agree. On the question of limitation counsel has urged that the case was governed by Art. 144, Limitation Act, and not Art. 113, but this is obviously wrong. To the suit so far as it relates to the specific performance of the contract in question, no Article other than Art. 113 applies, which expressly provides for such suits. Under that Article, the terminus a quo is the date fixed for the performance of the contract and if no such date is fixed, the date when the plaintiff has notice that performance is refused. The plaintiff is on the horns of a dilemma. If he contends that a specific date was fixed for the performance of the contract in the deed and that that date was the date when the property demised was vacated by the previous tenants, his suit is clearly time-barred, inasmuch as the plaintiff had himself stated in the plaint that this event occurred on 8th April 1934. If on the other hand, he urges that no date was fixed and

that he had no notice that performance was ever refused, his suit fails on the ground that those contracts of lease in which no date for delivery of possession is fixed cannot be specifically enforced. Reference in this connexion may be made to a judgment of their Lordships of the Privy Council reported in A I R 1921 P C 71.¹ As remarked in that judgment it is elementary that specific performance of an agreement to grant a lease cannot be decreed unless that agreement either expressly or impliedly to be granted fixes the date from which the term is to run.

Similarly, on the question of laches the appellant is bound to fail. As stated above, the agreement in his favour was executed on 26th November 1932, and the suit was instituted in 1938 in spite of the fact that the previous tenants had vacated the property in suit in 1934 and that to his knowledge the property had in spite of his agreement been demised to another person, Girdhari Lal. In these circumstances, he cannot but be held to be guilty of gross negligence. Commenting on a similar case which arose in Burma, their Lordships of the Privy Council remarked as follows :

The rights of equity which prevail in British Burma are rights which are given to people who are vigilant and not to those who sleep, and unless there can be clearly established some reason which threw upon the defendant the entire blame for the delay that had occurred, or unless, indeed, it can be shown that the real right of action had only accrued a short time before the proceedings were instituted, such a lapse of time would be fatal to any action for specific performance of a contract.

These remarks of their Lordships are quite pertinent to the appellant's case. So far as the appellant's allegation in relation to the godown is concerned, both the Courts below have concurrently found that he never came into possession of the godown, and this being a finding of fact cannot be disturbed on second appeal. Confronted with this situation counsel for the appellant asked for permission to amend his plaint at this stage so as to convert his suit into a suit for possession. Apart from the fact that this permission cannot be allowed at such a late stage, no power has been given to Courts to enable one distinct cause of action to be substituted for another nor can the subject-matter of a suit be changed by an amendment: A I R 1922 P C 249.² The appellant may, if so advised, institute

1. *Giribala Dasi v. Kalidas Bhanja*, (1921) 8 A I R P C 71 = 57 I C 626 (P C).

2. *Ma Shwe Mya v. Mg. Mo Hnaung*, (1922) 9 A I R P C 249 = 63 I C 914 = 48 I A 214 = 48 Cal 832 (P C).

a fresh suit for possession but he cannot be allowed to amend the present plaint in the manner desired by him.

I accordingly dismiss this appeal but in the circumstances of this case leave the parties to bear their own costs before me.

G.N./R.K.

Appeal dismissed.

*** A. I. R. 1940 Lahore 227**

SALE J.

Said Ahmad — Appellant.

v.

North Western Railway, Lahore, through Superintendent, Mechanical Workshops, Moghalpura — Respondent.

First Appeal No. 149 of 1939, Decided on 8th December 1939, from order of Senior Sub-Judge, and Commissioner under Workmen's Compensation Act, Lahore, D/- 27th March 1939.

(a) Workmen's Compensation Act (1923), S. 30—"Substantial question of law."

The question whether there is sufficient cause for extension of limitation to enable the application for compensation to be heard on the merits is substantial question of law. [P 227 C 2]

* (b) Workmen's Compensation Act (1923), S. 10 — Workman after accident re-employed by same employer on same pay — This is sufficient cause for extending limitation.

Where a workman is re-employed after the accident by the same employers in the same workshop at the same rate of wages, this fact is in itself sufficient cause for not making an application under the Workmen's Compensation Act within the period of limitation: *A I R 1934 Bom 28 and A I R 1938 Cal 348, Rel. on.* [P 228 C 1]

M. A. Majid — for Appellant.

M. Sleem, Advocate-General —

for Respondent.

Judgment. — This is an appeal under S. 30, Workmen's Compensation Act, from an order by the Senior Subordinate Judge, Lahore, rejecting as time-barred an application by Said Ahmad, an employee of the North Western Railway, for compensation on account of an accident. The accident occurred on 6th October 1936, and the claim for compensation was made on 31st August 1938. Under S. 10 of the Act, the period of limitation is one year from the occurrence of the accident. But there is a proviso, that the Commissioner may entertain a claim for compensation if he is satisfied that the failure to give notice or to prefer the claim within the period of limitation is due to sufficient cause. The applicant in this case was represented by counsel before the Senior Subordinate Judge and the record shows the applicant endeavoured in the lower Court to bring the claim within limitation on

the ground that he had made a claim within six months from the date of the accident. The Senior Subordinate Judge granted the applicant time to produce evidence to prove this fact and when the applicant failed to produce or lead evidence on due date, the Court declined to grant any further adjournment under O. 17, R. 1, Civil P. C., and, in the absence of evidence of sufficient cause, proceeded to judgment, holding that the claim was time-barred.

In appeal, counsel for the appellant frankly concedes no claim was made within six months of the accident and that the application is barred, so far as S. 10 of the Act is concerned but pleads that the application should have been entertained on the merits because there is in fact "sufficient cause" within the meaning of the proviso to S. 10. He explains that the counsel who conducted the case of the applicant before the lower Court appears to have been under a misapprehension of the real nature of his client's case and of the law on the subject, and urges that the real ground on which the case should have been presented before the lower Court is that from the date of the accident the applicant had been continuously in the service of the North Western Railway, that this is in fact itself "sufficient cause" for extension of time and that the applicant was not in a position to make any proper claim until the Board assembled by the North Western Railway had decided his case which it did, admittedly, only on 14th March 1938 that is less than six months before the claim was preferred. It is thus contended not only that there is sufficient cause for extension of time, but that even if any question of limitation arises the terminus a quo would be the report of the Board on 14th March 1938.

The learned Advocate-General on behalf of the railway raised a preliminary objection on two grounds, (1) that no appeal lay under S. 30 of the Act because no substantial question of law was involved and (2) that the amount in dispute in appeal is less than Rs. 300. I consider however that on the case as represented now in appeal a substantial question of law is involved viz. whether there is sufficient cause for extension of limitation to enable the application to be heard on the merits. As regards the amount in dispute, the facts are that the railway has offered Rs. 44-12-0 (in addition to a sum of Rs. 13 already paid). The petitioner urges in his claim that this amount is insufficient, and counsel for the

appellant contends before me that it is possible inasmuch as his client has been partially disabled by the accident that he could claim under Sch. 1 an amount exceeding Rs. 300. Inasmuch as the lower Court has, it is said, not allowed counsel to inspect this report, he is not yet in a position to say exactly the amount which it is considered might be due to him. In these circumstances, I reject the preliminary objections and hold that the appeal can be entertained. As regards the appeal itself, counsel for the appellant does not press ground 6 of his appeal; his prayer is that the case should be remanded to the lower Court for decision on the merits on the ground that there is, on the face of the record, sufficient cause for an extension of limitation. Admittedly, the applicant has been since the date of the accident (and still is) in the service of the North Western Railway on the same rate of pay on which he was employed before the accident. Counsel has drawn my attention to two rulings, one a Division Bench of the Bombay High Court, cited in A I R 1934 Bom 28¹ and the other a Division Bench of the Calcutta High Court cited in A I R 1938 Cal 348,² in which it has been held that where a workman is re-employed after the accident by the same employers in the same workshop at the same rate of wages, this fact is in itself sufficient cause for not making an application under the Workmen's Compensation Act within the period of limitation. In A I R 1938 Cal 348² their Lordships held that in these circumstances an application made even ten years after the accident was within time. It was pointed out that the Limitation Act does not apply to proceedings under the Workmen's Compensation Act. It appears to me that once the workman had, for sufficient cause, not brought his proceedings within six months (according to the law as amended the limitation is now one year) there is nothing in the Workmen's Compensation Act, the Limitation Act or in any other statute, to prevent him bringing his proceedings when he did.

In this case the applicant has been throughout in the service of the railway employed on the same pay by the same employer and on the two authorities cited I hold that this fact is a sufficient cause for extending limitation. There is considerable force in the point made by counsel for the

appellant that inasmuch as the railway was apparently from October 1936 until 14th March 1938 considering the amount of compensation that should be paid it was impossible for the applicant to make his application until the Medical Board reported on his case on 14th March 1938. In these circumstances I accept the appeal, set aside the decision of the Commissioner that the application by Said Ahmad is time-barred and remand the case to the trial Court with a direction that the application should be decided on its merits. In view of the admitted fact that the ground on which this appeal has been accepted was not presented before the trial Court, I leave the parties to bear their own costs of this appeal.

D.S./R.K.

*Appeal allowed.***A. I. R. 1940 Lahore 228**

DIN MUHAMMAD J.

*Mukat Ram and another —**Defendants — Appellants.*

v.

Sita Ram — Plaintiff — Respondent.

Second Appeal No. 947 of 1939, Decided on 6th December 1939, from decree of Senior Sub-Judge, Rohtak, D/- 12th May 1939.

(a) **Debtor and Creditor—Suit by creditor to recover his debt — Erasure found in bahi belonging to creditor supporting debtor's plea — Onus is on creditor to show how erasure came into existence.**

If once it is found in a suit by creditor to recover his debt that there was an erasure in the bahi belonging to the creditor himself and that erasure supported the plea of the debtor, the onus is evidently cast upon the creditor to show how the erasure came into existence. [P 229 C 1]

(b) **Negotiable Instruments Act (1881), S. 87 — Suit by creditor to recover debt — Alteration found to have been made by creditor in entry relating to repayment — Suit should not be dismissed in toto.**

The principle that a document in which alterations have been introduced is void and no decree can be based on a void document should not be acted upon in a case where the alteration which has been found to have been made by the creditor is not in the entry on the basis of which his suit has been instituted but in an entry relating to repayment. [P 230 C 1]

Sham Lal and Qabul Chand Mital —
for Appellants.

Nihal Singh — *for Respondent.*

Judgment. — The plaintiff Sita Ram instituted a suit against Mukat Ram and his son Toka Ram for recovery of Rs. 930 of which Rs. 824-8-0 represented the principal amount and Rs. 105-8-0 were charged

1. Hogan v. Gafur Ramzan, (1934) 21 A I R Bom 28=1934 Cr C 115=149 I C 247=58 Bom 128=35 Bom L R 1142.

2. Salamat v. Agent, E. I. Ry. Co., (1938) 25 AIR Cal 348=178 I C 810 = I L R (1938) 2 Cal 52=42 O W N 341.

as interest. It was alleged that on 15th September 1935 a loan of Rs. 1200 was raised by the defendants from the plaintiff and that Rs. 460-8-0 only were re-paid in that account. This sum was made up of the following four items:

- (a) Rs. 145-0-0
- (b) Rs. 60-8-8
- (c) Rs. 5-4-9 and
- (d) Rs. 250-0-0

Rs. 460-8-0

The defendants denied the claim in toto and pleaded the repayment of the entire sum advanced to them. Besides the sum of Rs. 250 admitted by the plaintiff, they contended that another sum of Rs. 250 too had been repaid and instead of Rs. 145 admitted by the plaintiff to have been repaid to him on 29th February 1936, the defendants contended that Rs. 745 had been repaid. The Court below did not rely on the evidence adduced by the defendants and made a decree for Rs. 824-8-0 in the plaintiff's favour disallowing him interest and costs altogether as he had not complied with the provisions of the Regulation of Accounts Act. It may be observed that the Court failed to notice that the amount decreed by it contained Rs. 85 by way of interest.

The Senior Subordinate Judge on appeal came to the conclusion that there was an erasure in the entry relating to the repayment of Rs. 145 and that, as stated by Lala Raghunath Sahai Jain, Handwriting Expert, Karnal, the digit "7" had been converted into the digit "1", but he did not attach any importance to this circumstance on the ground that, to use his own words, there was nothing improbable in the suggestion that the defendants might have found access to the documents while in Court and might have altered the condition of the document so as to strengthen their plea.

He accordingly affirmed the decision of the Court below. He, too, failed to consider that on the finding as recorded by the trial Court, Rs. 85 at least could not be allowed to the plaintiff. I am of opinion that the Senior Subordinate Judge has approached the case from a wrong angle of vision. If once it was found that there was an erasure in the bahi belonging to the plaintiff himself and that that erasure supported the plea of the defendants, the onus was evidently cast upon the plaintiff to show how the erasure came into existence and its effect could not have been lost by the mere probability that the defendants could have

tampered with the entry when the document was lying in Court. The document when lying in Court was in the custody of the Court and the Senior Subordinate Judge was really casting a slur on himself as well as on his own ministerial establishment in offering this explanation. It is evident that the plaintiff himself had brought it to the notice of the Court on 18th January 1939 that there was an erasure in the said entry and that it further appeared that an attempt had been made to tamper with it. Seeing that the document was produced by the plaintiff for the first time on 11th November 1938, and that 18th January was the first date fixed for evidence after 11th November, one is inclined to believe that it was the guilty conscience of the plaintiff himself that had impelled him to put in that application by way of what is known as pesh-bandi, otherwise it is inexplicable how he at such an early stage came to know of the alleged erasure and the alleged attempt to tamper with the entry in question.

The Senior Subordinate Judge has relied on a previous statement of the defendant Mukat Ram made before the Tahsildar in another case in support of the fact that the defendants knew that only Rs. 145 had been entered in the bahi and that that entry was correct. He has however failed to appreciate that even in that statement the defendant Mukat Ram had insisted that the entry relating to the repayment of Rs. 145 was wrong and that they had repaid Rs. 700. It is further clear on the record that about two months prior to the date when this statement was made, the defendants had sent a reply to the notice served upon them by the plaintiff stating therein that they had repaid Rs. 700 plus interest besides some other items with which they claimed to have discharged the entire liability. It is significant that at the time when they sent the reply, five months' interest only was due amounting to Rs. 45, and this fits in with the plea taken by the defendants that the repayment entry was originally Rs. 745 but that the digit "7" had been subsequently altered into digit "1". I am satisfied therefore that the figures in the entry relating to the alleged repayment of Rs. 145 only originally stood as "745" and that consequently the defendants are entitled to the benefit of Rs. 600 in addition to the sums already proved to have been repaid by them which can only be credited to the principal amount. The result

is that the decree granted by the Courts below will be reduced to Rs. 139-8-0.

I may remark in this connexion that counsel for the appellants insisted that the suit should be dismissed in toto inasmuch as a document in which alterations have been introduced is void and no decree can be based on a void document. Reliance was placed on A I R 1929 Cal 789¹ and 107 I C 475.² The principle enunciated in these judgments is no doubt sound and is contained in S. 87, Negotiable Instruments Act, but I am not prepared to act upon it in this case inasmuch as the alteration which has been found to have been made by the plaintiff is not in the entry on the basis of which this suit has been instituted but in an entry relating to repayment. I accordingly allow the appeal to this extent, that I reduce the decretal amount to Rs. 139-8-0. The plaintiff will get his costs on this amount as well as the costs incurred by him in proving the execution of the document which was falsely denied by the defendants. As against this, the defendants will be allowed costs in all the three Courts on Rs. 790-8-0 in relation to which the plaintiff's suit has been dismissed.

D.S./R.K. *Appeal partly allowed.*

1. Haran Chandra v. Kishori Lal, (1929) 16 AIR Cal 789=50 O L J 173.

2. Diljan v. Makhul Khan, (1928) 107 I C 475.

* A. I. R. 1940 Lahore 230

DALIP SINGH AND SALE JJ.

Qazi Abdul Ghani — Defendant —
Appellant.

v.

Lala Lal Chand — Plaintiff —
Respondent.

First Appeal No. 343 of 1938, Decided on 30th January 1940, from decree of Sub-Judge, First Class, Lahore, D/- 17th June 1938.

* (a) Civil P. C. (1908), S. 47—Mortgagee decree-holder in execution of his decree bringing property to sale and purchasing it himself—Suit by him for possession against person claiming under judgment-debtor is not between parties to suit relating to execution and is not barred by S. 47.

The mortgagee decree-holder does not have a right to possession of the property ordinarily speaking and therefore an application for possession of the property by the auction-purchaser even though he happens to be the decree-holder himself is not in the same capacity and the auction-purchaser must therefore remain the decree-holder. This being so such application must be taken to be made by the right accruing to him for possession by virtue of that sale. Therefore if a party claiming under the judgment-debtor resists the auction-purchaser, the

question neither relates to the execution, discharge or satisfaction of the decree, nor is it between the parties to the suit in the sense that the parties arrayed against each other are representatives in interest of the decree-holder and judgment-debtor or vice versa respectively in the original suit. Therefore it would follow that a suit by the auction-purchaser for possession of the property is not barred by reason of the provisions of S. 47: *A I R 1937 All 742, Rel. on.* [P 232 C 2; P 233 C 1]

(b) Civil P. C. (1908), S. 65 — Right of auction-purchaser to possession accrues from date of sale—Application by auction-purchaser for possession resisted by person claiming under judgment-debtor — Latter can be deemed to have notice of auction-purchaser's right of possession—Auction-purchaser is entitled to mesne profits from date of sale.

The title to the property after the sale is made absolute vests in the auction-purchaser from the date of the sale according to S. 65 and it is wrong to say that the right to possession only accrues from the date of the sale certificate. [P 233 C 1]

Where the auction-purchaser had applied for possession and is resisted by person claiming under judgment-debtor the latter can be said to have had notice of the claim of the auction-purchaser to possession. It is not necessary that a separate notice should be given that if he did not give up possession, he would be liable for mesne profits. The auction-purchaser is thus entitled to mesne profits from the date of the sale. [P 233 C 1]

Khalifa Shuja-ud-Din and Mohammad Nazir — *for Appellant.*

J. N. Aggarwal, Asa Ram Aggarwal and Daulat Ram — *for Respondent.*

Dalip Singh J. — On 14th February 1923, Zulfikar Ali and Nathu mortgaged a house 'A' with possession in favour of Sahibzada Saadat Ali Khan. On 19th February 1923, Saadat Ali Khan transferred his rights to Lal Chand Khosla, the present plaintiff-respondent. On 16th May 1923, Zulfikar Ali and Nathu mortgaged properties 'B' and 'C' to Lal Chand Khosla together with the equity of redemption of house 'A.' On 11th September 1923, a third mortgage was executed by Zulfikar Ali and Nathu in favour of Lal Chand Khosla which included the old property mortgaged in the previous two mortgages and the new construction erected on 'C' and all that subsequently might be built on property 'C.' On 20th October 1923, Zulfikar Ali and Nathu are alleged to have sold orally property 'C,' both site and building, to Abdul Ghani, the present defendant appellant. Disputes arose between Zulfikar Ali and Nathu and Abdul Ghani which were referred to arbitration. The reference at p. 81 of the printed paper-book shows that while Zulfikar Ali and Nathu contended that certain moneys paid to them by Abdul Ghani were in lieu of a parter-

ship debt incurred, Abdul Ghani's contention was that the moneys had been paid by him in pursuance of the sale of property 'C' to him by Zulfikar Ali and Nathu. An award followed the reference to arbitration on 26th March 1925, (see p. 77 of the printed paper-book) and in it the contentions of Abdul Ghani were upheld and he was declared to be the owner by sale together with certain conditions in case of dis-possession of Abdul Ghani which do not now concern us. A decree followed the award printed at p. 82 of the paper-book on 18th November 1925. An appeal from this decree was dismissed on 16th May 1929: see pp. 92 to 95 of the printed paper-book.

There arose in the meantime a dispute between Zulfikar Ali and Nathu on one side and Lal Chand Khosla on the other which was also referred to arbitration on 28th March 1925. The award on this dispute is at page 114 and dated 30th March 1925. Zulfikar Ali put in an application to file the award and a decree was passed on the award on 31st March 1925: see p. 117. On 16th May 1925, Lal Chand Khosla applied for execution of this decree and asked for ejectment of Abdul Ghani as a tenant of Zulfikar Ali and Nathu. Abdul Ghani refused to give up possession pleading his title under the award of 26th March 1925, to which reference has already been made. On 29th January 1929, Abdul Ghani brought a suit against Lal Chand Khosla to have it declared that he was the owner of house 'C' and that he was not bound by the decree passed in favour of Lal Chand Khosla already referred to. The suit was dismissed on 26th January 1933, and the appeal was dismissed on 21st June 1935: see p. 96. The trial Court appears to have dismissed the suit on the ground that no sale by Zulfikar Ali and Nathu in favour of Abdul Ghani was proved by Abdul Ghani on the date alleged by him, namely on or about 20th October 1923, that the decision of the arbitrators did not bind Lal Chand Khosla who was not a party to that decision, and therefore the suit failed. In appeal a Division Bench of this Court, to which my learned brother was a party, appear to have approved of the reasoning of the trial Court that title was not proved to have passed to Abdul Ghani on the date alleged by him, that up to that date and up to the date of the award there was only an agreement to sell and not a sale; but the Division Bench proceeded to decide the case on the ground that apart from this question,

the ordinary rule of the mortgagee being bound to implead subsequent transferees of the mortgaged property in a suit for sale of the mortgaged property did not apply and therefore the suit of Abdul Ghani had been rightly dismissed. In the meantime Lal Chand Khosla brought the property mortgaged, for which he had a decree, to sale and purchased it himself. Lal Chand Khosla then brought the present suit for possession against Abdul Ghani. The suit was resisted by Abdul Ghani on various grounds, which do not now concern us; but the trial Court decreed the suit in favour of Lal Chand Khosla. Lal Chand Khosla had also applied for mesne profits but this relief was refused by the trial Court. Hence Abdul Ghani has lodged the present appeal against the decree giving possession of the property to Lal Chand Khosla and Lal Chand Khosla has filed a cross-appeal in respect to the mesne profits for three years disallowed by the trial Court.

On appeal the learned counsel for Abdul Ghani have contended only two points: firstly, that Abdul Ghani has acquired adverse possession of the property as against Lal Chand Khosla. This point was also agitated in the trial Court which held on a variety of grounds that adverse possession was not proved. It is unnecessary to enter into all the grounds because Abdul Ghani in his own application in November 1925 admitted that Zulfikar Ali and Nathu were the owners of the property. That being so, on that date Abdul Ghani could not have been asserting possession as of right as an owner against the world. It follows immediately therefrom that Abdul Ghani could not have acquired adverse possession against Lal Chand Khosla because the present suit was brought on 23rd June 1936, and if in November 1925 adverse possession of Abdul Ghani had not started or had terminated by his admission that he was not the owner, the present suit being brought within 12 years of that date, could not be barred by adverse possession.

The next point raised by the learned counsel for Abdul Ghani was that the present suit was barred under the provisions of S. 47, Civil P. C. This point was also agitated in the trial Court and the trial Court decided it on two grounds against Abdul Ghani: one holding that Abdul Ghani was not the representative of Zulfikar Ali and Nathu and therefore could not be proceeded against under S. 47; secondly, holding that by purchasing the property in

execution of his mortgage decree Lal Chand Khosla had ceased to be a decree-holder and had become an auction-purchaser and therefore a suit by the auction-purchaser to obtain possession of the property from Abdul Ghani was not a question between the parties to the suit relating to the execution, discharge or satisfaction of the decree and therefore was not barred under the provisions of S. 47. It is unnecessary to enter into the first ground for the decision in favour of Lal Chand Khosla because it seems clear to me that the point can be settled on the second ground taken by the Court.

On this point admittedly there is a conflict of authority between the Madras and the Calcutta High Courts on one side and the Allahabad, Patna, Bombay and our own High Court on the other. In I L R (1939) Lah 295¹ a Division Bench of this Court after considering all the authorities came to the decision that such a suit would lie and was not barred under the provisions of S. 47 on the short ground that the bulk of authority was in favour of the view that such a suit lay. The point is not without difficulty but it seems to me that the reasoning of Sulaiman C. J. in I L R (1937) All 921,² speaking with great respect, appears to be conclusive on the point. In the Full Bench ruling of the Madras High Court, 43 Mad 107,³ three Judges came to a contrary decision on what appears to me, speaking with great respect again, different and contradictory views. Abdur Rahim, officiating Chief Justice, held that by virtue of certain Privy Council decisions, S. 47 was to be given the widest meaning possible and therefore the auction-purchaser of a decree was the representative both of the decree-holder and of the judgment-debtor according to the nature of the question which arose and according to the party contesting it: that is to say, if the dispute was between the auction-purchaser and the judgment-debtor, the auction-purchaser was to be considered the representative of the decree-holder; if the dispute was between the auction-purchaser and the decree-holder, then the auction-purchaser should be con-

sidered the representative of the judgment-debtor.

Oldfield J. was of opinion that in a money decree the auction-purchaser must be held to be the representative of the judgment-debtor. He considered that the question of a mortgage decree was more difficult but he did not decide it. On the facts of that case on the finding that the auction-purchaser was the representative of the judgment-debtor, the case appeared to him to be concluded by authority in favour of the auction-purchaser not being able to bring a suit but only to apply under S. 47. The third Judge, Seshagiri Ayyar, appeared to consider that in all cases the auction-purchaser was the representative of the judgment-debtor, but in view of the Privy Council ruling he was of opinion that all questions between persons, who represented either the decree-holder or the judgment-debtor, were to be settled under S. 47 and not by a separate suit.

The reasonings of these rulings, with all respect again, do not appear to me to be reconcilable with each other, and so far as the Privy Council case is concerned, I would only respectfully agree with the reasoning of Sulaiman C. J., in the Allahabad case referred to, which points out that the Privy Council did not intend to go as far as the reasoning of the third Judge in the Madras case. So far as the distinction drawn between mortgage decrees and money decrees is concerned, I would again respectfully agree with the reasoning of Sulaiman C. J., that the distinction does not really exist. The mortgage decree-holder does not have a right to possession of the property ordinarily speaking and therefore an application for possession of the property by the auction-purchaser even though he happens to be the decree-holder himself is not in the same capacity and that the auction-purchaser must therefore remain the representative of the judgment-debtor and not of the decree-holder. The auction-purchaser clearly in an execution sale purchases the right, title and interest of the judgment-debtor and however the word "representative" is construed as including all persons who represent the interest of the parties, the auction-purchaser cannot, in any sense, be held to represent the interest of the decree-holder. This being so, any application by the auction-purchaser, even though he happens to be the decree-holder, for possession of the property purchased by him in the execution sale, must be taken to be made by the right accru-

1. *Sardar Mal v. Kartar Singh*, (1939) 26 A I R Lah 211=183 I O 475=I L R (1939) Lah 295=41 P L R 546.

2. *Kedar Nath v. Arun Chandra*, (1937) 24 A I R All 742=172 I C 57=I L R (1937) All 921=1937 A L J 889 (F B).

3. *Veyindramuthu Pillai v. Maya Nadan*, (1920) 7 A I R Mad 324=54 I C 209=43 Mad 107=38 M L J 32 (F B).

ing to him for possession by virtue of that sale. Therefore, if a party claiming under the judgment-debtor resists the auction-purchaser, the question neither relates to the execution, discharge or satisfaction of the decree, nor is it between the parties to the suit in the sense that the parties now arrayed against each other are representatives-in-interest of the decree-holder and judgment-debtor or vice versa respectively in the original suit. Therefore, it would follow that a suit by the auction-purchaser for possession of the property is not barred by reason of the provisions of S. 47.

The second point raised therefore by the learned counsel for the appellant has in my opinion no force. The third point originally raised by the learned counsel for the appellant, namely that the judgment of this Court printed at p. 96 to which reference has already been made was not *res judicata* between the parties, was not pressed by him and was finally dropped. I would therefore consider that the appeal fails and I would dismiss it with costs.

Turning now to the appeal of Lal Chand Khosla as regards mesne profits, the trial Court held that as the sale certificate had only been granted in 1936 and as no notice had been given by Lal Chand Khosla to Abdul Ghani to vacate the property or be liable for mesne profits, therefore mesne profits could not be allowed to him. The Commentary of Mulla on the Civil Procedure Code under S. 65 shows clearly that this reasoning is not correct. The title to the property after the sale is made absolute vests in the auction-purchaser from the date of the sale according to the Section and the learned Commentator points out that the old rulings to the effect that the right to possession only accrued from the date of the sale certificate are no longer good law. The learned counsel for the respondent could only contend that notice had not been given by Lal Chand Khosla to Abdul Ghani and this point should be taken into consideration. I have already pointed out that Lal Chand Khosla had applied for possession and was resisted by Abdul Ghani. Abdul Ghani therefore clearly had notice of the claim of Lal Chand Khosla to possession, and had resisted it. It was not necessary that a separate notice should be given that if he did not give up possession, he would be liable for mesne profits.

I would therefore accept the appeal of Lal Chand Khosla regarding the right to claim mesne profits. He has claimed mesne

profits for three years at the rate of Rs. 40 per mensem which come for three years to Rs. 1440 in all. At p. 24 of the printed paper book Abdul Ghani admitted that the property was capable of realizing Rs. 50 as rent a month and had been so capable for the last four or five years. The amount claimed by Lal Chand Khosla is therefore less than the amount admitted to be the mesne profits of the property by Abdul Ghani himself. I would therefore pass a decree in favour of Lal Chand Khosla for Rs. 1440 mesne profits with costs.

Sale J.—I agree.

D.S./R.K.

Order accordingly.

*** A. I. R. 1940 Lahore 233**

BLACKER J.

Emperor

v.

Ram Lal Anand — Respondent.

Criminal Revn. No. 1379 of 1939, Decided on 18th January 1940, from order of Sess. Judge, Lahore, D/- 31st July 1939.

(a) Criminal P. C. (1898), S. 476 — S. 476 applies to summons as well as warrant case.

The word "inquiry" in S. 476 is wide enough to include any proceedings under Chap. 16, Criminal P.C. S. 476 is not therefore restricted to a warrant case but applies to a summons case also.

[P 234 C 1]

* (b) Criminal P. C. (1898), Ss. 476, 482 and 480 — Contempt of Court — S. 482 can be employed only when cognizance under S. 480 has been taken — Court has option to proceed either under S. 480 or under S. 476 — S. 482 does not take away that option.

The provisions of S. 482 can only be employed where cognizance has already been taken under S. 480. S. 482 is in no way independent of S. 480. Therefore in a case of contempt committed *coram judice* and punishable under S. 228, I. P. C., it is optional with the Court to proceed either under S. 480 or S. 476 and the existence of S. 482 does not operate so as to take away this option: *A I R 1930 Cal 366*; *A I R 1924 Oudh 402* and *22 W R Cr 10, Disting.* [P 235 C 2; P 236 C 1]

M. Sleem, Advocate General —

for the Crown.

Mehr Chand Mahajan, Amar Das, Madan Lal, M. L. Chawla, Bashir Ahmad and Abdul Aziz Sheikh — *for Respondent.*

Order. — This case has arisen out of an incident that occurred in the Court of Mr. Sant Ram, Special Magistrate at Lahore. The incident occurred on 20th May last and on 23rd May Mr. Sant Ram filed a complaint in the Court of the District Magistrate of an offence under S. 228, I. P. C., (contempt of Court) alleged to have been committed by the respondent, Mr. Ram Lal Anand, an advocate of this Court.

Mr. Ram Lal appealed to the learned Sessions Judge of Lahore who appears to have held that under the well-established rule that a special provision of law prevails over a general, the learned Magistrate could not have acted under S. 476, Criminal P. C., and that his proceedings were without jurisdiction. He accordingly accepted the appeal and ordered the withdrawal of the complaint.

There is now a petition before me on behalf of the Crown for the revision of this order. The case for the Crown is briefly that the rule relied upon by the Sessions Judge has no application to this case and that in spite of the existence of S. 482, the complaint under S. 476 was perfectly competent. The respondent who has appeared and argued his own case has supported the judgment of the Court below and has added a further argument that S. 476 is in its own terms inapplicable. I will deal with this latter argument first. S. 476 refers to the offences mentioned in S. 195 (1) (b) and (c), and S. 228, I. P. C., is one of those offences. But Mr. Ram Lal Anand contends that under S. 476 a Court can only act if it considers an "inquiry" necessary. An "inquiry" is not held in a summons case, as the trial starts immediately and the definition of "inquiry" in the Code excludes a "trial." Therefore, the argument goes, S. 476 can in terms only apply to a warrant case. To me the fallacy is immediately apparent. The learned respondent has overlooked Chap. 16 of the Code. The proceedings under that chapter precede a summons case as well as a warrant case and the term "inquiry" is wide enough to include any proceedings under that chapter even if they only consist of the act of the Magistrate in reading the complaint to find out whether it is a fit case in which to proceed against the accused or not.

The main and really the only question to decide in this case is whether in its circumstances the rule of *generalia specialibus* operates so as to exclude the applicability of S. 476. There appears to be no clear authority on the point. In 57 Cal 1007¹ which was cited by the respondent the matter was not decided as the case was disposed of on other grounds. AIR 1924 Oudh 402,² if anything, goes against the respon-

dent, as in the last paragraph the Court appeared to hold that even if the provisions of S. 482 had been violated, the complaint (in that case under S. 179, I. P. C.) could still be held to be one made under the general provisions of S. 195, Criminal P. C. The case cited in 22 W R Cr 10³ would appear at first sight to support the respondent, but a closer examination of it shows that the whole foundation of the argument on which the finding was based no longer exists. S. 476 has now been brought into the same Chapter of the Code as S. 482, and the entry against S. 228, I. P. C., in col. 8 of Sch. 2 is just as applicable to the former as to the latter. Moreover, though it might be that in a Presidency no Magistrate could have jurisdiction, a Sessions Judge certainly would. In those parts of India where S. 30 of the Code applies a Magistrate empowered under that Section would also have jurisdiction, in spite of the entry in the Schedule.

The authorities therefore being of no real assistance, it is necessary to turn to the statute itself to see whether this is a case to which the rule relied upon by the respondent applies or not. It cannot be said that a special procedure will oust a general procedure, where the statute itself gives the Court the free option to follow either. For instance it could hardly be argued that a Magistrate empowered under S. 260 can only try a case of simple hurt in a summary trial. The Code itself uses the words "may, if he thinks fit," thereby showing unmistakably that it is at the option of the Magistrate to choose which procedure he follows. The same phrase occurs in S. 480 of the Code which runs as follows :

When any such offence as is described in S. 228, I. P. C., is committed in the view or presence of any Civil, Criminal or Revenue Court, the Court may cause the offender to be detained in custody and at any time before the rising of the Court on the same day may, if it thinks fit, take cognizance of the case and sentence the offender

If therefore S. 480 stood alone the answer to the question before me would be simple and obvious. In a case of contempt, even *coram judice*, the Judge need not proceed under S. 480, and would therefore be presumed to retain the power to proceed alternatively under S. 476 if he thought fit. But S. 480 is followed by S. 482 which runs as follows :

(1) If the Court in any case considers that a person accused of any of the offences referred to in S. 480 and committed in its view or presence should be imprisoned otherwise than in default of

1. Prabhat Chandra v. Emperor, (1930) 17 A I R Cal 366 = 1930 Cr O 542 = 125 I O 853 = 31 Cr L J 942 = 57 Cal 1007 = 34 O W N 56.

2. Chhedi Lal v. Emperor, (1924) 11 A I R Oudh 402 = 81 I O 951 = 25 Cr L J 1127.

3. In the matter of Sardhari Lal, (1874) 13 Beng L R App 40 = 22 W R Cr 10.

payment of fine, or that a fine exceeding two hundred rupees should be imposed upon him, or such Court is for any other reason of opinion that the case should not be disposed of under S. 480, such Court, after recording the facts constituting the offence and the statement of the accused as hereinbefore provided, may forward the case to a Magistrate having jurisdiction to try the same, and may require security to be given for the appearance of such accused person before such Magistrate, or if sufficient security is not given, shall forward such person in custody to such Magistrate.

(2) The Magistrate, to whom any case is forwarded under this Section shall proceed to hear the complaint against the accused person in manner hereinbefore provided.

It is the case for the respondent that this provision excludes the applicability of S. 476 to a contempt committed *coram judice*. Now the words "the Court is . . . of opinion that the case should not be disposed of under S. 480," show clearly that the decision to act under this Section must be taken at a time when action under S. 480 is still possible, i. e. on the same day before the rising of the Court. If the respondent's view is correct, it would follow that where for any reason the Court cannot take cognizance there and then the offender must remain unpunished. Of course, if this were the unambiguously expressed intention of the Legislature, I would have no hesitation in holding it so. But it does not appear to me that the respondent's view is sound.

An examination of the language of S. 482 shows to me quite unmistakably that the procedure therein described is only to be adopted in a case where the Court has already taken cognizance under S. 480, I. P. C. For one thing, the offender of S. 480, I. P. C., is now described as a person "accused" of the offence. The term "accused" is nowhere defined, but it clearly means more than the term "offender." Its meaning in each case must be sought in the subject and context, and here it can only mean an offender in respect of whose offence the Court has already taken cognizance under S. 480. Again the reasons for which a Court may act under S. 482 will in many, if not in most, cases be such as it cannot find to exist unless it has already held some inquiry into the matter. An apparently serious contempt may be greatly mitigated by the humble and repentant attitude of the offender when called upon to explain. Conversely a less serious complaint may be aggravated by a defiant and insolent attitude. Lastly, in the third ground for which the Court may decide to adopt this procedure, the words used are not "dealt with"

or any similar phrase, but "disposed of." These words suggest that, just as in the two preceding grounds, it is the final result of the case which is being envisaged, and that therefore what the Court is considering is not whether it shall start to take cognizance itself, but whether having taken cognizance it shall leave the final action to some other Court. By itself, this circumstance might not be of any essential importance, but it does tend to show that the Legislature was choosing its language carefully and that therefore the use of the word "accused" above was deliberate. It would appear to me therefore that the provisions of S. 482 can only be employed where cognizance has already been taken under S. 480 and that the Section is in no way independent of S. 480. I have held that at the outset it is optional with the Court to proceed either under S. 480 or under S. 476 and the existence of S. 482 does not appear to me to operate so as to take away this option.

It has been argued that in this view the provisions of S. 482 would be unnecessary. I do not think so. For one thing once a Court has taken cognizance of the offence, it can only divest itself of that cognizance (a) by dismissing the complaint or discharging or acquitting the accused, (b) by convicting the accused or (c) by legally transferring, committing or otherwise remitting the case to another Court. If S. 482 did not exist, a Court which had once taken cognizance of a case under S. 228 would not be able to divest itself of that cognizance, except under (a) or (b). The provisions are therefore not unnecessary.

Moreover, the provisions of S. 482 are less favourable to the accused, as proceedings of a summary nature usually tend to be. For one thing, under S. 482 he can be tried even by a Third Class Magistrate, as the words "a Magistrate having jurisdiction to try the same" can only be interpreted as meaning "any Magistrate with local jurisdiction." Under S. 476 the complaint must go to a First Class Magistrate, and it might even be argued that the difference of description of the Magistrate in Ss. 476 and 482 lying in the omission of the words "to try the same" in the former Section means that even a First Class Magistrate, if he were not empowered under S. 30, would have to commit the case to Sessions under S. 28 read with column 8 of Schedule 2. In the second place the Magistrate to whom the complaint is sent must hear it under

S. 482: under S. 476 he has the option to dispose it under S. 203. In the third place there is no appeal against an order under S. 482. It must, on the other hand, be conceded that in the summary procedure an apology can be accepted. Even when the case has gone to the trial Court, in the general procedure the case is non-compoundable. This however does not vitally affect the issue.

In my opinion therefore in the case of a contempt committed *coram judice* and punishable under S. 228, I. P. C., a Court has the option of proceeding either under Ss. 480 to 482, Criminal P. C., or under S. 476, and that the learned Sessions Judge has misdirected himself in holding that the complaint under S. 476 was invalid. I accordingly accept this petition, set aside the order of the learned Sessions Judge and remand the case to him for a fresh hearing and decision.

G.N./R.K.

*Petition accepted.***A. I. R. 1940 Lahore 236**

ABDUL RASHID J.

Arya and others — Defendants —
Appellants.

v.

Daundi and others, Plaintiffs, and
others, Defendants — Respondents.

First Appeal No. 99 of 1939, Decided on 30th November 1939, from order of Senior Sub-Judge, Delhi, D/- 8th March 1939.

Evidence Act (1872), S. 92, Proviso 1 and S. 94 — Seller and purchaser both stating that by mutual mistake property not intended to be sold was inserted in sale deed — Evidence is admissible to show what was intended to be sold.

Where the seller and the purchaser both state that by mutual mistake property which had never been intended to be sold was inserted in the sale deed, it is open to the parties to produce evidence to show what was intended to be sold and purchased. To such a case S. 94 is inapplicable, because what is sought to be rectified in such case is not the sale deed but the mistaken expression of the intention of the parties as embodied in the sale deed: *A I R 1930 Lah 446, Rel. on.* [P 237 C 1, 2]

Qabul Chand — *for Appellants.*

Faqir Chand Mittal — *for Respondents*
(*Plaintiffs*).

Judgment. — By means of a registered sale deed dated 15th October 1936, Faiz-ul-Hassan, defendant 1 sold to Bhikan and Sukhan, defendants 2 and 3, 19 bighas 13 biswas of land for Rs. 295. The mutation in respect of this sale was sanctioned on 31st January 1937. The land sold bore the following khasra Nos. 962, 963, 964, 966

and 77. On 7th June 1937, Faiz-ul-Hassan sold 16 bighas, 14 biswas of land to Arya, Jal Singh, Bhagirat and Amin Chand, defendants 4 to 7 by means of a sale deed for Rs. 1500. The khasra Numbers of this land are 962, 963, 964 and 966. On 14th October 1937, it was discovered by Faiz-ul-Hassan, defendant 1, and Bhikan and Sukhan, defendants 2 and 3, that wrong khasra numbers had been given in the registered sale deed dated 14th October 1936. Both Faiz-ul-Hassan vendor and Bhikan and Sukhan vendees appeared before the Patwari and made a report that khasra Nos. 962, 963, 964 and 966 had been wrongly entered in the registered deed dated 14th October 1936, and that the sale deed really related to land bearing khasra Nos. 813, 814, 817, 818 and 819. All the facts with respect to this mutual mistake were given in the statements of Faiz-ul-Hassan and Bhikan and Sukhan. This mistake was eventually rectified by the revenue authorities by means of mutations Nos. 588 and 589.

The present suit was filed by Daundi on 16th October 1937, for possession by means of pre-emption of land bearing khasra Nos. 962, 963, 964, 966 and 77 alleged to have been sold by the sale deed dated 14th October 1936, for Rs. 295. The plaintiff ignored the rectification that had taken place and stated that really no mistake had been made and that the land mentioned in the plaint had in fact been sold by Faiz-ul-Hassan to Bhikan and Sukhan for Rs. 295. Arya, Jal Singh, Bhagirat and Amin Chand were also impleaded as defendants by the plaintiff as the land in dispute had further been sold to them by means of the sale deed dated 7th June 1937. The trial Court held that land bearing khasra Nos. 962, 963, 964 and 966 had never been sold to Bhikan and Sukhan and that these numbers were entered in the sale deed owing to a mutual mistake. After giving this finding the trial Court rejected the plaint on the ground that there being no sale actually of the land in question the plaint did not disclose any cause of action. The plaintiff preferred an appeal in the Court of the Senior Subordinate Judge. The Senior Subordinate Judge held that the sale deed was clear and unambiguous and that no oral evidence modifying the terms of the sale deed dated 14th October 1936 could be admitted. He also held that no mutual mistake was proved. The finding of the trial Court was upset and the case was returned to the lower Court for decision on

the merits in accordance with law. Against this decision defendants 4 to 7 have preferred a second appeal to this Court.

The learned Senior Subordinate Judge has overlooked proviso (1) to S. 92, Evidence Act. This proviso lays down that any fact may be proved which would invalidate any document owing to any mistake in fact or law. The evidence produced by the defendants was therefore admissible in order to prove that wrong numbers had been entered in the sale deed dated 14th October 1936. This is particularly so as both Faiz-ul-Hassan, the vendor, and Bhikan, the vendee, admitted before the revenue authorities as well as in their evidence in the trial Court that a mutual mistake of fact had crept into the sale deed. The evidence of Faiz-ul-Hassan vendor (D. W. 6) and of Bhikhan (D. W. 5) clearly showed that the land intended to be sold bore khasra Nos. 813, 814, 817, 818 and 819 and that the other khasra numbers were never intended to be sold. One very important circumstance has been ignored by the lower Appellate Court. Khasra Nos. 962, 963, 964 and 966 relate to "Har" land. This "Har" land is land of superior quality and is worth about Rs. 100 per bigha. 16 bighas and 14 biswas of this land could not be sold for a sum of Rs. 295. Reference in this connexion may be made to mutations Exs. D. B. to D. H. which show that "Har" land is worth about Rs. 100 per bigha. Khasra Nos. 813, 814, 817, 818 and 819 refer to "Par" land which is valued at Rs. 15 per bigha. This makes it perfectly clear that the vendor intended to sell and the vendees intended to buy "Par" land only and that the khasra numbers relating to "Har" land were wrongly entered in the sale deed dated 14th October 1936.

The principal argument addressed by Mr. Faqir Chand on behalf of the respondent was that, under S. 94, Evidence Act, when the language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts. The learned counsel contended that the khasra numbers entered in the sale deed, dated 14th October 1936, were owned by Faiz-ul-Hassan, that they could be sold by him and that Faiz-ul-Hassan could not be heard to say that he meant to sell other land and not the land entered in the sale deed. In my opinion, S. 94 is not applicable. In the present case, it is not the

seller alone who is trying to get out of a bargain but the seller and the purchaser both agree that the intention was to enter into a contract of sale of "Par" land bearing khasra Nos. 813, 814, 817, 818 and 819. The mistake was mutual. In such circumstances it is open to the parties to produce evidence to show what was intended to be sold and purchased. Reference may be made in this connexion to a Single Bench ruling of this Court reported in A I R 1930 Lah 446.¹ To put it in another way, what is sought to be rectified in the present case is not the sale deed but the mistaken expression of the intention of the parties as embodied in the sale deed. For the reasons given above, I accept this appeal, set aside the order of the Senior Subordinate Judge, dated 8th March 1939, and restore the decree of the trial Court rejecting the plaint. Having regard to the fact that the plaintiff was induced to enter into this litigation by a mistake in the sale deed I order that the parties will bear their own costs throughout.

D.S./R.K.

Appeal allowed.

1. Dalip Singh v. Dalip Singh, (1930) 17 A I R Lah 446=122 I C 493.

A. I. R. 1940 Lahore 237

TEK CHAND AND ABDUL RASHID JJ.

Parshotam Dass and others —

Defendants — Appellants.

v.

Shiv Ram and others, Plaintiffs and another, Pro forma Defendant —

Respondents.

First Appeal No. 117 of 1939, Decided on 30th January 1940, from decree of Sub-Judge, First Class, Rawalpindi, D/- 23rd December 1938.

(a) Will—Construction—Will held conferred absolute estate on testator's brother's widow.

A will provided that the widow of the testator's brother would be the owner for her life-time. She would have all rights of mortgaging and selling the property like owners, and there would be no restriction to her aforesaid rights as is the case in widow's rights :

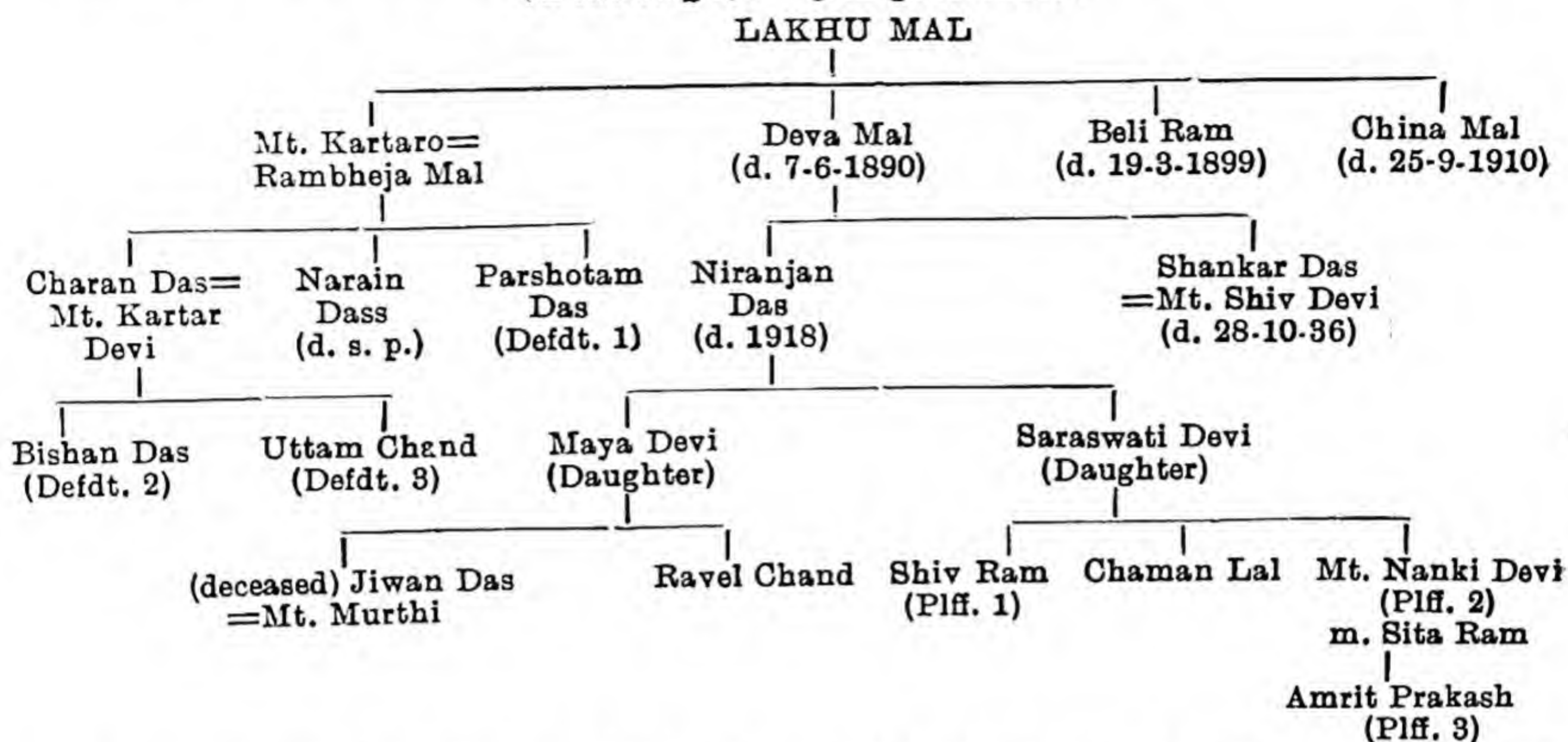
Held that the widow became absolute owner of the properties which were devised to her and she was competent to make a further bequest of these properties. [P 240 C 1, 2]

(b) Will — Absolute estate given to legatee — Gift over to take effect after death of legatee is void and does not cut down absolute estate.

Once an absolute estate is given to a legatee, the gift over to take effect after the death of the legatee is void and ineffective and cannot be taken to have cut down an absolute estate already conferred on the legatee : *A I R 1921 Lah 11, Rel. on.* [P 240 C 2]

Qabul Chand, Abdul Karim and Prakash
Chandra Jain — *for Appellants.*
Mehr Chand Mahajan and Yashpal
Gandhi — *for Respondents*
(*Plaintiffs*).

Tek Chand J.—The parties to this litigation are Khattris of Rawalpindi City, admittedly governed by Hindu law. Their relationship will appear from the following pedigree table:



The properties in dispute are a big Sarai, comprising a large number of kothris, known as 'Sarai Billa,' and a portion of a house in Landa Bazar, Rawalpindi, described in detail in para. 2 of the plaint and marked red on plan B. The last owner of these properties was Mt. Shiv Devi widow of Shankar Das. She died, without issue, on 28th October 1936. On 30th March 1937, the present suit was instituted by Shiv Ram, Mt. Nanki Devi and Amrit Parkash, minor, for a declaration that they are the owners of the two properties in dispute under a will, which had been executed by Mt. Shiv Devi on 7th August 1935 and registered on 16th August 1935 (Ex. P-1). It was alleged in the plaint, that Mt. Shiv Devi was the absolute owner of these properties and that she had duly executed the will. It was further averred that on the death of Mt. Shiv Devi, the defendants had taken forcible possession of the house in Landa Bazar as well as of a kothri (No. 34) in Sarai Billa, and that the rest of the Sarai was in actual possession of tenants. The plaintiffs, therefore, prayed for a declaration that they are the owners of the properties in dispute and for possession of kothri No. 34 in the Sarai and of the house in Landa Bazar.

The suit was resisted by the three defendants, Parashotam Das, Bishan Das and Uttam Chand, who are collaterals of Shankar Das, husband of Mt. Shiv Devi, in the third degree. They denied that Mt. Shiv Devi had executed any will, and alleged

that in any case, she did not have a disposing mind at the time when the will (Ex. P-1) was stated to have been written and thumb-marked by her. They further pleaded that Mt. Shiv Devi held the properties in dispute on the usual widow's estate and she had no power under Hindu law, to devise them after her death. An objection was also taken that the suit for declaration qua the Sarai (except kothri No. 34) did not lie as the defendants were in possession of the whole of 'Sarai Billa' and, therefore, the plaintiffs should have sued for possession of this part of the Sarai also. The learned Subordinate Judge found that the Sarai (except kothri No. 34) was in possession of tenants and, therefore, the plaintiffs could maintain a suit for a declaration qua this part of the Sarai. He also held that the will (Ex. P-1) had been proved to have been duly executed by Mt. Shiv Devi while she was in full possession of her senses, and that the will was valid as Mt. Shiv Devi was the absolute owner of the properties in dispute, she having acquired them from her husband's brother, Niranjn Das, under his will executed on 19th October 1918. On these findings, the learned Judge decreed the suit. From this decree, the defendants have appealed, and the only questions raised on their behalf relate to the due execution and validity of the will of Mt. Shiv Devi.

It is no longer denied that the will (Ex. P-1) bears the thumb-mark of Mt. Shiv

Devi, and that she had a disposing mind at the time. She herself got the will registered by the Sub-Registrar on 16th August 1935, nine days after its execution, and it was about fifteen months after that date, that she died on 28th October 1936. The will was written at her instance by a lawyer, Diwan Des Raj Sahni, Bar-at-law, (P. W. 14) and has been proved to have been attested by a medical practitioner, Dr. Des Raj, M. B. B. S. (P. W. 1) and by two other witnesses, Gobind Ram and Gokal Chand each of whom had seen the testator affix her thumb-mark on it. Before us the appellant's learned counsel admitted that these facts are correct, but he contended that it had not been proved that each of the attesting witnesses had signed the will in the presence of the testator, as required by S. 63, Succession Act. This point was not raised in the lower Court, and at the trial, no specific question relating to this matter appears to have been put to the scribe Diwan Des Raj Sahni or the attesting witness, Dr. Des Raj, when they were in the witness-box and were examined and cross-examined at length. It is however clear from their statements read as a whole that the testator, the scribe and the attesting witnesses were all present at the time when the witnesses attested the will. Diwan Des Raj Sahni has deposed that Mt. Shiv Devi came to his office, when the will was written by him. It was read over to her and she admitted it to be correct and thumb-marked it. He is definite that Gobind Ram and Dr. Des Raj attested it in his presence, but is not certain about Gokal Chand. Dr. Des Raj has sworn that when he arrived, the will had already been written, but that after his arrival Mt. Shiv Devi admitted the contents of the document and thumb-marked it in his presence. He has also stated that

Shiv Ram (plaintiff 1), Chaman Lal, Gobind Ram and the other witness, whose name I do not know, were present. Diwan Des Raj was present when I signed it.

On this evidence, it must be held that at least two of the attesting witnesses, Dr. Des Raj and Gobind Ram, affixed their signatures on the will in the presence of the testator. It is conceded that all the other requirements of S. 63 had been complied with. I overrule this objection and hold, in agreement with the learned Subordinate Judge, that the will (Ex. P-1) was duly executed by Mt. Shiv Devi while she was in full possession of her senses. The next question

for determination is whether the testator, Mt. Shiv Devi, was the absolute owner of the properties devised by her in the will. The case for the plaintiffs is that the properties in dispute were owned by Niranjana Das (brother of Shankar Das and husband of Mt. Shiv Devi), that Niranjana Das, by a will executed by him on 19th October 1918 (Ex. P-9), had bequeathed them to Mt. Shiv Devi in absolute ownership and that, therefore, she had unrestricted power of disposition over them. It is beyond question that Ex. P-9 is the last will of Niranjana Das. After his death, Mt. Shiv Devi applied for grant of letters of administration of his estate, with the will annexed, and the present appellant, Parshotam Das, entered a caveat, but after lengthy enquiry the will was held to have been duly executed and letters of administration granted to her. This decision was upheld on appeal by the High Court. It is, however, contended that Niranjana Das was not the sole owner of the properties devised by him and that, in any case, his will did not confer an absolute estate on Mt. Shiv Devi. In my opinion, both these contentions are devoid of force.

It is common ground between the parties, that Sarai Billa as well as the house in Landa Bazar which are in dispute now, originally belonged to Beli Ram, who was separate from his brothers. It is proved that by a deed executed and registered on 11th July 1882 (Ex. P-16) Beli Ram sold the Sarai to his brother, Deva Mal, for Rs. 4500. Similarly, by two deeds (Exs. P-14 and P-15) executed and registered on 26th March 1873 and 5th May 1876 respectively, Beli Ram sold the house in Landa Bazar to Deva Mal. The execution of these sale deeds is admitted by the appellants, but with regard to the sale of the Sarai, it is urged that it was a mere paper transaction and that after the execution and registration of the deed (Ex. P-16), Beli Ram continued to be its owner and remained in possession as such during his life-time. There is, however, no reliable evidence in support of this allegation. It has not been explained, why a fictitious sale deed should have been executed by Beli Ram in favour of Deva Mal in 1882. Nor is it proved that Beli Ram exercised any acts of ownership in this Sarai after 1882. The appellants' learned counsel relies solely on certain entries in the khasra paimaish, in which Beli Ram is entered as the owner of the Sarai in 1900 (Ex. D W 9/7). But this entry is obviously incorrect, as admittedly Beli Ram

had died in 1899. No reliance can therefore be placed on these entries. There is nothing suspicious about the sale, which is evidenced by a registered document, more than 30 years old. It must therefore be held that Deva Mal had become the sole owner of the Sarai in 1882.

The appellants' learned counsel next contended that even if Deva Mal was the sole owner of the Sarai and the house, on his dying intestate, these properties devolved on his sons, Niranjana Das and Shankar Das, in equal shares, and, subsequently on Shankar Das's death, his widow Mt. Shiv Devi must be taken to have succeeded to his half share on the usual widow's estate. It was therefore urged that Niranjana Das by his will could have devised his own half share only to Mt. Shiv Devi, and not the other half, to which she had already succeeded as the heir of Shankar Das. This contention is based on the assumption that Niranjana Das and Shankar Das had separated in their lifetime and were in possession of their paternal estate in well-defined shares, and that on Shankar Das's death Mt. Shiv Devi had succeeded to his share. (After examining certain evidence the judgment proceeded further.) I must therefore reject the contention that Niranjana Das was not the sole owner of these properties and hold that he was fully competent to devise them by his will (Ex. P-9). In this view of the case, it is not necessary to consider the further question, discussed at length by the learned Subordinate Judge, that Mt. Shiv Devi having succeeded to her husband's estate as a limited owner had surrendered it to her brother-in-law, Niranjana Das, and who had thus become the sole owner of the entire property. The only other question which remains for consideration is the nature of the estate taken by Mt. Shiv Devi under the will of Niranjana Das. Para. 4 of the will which deals with the matter, reads as follows :

Mt. Shiv Devi, widow of Shankar Das who is my bharjai (brother's wife) shall be the owner of the entire remaining property. Since my brother was joint with me, Shiv Devi aforesaid is entitled to maintenance in every way. Besides, she has rendered great services to me as well. Hence I declare her to be the owner for her lifetime. She would have all rights of mortgaging and selling the property like owners, and there would be no restriction to her aforesaid rights as in the case in widow's rights.

It is no doubt true, that it is stated that Mt. Shiv Devi shall be owner "for her lifetime," but it is further made clear that she

"will have the power of mortgaging and selling the property like owners," and the matter is put beyond all doubt by saying that there is "no restriction to her aforesaid rights as is the case in widow's rights." Both counsel cited a large number of rulings before us, but it is not necessary to consider them in detail. Each case turned on its own peculiar facts and the terms of the particular document under consideration. It is well-settled that in such documents, the use of the word *malik*, coupled with the fact that the legatee had been invested with full power of alienation, clearly establish that an absolute estate has been conferred, regardless of whether the legatee is a male or a female.

The appellants' learned counsel next referred to cl. (5) of the will, in which the testator had made a "gift over" of that part of the devised properties, which might be left undisposed of at the time of the legatee's death, and contended that this clearly indicated that the intention of the testator was to confer only a life estate on Mt. Shiv Devi. The proposition of law is firmly established that once an absolute estate is given to a legatee, the "gift over" to take effect after the death of the legatee, is void and ineffective. A case, very similar to the present, is 2 Lah 175,¹ in which the question was discussed at great length, and it was held that the "gift over" being void, could not be taken to have cut down the absolute estate already conferred on the legatee. Reading the will of Niranjana Das (Ex. P-9), as a whole, I have no doubt that Mt. Shiv Devi became absolute owner of the properties which were devised to her by Niranjana Das, and that she was competent to make a further bequest of these properties to the plaintiffs. I would therefore hold that due execution as well as the validity of the will (Ex. P-1) have been established and by this will the plaintiffs became the owners of Sarai Billa and the portion of the house in Landa Bazar as described in the plaint, and that their suit was rightly decreed by the Court below. The appeal fails and is dismissed with costs.

Abdul Rashid J.—I agree.

D.S./R.K.

Appeal dismissed.

1. Mohan Lal v. Niranjana Das, (1921) 8 A I R Lah 11=60 I C 619=2 Lah 175.

* A. I. R. 1940 Lahore 241

DIN MOHAMMAD J.

Ram Kishen — Judgment-debtor —
Appellant.

v.

Chandar Bhan — Decree-holder —
Respondent.

Exn. First Appeal No. 377 of 1939,
Decided on 23rd January 1940, from order
of Senior Sub-Judge, Gurgaon, D/- 18th
August 1939.

* (a) Civil P. C. (1908), O. 32 — O. 32 does
not apply to execution — Failure to appoint
guardian does not vitiate execution proceedings.

Failure to appoint guardian for the minor does
not vitiate execution proceedings since the provi-
sions of O. 32 do not in terms apply to execution:
A I R 1921 Cal 476 and A I R 1926 Lah 490,
Rel. on; 12 I C 628, Not foll. [P 242 C 1]

(b) Compromise Decree — Execution—Com-
promise reducing decretal amount and allowing
it to be paid in instalments—Default clause that
if instalments were not duly paid whole decree
as it stood would be executable is not penal.

Where as a result of compromise the decretal
amount is reduced and is allowed by the decree-
holder to be paid in instalments a default clause
that if the instalments were not duly paid the
decree-holder would be entitled to execute the
whole decree as it then stood cannot be treated as
penal. The reduction of the decretal amount is in
the nature of a concession which can be withdrawn
on the default of the judgment-debtor: *A I R 1933
Lah 23, Rel. on.* [P 242 C 2]

Parkash Chand Jain for Shamair Chand
— for Appellant.

Judgment.—On 8th September 1931, the
firm Pars Ram Jagan Nath suing through
Jagan Nath obtained a decree against the
firm Bhondu Mal Bhoru Mal through Bhoru
Mal. Execution proceedings were taken out
by the decree-holder in the course of which,
on 16th April 1935, the parties effected a
compromise by which the decretal sum was
reduced to Rs. 3250 only, of which Rs. 1500
were paid in cash to the decree-holder and
the balance was agreed to be paid in two
instalments. It was further provided in the
deed that, if the instalments were not duly
paid, the decree-holder would be entitled to
execute the whole decree as it then stood.
It may be observed that the total amount
due to the decree-holder on that date was
Rs. 5438. On 23rd April 1935, counsel for
the decree-holder stated in Court that
Rs. 1500 had been received by the decree-
holder in the decree and prayed that the
execution proceedings be consigned to the
record room and the decree be shown as
partially satisfied. The judgment-debtor,
Bhoru Mal, did not appear on that day as

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he was reported to be unwell. On 24th
April, Bhoru Mal died and was succeeded
by Ram Kishan, a minor son of his pre-
deceased son. On 20th July, fresh execution
proceedings were taken out in which it was
stated that Ram Kishan was the only legal
representative of the judgment-debtor and
that the decree be executed against him by
the attachment of his property as well as
by his arrest. On 22nd July a notice was
issued to Ram Kishan who was personally
served, but as he failed to appear, the exe-
cution proceedings were allowed by the
decree-holder to be consigned to the record
room.

On 12th August 1936, another applica-
tion for execution was put in, in which it
was prayed that the moveable as well as
the immovable property belonging to the
judgment-debtor be attached and that war-
rants of arrest be issued against the legal
representative. This application was not
pursued further by the decree-holder and
was consequently dismissed for default on
17th November 1936. On the same day, a
new application appears to have been drafted
but was presented in Court on 1st Decem-
ber 1936. On 3rd December a prohibitory
order was issued to the judgment-debtor as
also warrants of attachment of the judg-
ment-debtor's property and both were duly
served on 5th February 1937. On 25th
March, Ram Kishan made an application
through Kanwar Singh, who was described
as his next friend, challenging the execution
proceedings on the ground that no legal
representative of the judgment-debtor had
been duly brought on the record and that
inasmuch as proceedings had been taken
against Ram Kishan personally in spite of
the fact that he was a minor, they were
altogether null and void. It was pleaded at
the same time that an adjustment had taken
place between the decree-holder and the
judgment-debtor on 16th April 1935 and
that the decree-holder could not ignore the
adjustment and execute the whole decree.
A further payment of Rs. 200 in addition to
Rs. 1500 was alleged and as a last resort it
was urged that the default clause was penal
and could not be enforced.

In the meantime, on 22nd March 1937,
the decree-holder had died and, on 29th
March 1937, an application was made by
Chandar Bhan, an adopted son of Jagan
Nath, to be substituted for the original
decree-holder. On behalf of Ram Kishan
Kanwar Singh resisted this application
through his counsel Mr. Manohar Lal and

this application was eventually dismissed by the executing Court on 20th April 1937. On 14th June 1938, a fresh application for execution was made and, on 19th January 1939, Ram Kishan, who was still a minor, once more appeared through his next friend, Kanwar Singh and the lawyer, Mr. Manohar Lal and resisted the application on the same grounds as had been urged before. A replication was put in on behalf of Chandar Bhan on 14th April 1939. By that time Ram Kishan had attained majority and he himself then conducted his own case as a major through his counsel, Mr. Manohar Lal. These objections were dismissed on 18th August 1939 by the executing Court. Hence this appeal.

Counsel for the appellant insists that the application of 14th June 1938 was time barred, inasmuch as no valid application had been put in within three years prior to that date. He contends that Ram Kishan was a minor and that no proceedings could be taken against the minor without appointing a guardian for him and that as the decree-holder had failed to satisfy the requirements of the law in this connexion, all applications put in by him from time to time since the dismissal of the first application, when Bhoru Mal was alive, could not be availed of by him. I am not however disposed to agree. The provisions of O. 32, Civil P. C., do not apply to execution proceedings. Reference in this connexion may be made to the judgment of a Division Bench of the Calcutta High Court presided over by Sir Lancelot Sanderson C. J. and Richardson J. in a case reported in 64 I C 25,¹ where it was laid down that O. 32 did not in terms apply to execution proceedings. It was further observed there that in determining whether a minor is sufficiently represented in the execution proceedings the Court was at liberty to look at the substance of the transaction. The principle enunciated in this judgment was affirmed by a Division Bench of this Court presided over by Sir Shadi Lal C. J. and Coldstream J., in a case reported in A I R 1926 Lah 490,² where the learned Judges refused to set aside a sale in execution on the ground that the minor judgment-debtor had not been properly represented in the proceedings. In the face of this judgment, no reliance can be placed on the

Allahabad judgment reported in 12 I C 628,³ which is referred to by the appellant's counsel.

The only question therefore that falls for determination in this case is whether Ram Kishan was at any time during three years before the last execution application was made properly represented, and from the recital of facts made above it cannot but be held that this was so. He not only put in objections on 25th March 1937, through a guardian, Kanwar Singh, but he further resisted the application of Chandar Bhan for being brought on the record as the legal representative of the deceased decree-holder. A counsel had also been engaged in that application and it was the same counsel who was later engaged by Ram Kishan in the present application both before and after attaining majority. Seeing that the execution application against Bhoru Mal had been consigned to the record room on 23rd April 1935, the date on which Ram Kishan put in objections fell within two years of the previous dismissal, and it was within fourteen months of the dismissal of Chandar Bhan's application that the present application was lodged. It cannot be said therefore that this application was barred by time or that all the previous applications were null and void on the ground that no guardian had been appointed for the minor Ram Kishan. Counsel next contends that the decree-holder could not enforce the default clause inasmuch as it was penal. Here, too, he is on weak ground. The default clause referred to above could not be treated as penal in any circumstances. The reduction of the decretal amount was in the nature of a concession which could be withdrawn on the default of the judgment-debtor. There is ample authority in support of the proposition that such default clauses cannot be treated as penal: see A I R 1933 Lah 23⁴ among other judgments. I accordingly maintain the decision of the executing Court and dismiss this appeal with costs.

G.N./R.K.

Appeal dismissed.

3. Mahomed Ismail Khan v. Rashid-un-nissa, (1911) 8 A L J 1277=12 I C 628.

4. Jhanda Singh v. Piara Singh, (1933) 20 A I R Lah 23=140 I C 225=33 P L R 1026.

1. Fani Bhusan v. Surendra Nath, (1921) 8 A I R Cal 476=64 I C 25=35 O L J 9.

2. Bansidhar v. Muhammad Suleman, (1926) 13 A I R Lah 490=97 I C 181=27 P L R 494.

A. I. R. 1940 Lahore 243

BHIDE J.

Sardar Gulab Singh — Plaintiff —
Appellant.

v.

Punjab Zamindara Bank Ltd. Lyallpur through Sardar Desa Singh and others — Defendants — Respondents.

Second Appeal No. 326 of 1939, Decided on 4th November 1939, from decree of Senior Sub-Judge, Lyallpur, D/- 10th January 1939.

(a) Companies Act (1913), Ss. 20 and 81—Amendment of articles of association under S. 20—Failure to mention question of amendment in notice under S. 81 is fatal and renders amendment invalid.

Where a company amends the articles of association under S. 20 by a special resolution without mentioning in the notice under S. 81 that the question of amendment of articles was to come up for decision in the meeting, the irregularity is fatal to the proceedings and makes the amendment invalid and ultra vires. [P 244 C 1]

(b) Companies Act (1913), S. 21 — Articles are contracts.

According to S. 21, the articles of association are binding on the company as well as on the members thereof. The articles constitute a contract inter se amongst the share-holders, and where the articles have been acted upon by the company and the members, the articles constitute an implied contract between the members and the company. [P 244 C 1, 2]

Therefore, where in pursuance of certain articles acted upon by the company, a member was appointed Managing Director of the Bank and acted for 11 years in that capacity, the articles constitute an implied contract between the member and the company, a suit for performance of which lies in a Civil Court : (1892) 2 Ch 158; (1898) 1 Ch 324 and (1872) 8 Ch D 956, Rel. on; (1876) 1 Ex D 88, Not foll. [P 244 C 2]

(c) Master and Servant — Declaratory suit — Managing director removed by company by resolution — Suit for declaration that he is still managing director — Resolutions found ultra vires — Plaintiff is entitled to declaration — Fact that company might remove him by valid resolution subsequently is no ground for refusing declaration.

Where in a suit by the managing director who was removed by the company by a special resolution for a declaration that he is still the managing director it was found that the resolutions removing him from office were ultra vires :

Held that the managing director was entitled to the declaration and the same could not be refused on the ground that the company might subsequently remove him from office by a valid resolution. [P 245 C 1]

(d) Specific Relief Act (1877), Ss. 21 and 56 — Contract between company and member — Member appointed managing director illegally removed — Suit by managing director for injunction restraining company from preventing him from discharging his duties — Specific relief in shape of injunction cannot be granted — Damages held to be adequate relief.

In pursuance of certain articles of association a member was appointed by the company as its managing director and was subsequently illegally removed. The managing director on the basis of the articles which constitute an implied contract between him and the company brought a suit for injunction to the effect that the company should not prevent him from discharging his duties :

Held that the contract on which the managing director relied being dependent on personal services and volition of the parties, the contract could not be specifically enforced under S. 21 nor an injunction could be granted under S. 56. Claim for damages against the company was adequate relief. [P 245 C 2]

Mehr Chand Mahajan and Madan Lal Kapur — for Appellant.

Basant Krishen — for Respondents.

Judgment.—The plaintiff sued in this case for a declaration that he is still the Managing Director of the Punjab Zamindara Bank, Lyallpur, and for an injunction restraining the defendants from preventing him from acting as such. The suit was decreed by the trial Court, but dismissed on appeal by the learned Senior Subordinate Judge. Plaintiff has preferred a second appeal. The plaintiff rested his case on the provisions in Arts. 84 and 101 of the articles of association in support of his contention that he was entitled to act as a Managing Director of the Bank so long as he held shares worth Rs. 20,000 or more and could not be removed from his office. The contention of the defendants was that the said articles had been duly amended and the plaintiff had been removed from his office by resolutions passed at extraordinary meetings of the share-holders passed on 24th December 1931 and 22nd January 1932. The main issue in the case was whether Arts. 84 and 101 had been validly amended. The learned Senior Sub-Judge has held that the amendment of the articles was ultra vires, owing to defects in the procedure convening the extraordinary meetings for the purpose.

Various irregularities were alleged, but it seems unnecessary to discuss them all. For there is one irregularity which seems fatal. It appears that the notice did not mention that the question of amendment of Arts. 84 and 101 was to come up for decision in the meeting. The notice only referred to a vote of 'non-confidence' in the plaintiff ; but I do not think this can be considered to be sufficient notice of the proposed amendment of the articles. It may be noted that in addition to the vote of 'non-confidence,' there was also a resolution to the

effect that the plaintiff was not entitled to get 1/4th of the net profit as remuneration. It was by no means clear that the meeting was to consider the question of amending the articles of association, even if the plaintiff was not liable to be removed under the aforesaid articles. According to S. 20, Companies Act, the articles could not be amended except by a special resolution passed at an extraordinary meeting, and due notice of the proposed resolution has to be given: see S. 81, Companies Act. No such notice having been given, I agree with the finding of the learned Senior Sub-Judge that the amendment of the articles relied on by the defendants was invalid.

It was contended on behalf of the defendant Bank that even if the articles were not amended, they did not constitute any contract between the plaintiff and the Bank and the Bank was therefore not bound by the said articles. In support of this contention, reliance was placed on (1888) 37 Ch D 1,¹ (1872) 8 Ch D 956,² (1876) 1 Ex D 88³ and (1915) 1 Ch D 881.⁴ Counsel for the appellant conceded the correctness of the proposition that the articles of association constituted a contract inter se amongst the share-holders, but he contended that the provisions of the said articles about the plaintiff's acting as a managing director having been acted upon, those provisions now constituted an implied contract between the Bank and the plaintiff and are therefore binding on the Bank. Reliance was placed by him on (1892) 2 Ch 158⁵ and (1898) 1 Ch 324.⁶ The contention of the learned counsel for the appellant seems to me to receive support not only from the rulings cited by him but also from remarks in one of the rulings cited on behalf of the respondent: see (1872) 8 Ch D 956³ at p. 960. Out of the cases cited for the respondent, the facts in (1876) 1 Ex D 88³ were somewhat similar to those of the present case. In that case the plaintiff sued on

the basis of a provision in the articles of association to the effect that he was to be employed as a permanent solicitor of the company. The plaintiff was however not a member of the company and was not a party to the articles. The question of an implied contract was raised in that case, but the plea was not accepted. This ruling seems to be against the appellant.

It must be said that the rulings cited are not easy to reconcile. No ruling of any Indian High Court was cited. According to S. 21, Companies Act, the articles of association are binding on the company as well as the members thereof. In view of the express statutory provision, I do not see why the articles on which the plaintiff has relied should not be considered to be binding on the company. Moreover, the company has acted upon the articles and the plaintiff has admittedly acted as Managing Director for some 11 years before the suit. In the circumstances, I do not see why there should not be held to be implied contract between the company and the plaintiff in terms of the aforesaid articles, as held in the rulings cited by the learned counsel for the appellant. It is not shown that a contract of this kind with a company must be in writing or under seal and no difficulty as regards the forms of the contract seems to arise: see S. 88, Companies Act. I shall therefore follow the view taken in these rulings and hold that there was an implied contract between the plaintiff and the defendant Bank and he is entitled to maintain the present suit on the basis of that contract.

I now come to the grounds on which the learned Senior Sub-Judge has refused to grant the plaintiff the declaration and injunction prayed for. The learned Senior Sub-Judge has held that the plaintiff has come to Court after great delay, that it would be ludicrous and inequitable to force him on the Bank as a Managing Director after this long period, especially in view of the fact that it would be open to the shareholders to remove him at any time by passing a proper resolution for amending the aforesaid articles according to law. As regards the question of delay, it appears that on 6th July 1932 the Directors of the Bank had themselves filed a suit for a declaration that the present plaintiff was no longer the Managing Director of the Bank. This suit was dismissed in default on 14th August 1933. The plaintiff then filed a suit on 31st August 1933 for a decla-

1. *Brown v. La Trinidad*, (1888) 37 Ch D 1 = 57 L J Ch 292 = 58 L T 137 = 36 W R 289.

2. *In re Tavarone Mining Co.*, (1872) 8 Ch D 956 = 42 L J Ch 768 = 29 L T 363 = 21 W R 829.

3. *Eley v. Positive Govt. Security Life Assurance Co. Ltd.*, (1876) 1 Ex D 88 = 45 L J Ex 451 = 34 L T 190 = 24 W R 338.

4. *Hickman v. Kent or Romney Marsh Sheep-Breeder's Association*, (1915) 1 Ch D 881 = 84 L J Ch 688 = 113 L T 159 = 59 S J 478.

5. *In re Anglo-Austrian Printing & Publishing Union*, (1892) 2 Ch 158 = 61 L J Ch 481 = 66 L T 593 = 40 W R 518.

6. *In re New British Iron Co., Ex parte Beckwith*, (1898) 1 Ch 324 = 67 L J Q B 164.

ration that the other Directors, who were opposing him, were not duly elected. The Bank was not made a party to that suit. That suit dragged on for a long time. It was dismissed by the trial Court on 6th July 1936. During the pendency of the appeal from that decision, the suit was withdrawn, as fresh elections of Directors had been held and the relief claimed had become infructuous. The present suit was then instituted on 13th August 1936.

It will thus appear that the question of the plaintiff's status was directly the subject-matter of the first suit. In the second suit, however the plaintiff only sued for a declaration that the other Directors who were joined as defendants were not duly elected. The Bank was not made a party to the suit and no satisfactory explanation is given as to why the plaintiff did not seek the relief now prayed for in that case, when he had been already removed from the post of Managing Director on 26th November 1932. It must therefore be held that he had delayed the present claim against the Bank at least for about three years. I do not however see why the plaintiff should not be granted at least a declaratory relief as regards his status when he has come to Court within limitation. The learned Sub-Judge has remarked that it would be open to the Bank to remove the plaintiff at any time by passing the necessary resolution at a meeting of the share-holders as required by law. But they have apparently not done so up till now (at least there is no evidence to that effect on the record) and it seems useless to speculate about the attitude which the share-holders may take in the matter. The plaintiff has come to a Court of law, and when it has been found that the resolutions removing him from office were ultra vires, I do not see why a declaration to that effect should not be granted.

The relief as regards the injunction which he has prayed for however stands on a different footing. As the plaintiff did not sue the Bank immediately, the Bank has naturally carried on its work under other management for a long time. The Bank is evidently not prepared to have the plaintiff as Managing Director now as it is opposing his claim. Moreover, it is well established that a Court will not give specific relief in the shape of an injunction when damages will be an adequate remedy (*cf.* Ss. 21 and 56, Specific Relief Act). In the present instance, if the plaintiff has been deprived of his lawful rights, it would be open to the

plaintiff to claim damages from the Bank and I do not see why that should not give adequate relief to the plaintiff. Secondly, the status of the plaintiff as a Managing Director is that of an employee. The contract on which the plaintiff relies is dependent on personal services and volition of parties. In such cases, the contract cannot be specifically enforced (*vide* S. 21, Specific Relief Act) and a Court will also not grant an injunction: *see* S. 56 (f) of the same Act. This is also the rule observed by Courts where a servant sues his master to restrain him from dismissing him during the contracted period of service: *see* Smith's Law of Master and Servant, Edn. 8, p. 13.

I am therefore of opinion that the plaintiff is entitled to a declaration as to his status, but not to the injunction prayed for. I have already stated that it would be open to the plaintiff to claim damages from the Bank, subject, of course, to any other pleas as to limitation bar under O. 2, R. 2, Civil P. C., etc., which the Bank may raise. The plaintiff has not claimed any damages in the present suit and it is therefore unnecessary for me to say anything further here on that point. On the above findings, I accept the appeal only to the extent of granting plaintiff a declaration that the resolutions of the share-holders dated 24th December 1931 and 22nd January 1932 in pursuance of which he was removed from his post as a Managing Director of the defendant Bank were ultra vires. In view of all the circumstances, I leave the parties to bear their costs.

G.N./R.K.

Order accordingly.

A. I. R. 1940 Lahore 245

DIN MOHAMMAD J.

Mt. Nanhi and another — Defendants
— Appellants.

v.

Badlu, Plaintiff and others,
Defendants — Respondents.

Second Appeal No. 759 of 1939, Decided on 3rd January 1940, from decree of Addl. Dist. Judge, Hissar, D/- 25th February 1939.

(a) Custom (Punjab) — Ancestral land — Land to be ancestral must be traced back to common ancestor of parties.

Under the Customary law the word "ancestral" carries a peculiar signification and even if the land be ancestral of the last male holder, it cannot be held to be ancestral qua the party, unless it is proved that the common ancestor of the parties had ever held it: 76 P R 1898; 81 P R 1901; 93 P R 1901 and A I R 1925 P C 267, *Rel. on.*

[P 246 C 2]

(b) Evidence Act (1872), Ss. 32 and 90 — Pandah's bahis when admissible under S. 32 (5) and (6) and S. 90 stated.

Pandah's bahis are admissible under S. 32 (5) and (6) and S. 90 only if evidence is led to prove the identity, signature and handwriting of the writer. The mere fact that such bahi is old is no justification for admitting it either under S. 32 (5) and (6) or under S. 90: *A I R 1937 Lah 599, Rel. on.* [P 246 C 2]

(c) Civil P. C. (1908), S. 100—Finding of fact cannot be arrived at on inadmissible evidence.

A finding of fact cannot be arrived at on inadmissible evidence and consequently if a judgment of any High Court has laid down that the evidence of a certain type and character was inadmissible, lower Court cannot ignore it merely on the ground that it was called upon to decide a question of fact only and for that no authority was necessary.

[P 246 C 2 ; P 247 C 1]

(d) Evidence Act (1872), Ss. 32 and 50 — Prohit's statement regarding relationship when admissible stated.

A prohit's statement regarding relationship is admissible only if it comes within the four corners of S. 32 (5) and (6) or under S. 50 of the Act.

[P 247 C 1]

N. C. Pandit and Prem Chand Pandit —
for Appellants.

J. R. Agnihotri — for Respondent
(Plaintiff).

Judgment. — The suit out of which this appeal has arisen was instituted by one Badlu against Mt. Nanki and Mt. Dhapan, who were described as the principal defendants, and six other persons whose interest was said to be identical with that of the plaintiff. It was alleged in the plaint that the plaintiff as well as defendants 3 to 8 were the collaterals of one Bunti and that on the death of Bunti's mother, who had succeeded to his estate, they were entitled to succeed in preference to the two principal defendants who were Bunti's sisters and thus not entitled to inherit their brother's land. The contesting defendants resisted the suit on various grounds including among others that the plaintiff was not a collateral of Bunti and that the land was not ancestral qua him. The trial Court found both the issues in favour of the plaintiff and decreed the suit. On appeal, the District Judge found that the land was not ancestral qua the plaintiff, inasmuch as it had not been established that it was ever occupied by the common ancestor of the parties, but all the same he treated the land as ancestral for the purposes of the suit. On the question of relationship, he relied both on the documentary and oral evidence led by the plaintiff and thus upheld the decree of the Court below. On the record as it stands, the decision of the District Judge cannot

be maintained on either of the points referred to above. On the question, whether the land was ancestral or not, he erred in treating the land as ancestral in spite of his finding that it could not be traced back to the common ancestor of the parties. Under the Customary law, the word "ancestral" carried a peculiar signification and even if the land be ancestral of the last male holder, it cannot be held to be ancestral qua the plaintiff, unless it is proved that the common ancestor of the parties had ever held it. This is such an obvious proposition of law that it requires no authority to support it. If however, any authority is needed for the proposition, reference may be made to 76 P R 1898,¹ 81 P R 1901,² 93 P R 1901³ and 6 Lah 502⁴ at p. 510.

Similarly, the decision of the District Judge on the question of relationship is bad in law as it is based on inadmissible evidence. On this matter he has relied on (a) pandah's bahi, (b) prohit's statement and (c) the statements of oral witnesses who have deposed to the relationship of the plaintiff with Bunti. So far as the pandah's bahis are concerned, the question was recently decided by a Division Bench of this Court in a case reported in *A I R 1937 Lah 599*.⁵ I was a member of that Bench and I wrote the judgment myself and explained therein in what circumstances such bahis could be admitted under sub-ss. (5) and (6) of S. 32 and S. 90, Evidence Act. None of the conditions laid down there was fulfilled in the case of the bahi relied on by the District Judge and it could not therefore be admitted in evidence in any circumstances. The mere fact that a bahi is old is no justification for admitting it either under S. 32 (5) and (6) or under S. 90. Some judgments were brought to the notice of the District Judge but he failed to consider them on the ground that on a mere question of fact he needed no authorities. He should however have realized that although the point at issue was a question of fact, a finding of fact could not be arrived at on inadmissible evidence and consequently if a judgment of this Court or of any other High Court laid down that the evidence of

1. Jowahir Singh v. Dial Singh, (1898) 76 P R 1898.

2. Fakir v. Daulat, (1901) 81 P R 1901.

3. Jhanda Singh v. Gurmukh Singh, (1901) 93 P R 1901.

4. Ahmad Khan v. Channi Bibi, (1925) 12 AIR P C 267=91 I C 455=52 I A 379=6 Lah 502 (PC).

5. Hazura Singh v. Mohindar Singh, (1937) 24 A I R Lah 599=173 I C 779=39 P L R 370= I L R (1937) Lah 732.

a certain type and character was inadmissible, he could not ignore it merely on the ground that he was called upon to decide a question of fact only and for that no authority was necessary.

The statement of the prohibit as well as the oral statements of the witnesses who deposed to the relationship of the parties could also not be treated as evidence under the Evidence Act inasmuch as the requirements that are laid down in the Act itself were not satisfied in the case of those statements. Under the existing law, relationship can be established either under S. 32 (5) and (6) or under S. 50, Evidence Act, and unless a piece of evidence comes within the four corners of these provisions of law, it cannot be acted upon by any Court. Under S. 32 (5) and (6), the statements of such persons only can be proved as are specifically enumerated there and it is clear that the statement of the prohibit or of the other witnesses of the plaintiff did not fall under that category. Under S. 50, Evidence Act, opinion derived from conduct alone can be established and none of the plaintiff's witnesses could under the circumstances offer an opinion which was based on the conduct of the ancestors of the parties, inasmuch as the persons to whose relationship they deposed had been non-existent long before their birth.

The only reliable piece of evidence on the record was that derived from the revenue records but, unfortunately for the plaintiff, none of the copies produced by him connected him or defendants 3 to 8 with Bunti or his ancestors in any manner. All the three branches had been mentioned in separate genealogical trees and there was no connecting link between them. This link was supplied by oral evidence or the evidence derived from the pandah's bahi and that evidence, as remarked above, was altogether inadmissible. It follows therefore that the plaintiff bore no relationship to Bunti and had thus no locus standi to sue. However defective the title of the principal defendants, he alone could oust them who had a better title. I accordingly allow this appeal, set aside the judgments and decrees of the Courts below and dismiss the plaintiff's suit with costs throughout.

D.S./R.K.

*Appeal allowed.***A. I. R. 1940 Lahore 247**

TEK CHAND AND ABDUL RASHID JJ.

Ram Lal — Defendant — Appellant.

v.

*Bhagat Ram, Plaintiff and others,
Defendants — Respondents.*

First Appeal No. 68 of 1939, Decided on 23rd February 1940, from decree of Sub-Judge, First Class, Rawalpindi, D/- 11th January 1939.

Mortgage—Subrogation—Mortgage by J to S —Property sold by J to M and M mortgaging it to B and then selling to R—In suit by S on his mortgage R making certain payment in discharge of S's mortgage—Suit by B on his mortgage — R held subrogated to rights of S and property could be sold in execution of B's decree subject to R's charge.

One J mortgaged certain property to S. J then sold the property to M and M mortgaged it to B. Subsequently, M sold the property to R. In a suit on mortgage brought by S, R paid certain amount to S in discharge of his mortgage. Later on, B brought a suit on his mortgage and in execution sought to sell the property :

Held that in such a case, in the absence of any evidence to the contrary, the presumption was that by making the payment to S, R intended to keep S's charge alive to the extent of amount paid by him and for that sum he must be held to be subrogated for S. It must therefore be held that R had the first charge on the property and the property should be sold in execution of B's decree subject to that charge : 10 Cal 1035 (P C) ; 38 P R 1894 and A I R 1922 Lah 275, Rel. on.

[P 249 C 2]

J. L. Kapur and Shamair Chand —

for Appellant.

S. L. Puri, Roop Chand and Ajit Ram —

for Respondents.

Tek Chand J. — One Jaikishan Das had taken on lease a plot of land from Kultar Singh in Mandi Baha-ud-Din. On this plot he had constructed some buildings in which he put up a small flour mill and other machinery. On 22nd June 1928 Jaikishan Das mortgaged the superstructure of this building and the machinery to Balwant Singh for Rs. 9000. The mortgage was without possession and the principal sum secured carried interest at 6 per cent. per annum. This deed was duly registered in the office of the Registrar at Gujrat, in which district Mandi Baha-ud-Din is situate. Some time in 1929, Jaikishan Das sold the superstructure and the machinery to Makhan Singh, who entered into possession as owner. On 18th July 1932 Makhan Singh mortgaged a residential house in Rawalpindi and the machinery of the flour mill etc. in Mandi Baha-ud-Din to Bhagat Ram plaintiff for Rs. 5000. This mortgage, also, was without possession and carried interest at

Re. 1.4.0 per cent. per annum. As a part of the property covered by the mortgage was situate in Rawalpindi, the deed was registered at Rawalpindi. In this mortgage deed no mention was made by Makhan Singh of the fact that the machinery had previously been mortgaged by his transferor, Jaikishan Das, to Balwant Singh. On the other hand, Makhan Singh distinctly stated in the deed that the entire property, which was being mortgaged to Bhagat Ram, was "free from any previous charge of mortgage or sale." On 11th June 1934, Makhan Singh sold the machinery and the factory at Mandi Baha-ud-Din to Ram Lal and Hans Raj for Rs. 7000. This sale was effected by a deed which was registered by the Sub-Registrar at Phalia, in whose jurisdiction Mandi Baha-ud-Din is situate. In this deed also, Makhan Singh did not disclose that the machinery had been previously mortgaged to Balwant Singh or Bhagat Ram. He falsely stated that "the things sold and the materials mentioned above are previously free from all encumbrances" and gave the undertaking that "if there be found any encumbrance I will be liable therefor." Under this deed the vendees, Ram Lal and Hans Raj, took possession of the factory including the machinery.

On 22nd June 1934, Balwant Singh brought a suit for recovery of Rs. 7500 by sale of the machinery which had been mortgaged to him by Jaikishan Das on 22nd June 1928. In this suit he impleaded Jaikishan Das, Makhan Singh, Ram Lal and Hans Raj as defendants. After the suit had proceeded for some time, the Court, on the application of the parties, referred the case to the sole arbitration of one Lala Nanak Chand. Before the arbitrator the parties came to a settlement: Balwant Singh agreed to accept Rs. 4000 in full satisfaction of the amount due on the mortgage and it was agreed that this amount be paid in the following manner: Rs. 2600 by Makhan Singh in certain instalments. Rs. 1400 by Ram Lal and Hans Raj in equal shares. The arbitrator embodied the terms of this agreement in his award and submitted the same to the Court on 23rd February 1935. The Court accepted the award and passed a decree in accordance with its terms on 7th March 1935. On 18th July 1935, Hans Raj and Ram Lal deposited Rs. 1400 in Court, which was duly paid over to Balwant Singh. On 11th June 1938, Bhagat Ram instituted the present suit in the Court of the Subordinate Judge, Rawalpindi, for re-

covery of Rs. 6250 by sale of the house at Rawalpindi and the machinery at Mandi Baha-ud-Din, both of which had been mortgaged by Makhan Singh to him by the deed, executed and registered on 18th July 1932. The defendants impleaded in the suit were Makhan Singh, Ram Lal, his son Hira Nand, and the Co-operative Bank to which the house in Rawalpindi had been mortgaged. It appears that Hans Raj had, in the meantime, sold his share in the machinery to Ram Lal and therefore he was not impleaded as a defendant. The suit was resisted by Makhan Singh on various grounds, but all his defences failed. As he has not appealed it is not necessary to set out here his pleas nor those of the Co-operative Bank which also is not interested in the result of this appeal.

Ram Lal raised various pleas, of which those material for the purposes of this appeal, are (1) that he is a bona fide purchaser of the machinery for value, without notice of the plaintiff's charge and therefore the plaintiff is not entitled to enforce his mortgage against him and (2) that he having paid Rs. 1400 to Balwant Singh, who held the first mortgage on the machinery, he stood in the shoes of Balwant Singh and as such had a prior right for recovery of that sum as against the plaintiff, even though the mortgage in favour of the plaintiff was earlier than that in his favour. The learned Subordinate Judge has found both these points against Ram Lal and has granted the plaintiff a decree for Rs. 5584.8.0 recoverable by sale of the properties which had been mortgaged to him. He has dismissed the suit against Hira Nand (defendant 3) as he was not found interested in the machinery, but has passed no order as to his costs. From this decree Ram Lal has appealed urging that the plaintiff's suit should have been dismissed against him: Hira Nand has filed cross-objections praying that he should have been allowed costs in the trial Court.

The mortgage of the machinery by Makhan Singh in favour of Bhagat Ram had been effected earlier than the sale by him to Ram Lal. It appears that Makhan Singh did not reveal this fact to Ram Lal at the time of the sale. On the other hand, he falsely stated that the machinery was unencumbered. But the mortgage in favour of the plaintiff had been effected by a registered document and therefore Ram Lal, who subsequently acquired the machinery, must be presumed to have had notice of

this earlier transaction. It has, however, been argued by the learned counsel for the appellant that this presumption cannot be made in this case, as the mortgage deed in favour of the plaintiff was registered at Rawalpindi and not in the Gujrat District where the machinery in dispute is situate and it has not been shown that a copy of the deed was forwarded by the Sub-Registrar of Rawalpindi to the Registrar of Gujrat District as required by S. 65 (1), Registration Act, and the memorandum of registration was filed by the latter in his book as laid down in sub-s. (2) of that Section. This point had not been raised in the Court below, nor is it mentioned in the grounds of appeal presented in this Court, and there is no basis for the suggestion that the procedure laid down in S. 65, Registration Act, had not been followed. Counsel asks for an inquiry on this point, but I can see no reason to grant this prayer. Counsel is unable to suggest any data on which his suggestion is based. Under S. 114, Evidence Act, it must be presumed that all official acts were duly and properly done and there is no reason why this presumption should not be raised in this case. In my opinion, the contention is without force and must be rejected. Ram Lal cannot therefore be said to be a transferee without notice, and he must be taken to have purchased the machinery subject to the charge of the plaintiff. No fraud, misrepresentation or gross neglect on the part of the plaintiff has been proved nor has it been shown that the plaintiff, by any act or conduct of his, had induced Ram Lal to purchase the machinery which had previously been mortgaged to him. The plaintiff therefore is entitled to enforce his prior mortgage against the machinery.

The appellant is, however, on firmer ground when he claims to stand in the shoes of the first mortgagee, Balwant Singh, whom he has paid Rs. 1400 under the decree passed on 7th March 1935. As has been stated above, the original owner, Jaikishan Das, had mortgaged the machinery to Balwant Singh by a registered deed in June 1928. Subsequently, Makhan Singh purchased the machinery from Jaikishan Das; it was subject to this mortgage; and later, when he created a second mortgage over the same machinery in favour of Bhagat Ram, plaintiff, he concealed from him the fact of the prior mortgage to Balwant Singh. The deed in favour of Balwant Singh being registered, Bhagat Ram must

be presumed to have notice of that mortgage, and of the fact that Balwant Singh had the first charge on the property. To enforce this charge Balwant Singh brought a suit, which resulted in a compromise decree by which Balwant Singh reduced his claim to Rs. 4000 and agreed to receive it partly from Makhan Singh and partly from Ram Lal. In accordance with that arrangement, Ram Lal paid Rs. 1400 to Balwant Singh in July 1935. This payment must, in the circumstances, be taken to have been made by Ram Lal in redemption of the mortgage in favour of Balwant Singh and, accordingly Ram Lal is subrogated to the rights of Balwant Singh to the extent of Rs. 1400. Mr. Shambhu Lal Puri for the plaintiff-respondent contended that as the decree based on the award did not, in so many words, create a charge for the sum of Rs. 4000 which Balwant Singh had agreed to accept on the machinery, his mortgage must be deemed to have been extinguished by this decree and that at the time of the payment of Rs. 1400 by Ram Lal three months later, the payment cannot be said to have been made in redemption of the prior mortgage in favour of Balwant Singh. In my opinion, this contention is without force. As has been stated above, the mortgage in favour of Balwant Singh was alive at the time when he instituted the suit for recovery of the amount due on foot of his mortgage, and it was in satisfaction of that charge that the arrangement had been arrived at, by which he was paid in the manner stated above. In such a case, in the absence of any evidence to the contrary, the presumption is that by making this payment Ram Lal intended to keep Balwant Singh's charge alive to the extent of Rs. 1400 and for that sum he must be held to be subrogated for Balwant Singh: 10 Cal 1035,¹ 38 P R 1894² and 3 Lah 99.³ It must therefore be held that Ram Lal has the first charge for Rs. 1400 on the machinery, etc., at Mandi Baha-ud-Din and this property shall be sold in execution of the plaintiff's decree subject to that charge.

For the foregoing reasons, I would accept this appeal in part and, in modification of the decree of the lower Court, would order that the machinery in dispute and the kothris, etc., in Mandi Baha-ud-Din be sold

1. Gokal Das Gopal Das v. Puranmul Premsukh Das, (1884) 10 Cal 1035=11 I A 126=4 Sar 543 (P C).

2. Ghanaya v. Chajju Ram, (1894) 38 P R 1894.

3. Bur Singh v. Hazara Singh, (1922) 9 A I R Lah 275=63 I C 760=3 Lah 99.

in execution of the plaintiff's decree, subject to the appellant Ram Lal's charge in the sum of Rs. 1400 together with interest thereon at 6 per cent. per annum from 18th July 1935. Having regard to all the circumstances, and particularly in view of the fact that both Bhagat Ram and Ram Lal appear to have been cheated by Makhan Singh, we leave Bhagat Ram and Ram Lal to bear their own costs of this appeal. The cross-objections by Hira Nand are without force. He is the son of Ram Lal and is, admittedly, joint with him. He does not appear to have incurred any additional expense and therefore the lower Court, while dismissing the suit against him, was justified in not allowing him costs in that Court. The cross-objections must be dismissed, the parties being left to bear their own costs of these cross-objections in this Court.

Abdul Rashid J.—I agree.

D.S./R.K. *Appeal partly allowed.*

A. I. R. 1940 Lahore 250

YOUNG C. J. AND TEK CHAND J.

Hakim Singh and another —

Defendants — Appellants.

v.

*Committee of Management, Gurdwara
Guru Bhag Singh — Plaintiff —*

Respondent.

First Appeal No. 160 of 1939, Decided on 8th December 1939, from decree of Sikh Gurdwaras Tribunal, Lahore, D/- 6-4-1939.

(a) Punjab Sikh Gurdwaras Act (8 of 1925), S. 25-A — Suit for possession of "right of way" — S. 25-A does not apply as "right of way" being incorporeal right is incapable of being possessed — Remedy lies in Civil Court.

The only relief which can be given in a suit under S. 25-A is one of possession. A "right of way" is an incorporeal right of which possession cannot be given. The provisions of S. 25-A therefore do not apply. A tribunal under the Act cannot entertain and decree a claim for a right of way. The remedy may be by way of injunction or other relief which might be obtained in the ordinary Civil Court. [P 251 O 1]

(b) Punjab Sikh Gurdwaras Act (8 of 1925), Ss. 25-A, 10 and 7—Compromise decree under S. 10 — Decree with regard to property included in compromise petition but not in notification under S. 7 is invalid — Suit in respect of that property does not lie under S. 25-A—Remedy is by way of regular suit on basis of registered compromise deed.

Where a compromise decree is passed by a tribunal in proceedings under S. 10, the decree with regard to property not mentioned in the notification under S. 7 but included in the petition of compromise must be deemed to be invalid, under O. 23, R. 8, Civil P. O.; therefore the proper remedy in respect of that property is by way of a

regular suit in the ordinary Civil Court based on the registered compromise deed and not by proceedings under S. 25-A before a tribunal. [P 251 O 2]

Chuni Lal Vohra — *for Appellants.*

J. L. Kapur — *for Respondent.*

Tek Chand J. — This is an appeal from the judgment of the Sikh Gurdwaras Tribunal, Lahore, dated 6th April 1939, in a suit under S. 25-A, Sikh Gurdwaras Act. The suit was instituted by the Committee of Management of the Gurdwara Guru Bhag Singh of village Urapar, Tahsil Nawanshahr, District Jullundur, against Hakim Singh and Rai Singh, sons of Jaimal Singh, for possession of certain properties which are described in detail in para. 3 of the plaint. The tribunal granted the plaintiff committee a decree for all the properties mentioned in para. 3. The defendants, Hakim Singh and Rai Singh, appeal with regard to three of these properties, namely those described in cls. (c), (e) and (j). It will be convenient to take up the case relating to each property separately. The claim in cl. (c) relates to a right of way over land in Khasra No. 4052. This claim is based on a decree passed by the tribunal on 5th June 1934 in accordance with a compromise arrived at in proceedings on a petition under S. 10 of the Act. By that decree Jaimal Singh, father of the defendant-appellants, was declared to be the owner of Khasra No. 4052, but the "Gurudwara" was held "to have a right of way over it." The Committee of Management of the Gurdwara have now sued under S. 25-A of the Act to be "put in possession of the right of way." It is objected on behalf of the appellants that the "right of way" given to the defendant is in the nature of an easement, which is not capable of being given possession of and therefore S. 25-A is inapplicable. In our opinion, this contention is well founded and must succeed. S. 25-A provides a summary and cheap remedy for delivery of possession of properties in which the right, title or interest of a Sikh Gurdwara or other person has been declared by the tribunal (or on appeal by the High Court) under the provisions of the Act. S. 25-A lays down that:

When it has been decided under the provisions of this Act that a right, title, or interest in immovable property belongs to a Notified Sikh Gurdwara, or any person, the Committee of the Gurdwara concerned, or the person, in whose favour a declaration has been made may . . . institute a suit before a tribunal claiming to be awarded possession of the right, title or interest in the immovable property.

It will be seen that the only relief which

can be given in a suit under this Section is one of possession. The "right of way" which was given to the plaintiff committee by the previous decree is an incorporeal right of which possession cannot be given. The provisions of S. 25-A therefore do not apply and the tribunal has erred in entertaining and decreeing this part of the claim. The plaintiff committee may have a remedy by way of injunction, or other relief, which might be open to them in the ordinary Civil Court, and they may, if so advised, pursue it in the proper Court. The property in cl. (e) of para. 3 of the plaint is described as Khasra Nos. 4070 and 4072 of which the area is 2 kanals and 1 marla. It is urged on behalf of the defendant-appellants that this property was acquired by them after the compromise decree of 1934 and therefore no suit for its possession lies under S. 25-A. This contention is clearly erroneous. Rai Singh, defendant, in his statement made before the tribunal on 14th October 1938, admitted in clear terms that this property had been included in the notification under S. 7. This being so, it was the subject of the petition under S. 10, which was eventually settled by the compromise decree of 5th June 1934. It appears that in order to defeat the right of the Gurdwara the defendants, on 11th November 1937, secured a *ruqqa* from one Daulat Ram to the effect that on that date he had sold Khasra No. 4070 with some other properties to the defendants. Apart from this fact, this *ruqqa* is unregistered and could have been prepared at any time and it is obvious that it can have no effect against Rai Singh's own admission mentioned above. The Gurdwara was declared its own in the previous litigation and the plaintiff committee is entitled to a decree for its possession under S. 25-A.

The third property is described in cl. (j) of para. 3 of the plaint and covers an area of 14 marlas in Khasra No. 3516 with the building standing thereon. It is conceded by counsel for the plaintiff committee that this property was not included in the notification under S. 7 and therefore was not the subject-matter of the proceedings before the tribunal under S. 10, which ended in the decree of 5th June 1934. It was, no doubt, mentioned in the petition of compromise filed in those proceedings, but being outside the scope of the proceedings under S. 10 no decree could be or was in fact passed by the tribunal in respect of it. That decree declared, in accordance with the compromise made

between the parties, that the property in dispute belongs to the Sikh Gurdwara Dera Guru Wad Bhag Singh subject to the terms of the compromise.

Admittedly, this particular property was not in dispute then and was therefore not covered by the decree. This being so, S. 25-A is inapplicable and the plaintiff committee is not entitled to recover possession under the summary remedy provided by S. 25-A. Mr. J. L. Kapur conceded that under the Act the tribunal, or on appeal the High Court, had no jurisdiction to pass a decree relating to properties not covered by the notification under S. 7 or the petition under S. 8. He argued however that the position in this case is different as the compromise, actually arrived at between the parties, related to properties, some of which were the subject of the petition and others were outside it, that this compromise was filed before the tribunal and was accepted by it and a decree passed in accordance with its terms. But as stated already, the decree, actually passed, related only to the properties then in dispute. Further, under O. 23, R. 3, Civil P. C., read with S. 12 (9) of the Act (to which reference was made by Mr. Kapur himself) the Court recording the compromise is empowered to "pass a decree in accordance therewith so far as it relates to the suit." This is exactly what the tribunal did in the previous case. The persons who were actually conducting the litigation on behalf of the Gurdwara before the tribunal at that time appear to have fully realized this and it was apparently for this reason that they got the compromise registered under the Registration Act on 5th October 1934. Their remedy therefore is by way of a regular suit in an ordinary Civil Court based on the registered compromise deed and not by proceedings under S. 25-A before the tribunal. The decision of the tribunal relating to property (j) is incorrect and must be set aside.

Accordingly, we accept the appeal in part, set aside the decree of the tribunal in respect of properties (c) and (j) described in para. 3 of the plaint and dismiss the suit of the plaintiff committee for possession of these two properties. We affirm the decree of the tribunal with regard to the other properties, including that mentioned in cl. (e) of the aforesaid paragraph. As neither party has succeeded in full, they shall bear their own costs in both Courts.

G.N./R.K.

Order accordingly.

A. I. R. 1940 Lahore 252

DIN MOHAMMAD J.

Sardar Jai Singh and another —
Plaintiffs — Appellants.
 v.

Wali Mohammad and another —
Defendants — Respondents.

Second Appeal No. 1356 of 1939, Decided on 8th January 1940, from decree of Dist. Judge, Ambala, D/- 25th July 1939.

(a) Practice—New plea—Point of law can be raised for first time in appeal if same can be determined from material on record.

Where the point of law that a party intends to raise for the first time in appeal can be determined on the material already existing on the record, the Court should not refuse permission to the party to urge that plea. [P 253 C 2]

(b) Transfer of Property Act (1882), S. 41—Husband, wife and son executing mortgage of two houses—Registration only in name of husband—Wife allowing husband to represent himself as ostensible owner of house belonging to her—S. 41 applies.

Where a Mahomedan, his wife and son have executed a mortgage of two houses and the mortgage deed has been registered as executed by the husband alone, the wife allowing her husband to represent himself as the ostensible owner of one of the houses belonging to her, the case is covered by the provisions of S. 41. [P 253 C 2]

Harnam Singh — *for Appellants.*

R. C. Soni — *for Respondents.*

Judgment.—The suit out of which this appeal has arisen was instituted by Sardar Jai Singh and his brother, Nand Singh, against Wali Muhammad, son of Ghauns and Mt. Munti, widow of Ghauns, in their personal capacity and also as the legal representatives of Ghauns deceased. It was for recovery of Rs. 1400 on the foot of two mortgage deeds executed by Ghauns deceased in favour of the plaintiffs on 25th June 1926 and 11th March 1929 respectively. The suit was resisted on the ground that one of the houses said to have been mortgaged to the plaintiffs did not belong to Ghauns but belonged to Mt. Munti and consequently the plaintiffs were not entitled to obtain a decree against that house. It was further alleged that inasmuch as registration had been refused on behalf of both Wali Mohammad and Mt. Munti, although they had been shown as joint executants of the mortgage deed of the year 1926, they could not be held responsible. On the pleadings of the parties, their respective counsel were examined who stated what the case was as put forward by them. Counsel for the plaintiffs insisted that both the houses belonged to Ghauns and further

relied on the fact that the mortgage deed of the year 1926 had been executed by both Wali Mohammad and Mt. Munti along with Ghauns. Counsel for the defendants reiterated what had been incorporated in the written statement. Thereupon, Mr. Gobind Ram, Subordinate Judge, First Class, framed the following issues :

(1) Are Mt. Munti and Wali Mohammad defendants liable on the mortgage deed in spite of the fact that as against them its registration was refused ?

(2) Did both the houses mortgaged belonged to Ghauns deceased ?

(3) Was the mortgage amount received by all the three executants ?

(4) Was the second mortgage deed executed by Ghauns deceased in the plaintiffs' favour and for consideration ?

(5) Relief.

On issue 1, the Subordinate Judge held that the registration of the document, Ex. P-1, that is the mortgage deed of the year 1926, did not affect any property which did not belong to Ghauns. On issue 2, it was decided that of the two houses mortgaged one did not belong to Ghauns. Issue 3 was found to be redundant inasmuch as personal remedy had been time-barred. Issue 4 was decided in favour of the plaintiffs. The suit was accordingly decreed as regards the house described in the judgment as No. 1 only but was dismissed as regards house No. 2. The plaintiffs appealed to the District Judge and their appeal was heard by Mr. I. M. Lall. One of the points raised before him was that even if house No. 2 did not belong to Ghauns, Mt. Munti was debarred from raising any such plea under S. 41, T. P. Act. This plea however was not allowed to be raised by the District Judge on the ground that it had not been raised in the Court below. On the question whether registration of the deed had been effected in respect of both houses, the District Judge found that the admission made by Mt. Munti was not clear and he consequently dismissed the appeal and maintained the order of the trial Court. Hence this appeal.

In my view, this appeal must succeed. It has been reliably established that the document Ex. P-1 was executed on behalf of Wali Mohammad and Mt. Munti in addition to Ghauns and it was duly signed by all of them. The deed was written on two papers of Re. 1-8-0 each as one paper of the value of Rs. 3 was not available and both papers were similarly signed. At the time when they were purchased from the stamp vendor all the three persons had gone there and had signed the endorse-

ments made by the stamp vendor on the deeds. Both the endorsements and the deed refer to the mortgaging of two houses. Further, in order to make the matter doubly sure, a plan was attached to the deed the heading of which ran as follows:

Plan of pukhta houses situate in the abadi of Rupar, Mohalla Miran Sahib, owned by Ghauns, son of Ranjhe Khan, Rajput Mussalman of Rupar.

This plan too was signed by all the three persons concerned. On the same day, the document was presented for registration by all the three persons named in the deed as executants. The Sub-Registrar made an endorsement stating that Ghauns had admitted the execution of the deed and the receipt of consideration and the registration was consequently allowed on his behalf but was disallowed on behalf of Wali Mohammad and Mt. Munti. The reason that was advanced for this order may be stated in the language of the Sub-Registrar himself as it is that part of the endorsement which has given rise to this dispute:

Kiyonkih Ghauns bian karta hai kih yeh makan jis ko main ar karta hun meri malkiyat ka hai Wali Mohammad aur Mt. Munti bhi is bat ko tasdik karte hain kih yeh makan hamara nahin hai. Siraf Ghauns hi ki malkiyat ka hai. Isliye Ghauns ki taraf se registry manzur ki jati hai. Wali Mohammad wa Mt. Munti bian karte hain kih hamara nam siraf murtehan ke kehne se Arzi Nawis ne pesh kunandan men tahrir kar diya hai.

This may be translated as follows:

Inasmuch as Ghauns states that the house mortgaged belongs to him alone, and Wali Mohammad and Mt. Munti too admit this fact and state that the house does not belong to them and that it belongs to Ghauns alone, registration is effected on behalf of Ghauns only. Wali Mohammad and Mt. Munti further state that their names have been shown as executants by the petition writer at the instance of the mortgagee.

The deed had not been drafted as a mortgage deed. It was drafted as a bond and the words "do makanat", i. e. two houses, occurred only once throughout the deed. It appears therefore that the Sub-Registrar at that time did not cautiously read the deed and so misdescribed two houses as one; otherwise the trend of his note clearly shows that both Wali Mohammad and Mt. Munti admitted the ownership of the property mortgaged to be that of Ghauns alone and on that basis the Sub-Registrar did not effect the registration on their behalf. Had Wali Mohammad or Mt. Munti represented at the time that one of the houses belonged to Mt. Munti and that as she was not mortgaging that house to the plaintiffs, registration should be refused on that account, the note would have been drafted in a different language. On the wording of the note, as it

stands, it can be safely argued that registration was not refused as some of the executants had protested that the property mortgaged belonged to them and that they were not mortgaging it but on the ground that the property belonged to one executant only and that they had no interest in the matter. Further, it is in evidence that some time after the execution of this deed another deed was executed on behalf of Ghauns where both houses were again stated to have been mortgaged by Ghauns. It is significant that in the body of the document the petition writer committed the same mistake as the Sub-Registrar and at one place described the property mortgaged as *makan makfula* (house mortgaged) although at other places he had used the term *jaidad makfula* (property mortgaged).

It is true that the site of the house was transferred to Mt. Munti for Rs. 99 in 1918 but it is in evidence that application for sanction to build on that site was put in by Ghauns himself. In the circumstances disclosed above, there could be no doubt as to the applicability of S. 41, T. P. Act, to the facts as had been brought upon the record and the District Judge was consequently wrong in not allowing counsel to argue that point before him especially as in my view it was covered by issue 2. The point did in the alternative arise under that issue. The appellants could not be allowed to lead further evidence on the matter but if the point of law that they intended to raise could be determined on the material already existing on the record, the District Judge should not have refused permission to the appellants' counsel to urge that plea.

Counsel for the respondent states that a question arising under S. 41, T. P. Act, is not a mere question of law but is a mixed question of law and fact; but even if this were so the appellants before the District Judge had not asked for any permission to lead further evidence on the matter and if counsel for the appellants had missed this aspect of the case in the trial Court, they should not have been deprived of the use of better intelligence in the lower Appellate Court. I accordingly hold that even if the site of the house in question had been sold to Mt. Munti in 1918, in 1926, when the document Ex. P. 1 was executed on behalf of Wali Mohammad, Mt. Munti and Ghauns, Mt. Munti allowed Ghauns to represent himself as the ostensible owner of the property and to transfer it for consideration. On the grounds stated above, I allow this

appeal, set aside the judgments and decrees of the Courts below and decree the plaintiffs' suit with costs throughout. The amount decreed will be payable by the defendants into Court within six months from the date of this judgment.

G.N./R.K.

Appeal allowed.

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DIN MOHAMMAD J.

*Firm Lorind Chand Lachhman Das
through Sainditta Mal—Plaintiff—
Appellant.*

v.

*Punjab National Bank Ltd., Sargodha
and another — Defendants —*

Respondents.

Second Appeal No. 1413 of 1939, Decided on 5th January 1940, from decree of Addl. Dist. Judge, Shahpur at Mianwali, D/- 26th May 1939.

(a) **Evidence Act (1872), S. 115—There is no estoppel if true facts are known to both parties.**

Section 115 does not apply to a case where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both parties: 30 Cal 539 (P C), *Rel. on.* [P 255 C 1]

(b) **Limitation Act (1908), Art. 145 — Depository's depository.**

A depository's depository is not contemplated in the Act: *A I R 1934 Cal 87*; *A I R 1924 Nag 12* and *A I R 1921 Cal 416, Disting.* [P 256 C 1]

Ratan Lal Chawla and Gosain Kundan Lal — for Appellant.

M. L. Puri — for Respondent (Bank).

Judgment. — The suit out of which this appeal has arisen was instituted in the following circumstances: In August 1929, the firm Lorind Chand Lachhman Das deposited 14 bales of cotton with Jawanda Mal for safe custody. Jawanda Mal's lease of the factory in which these bales were lying expired, and they were consequently transported to the factory of one Tara Chand. One Jawahar Mal obtained a decree against Tara Chand and in the execution of his decree these bales along with some other property, with which we are not concerned, were attached. The Punjab National Bank Ltd. raised an objection to that attachment on the ground that the property attached did not belong to Tara Chand but was in its possession. These objections were however dismissed. It is further evident that Tara Chand was in the meantime adjudged an insolvent and the receiver in insolvency took possession among other things of 167

bales of cotton including these 14 bales. On 1st October 1930, he sold the whole property including these bales for Rs. 7777-15-0

In the meantime, on 28th April 1930, the Bank instituted a suit for a declaration that the property attached in execution of Jawahar Mal's decree against Tara Chand was not liable to attachment and sale. On 4th December 1930, the Bank instituted another suit against the same persons for recovery of Rs. 12,711-10-9 by way of damages. The former suit was decreed in favour of the Bank on 30th July 1931 and the latter on 13th August 1932. From these decrees Jawahar Mal preferred two appeals to this Court: Civil Appeals Nos. 1386 of 1931 and 1786 of 1932.¹ Both these appeals were disposed of by one judgment by a Division Bench of this Court on 3rd January 1936. The appeal against the declaratory decree was dismissed, while the appeal against the decree for damages was allowed only to this extent that the amount was reduced to Rs. 9392-4-0. On 30th July 1936, the firm Lorind Chand Lachhman Das instituted the present suit against the Punjab National Bank Ltd., and Jawanda Mal for recovery of Rs. 1697-4-0 as the price of 14 bales of cotton which as stated above had been lying with Jawanda Mal on their account and of which the price had been realized by the Punjab National Bank. It may be remarked here that the Bank had, instead of paying the price of these bales of cotton to the firm Lorind Chand Lachhman Das, credited Jawanda Mal's account with the amount so received on the ground that Jawanda Mal had pawned these bales with it. This suit was resisted by the Bank on various grounds. The Subordinate Judge who tried the suit decreed it against Jawanda Mal but dismissed it against the Bank, mainly on the ground that the plaintiff firm was estopped by virtue of the sale effected in their favour on 1st October 1930. The District Judge on appeal maintained the decree of the Court below holding that there being no privity of contract between the plaintiff firm and the Bank, the plaintiff had no cause of action against it.

In my view, the decision of both the Courts below is wrong on the question of estoppel as well as on the question of absence of cause of action. In the matter of estoppel, all that is pleaded against the

1. *Jawahar Mal v. Punjab National Bank Ltd., Sargodha, Reported in (1936) 23 A I R Lah 524=166 I C 521=17 Lah 668=39 P L R 68.*

plaintiff firm is that in the sale held by the Official Receiver on 1st October 1930, the plaintiff firm purchased 167 bales of cotton including the 14 bales now claimed by it. This however is not enough. In the first place, the property that was put to auction by the receiver in insolvency was described to be that of Tara Chand and the plaintiff firm purchased it as such. Secondly, nothing that was done by the plaintiff firm amounted to a declaration, act or omission intentionally causing or permitting the Bank to believe that the property did not belong to it and to act upon such belief, and unless this is so, S. 115, Evidence Act does not come into play. Moreover, there is no estoppel if the true facts are known to the person who pleads estoppel in his defence. Reference in this connexion may be made to 30 Cal 539.² In that case it was held in very clear terms by their Lordships of the Privy Council that S. 115, Evidence Act does not apply to a case where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both parties. So far as the Bank is concerned, it was aware of the fact that the 14 bales of cotton in dispute did belong to the plaintiff firm and, this being so, it could not be misled by anything done by the firm in the matter of the sale by the Receiver.

Similarly, the District Judge was wrong in holding that the plaintiff had no cause of action against the Bank. It is reliably established that the Bank knew that the 14 bales of cotton belonged to the plaintiff even so far back as 29th November 1929 when two inventories, Exhibits P. 16 and P. 16.A, were prepared by the Bank itself of the goods lying in their charge. In both the documents it was clearly said that the 14 bales of cotton belonged to the plaintiff firm. Not only that, throughout the previous litigation the Bank relied on the position that the 14 bales of cotton belonged to the plaintiff firm and that it was with their consent that steps were being taken for their release from attachment. It is further clear that the Bank in the previous litigation represented itself to be the bailee of these goods and on that basis invoked in its aid S. 180, Contract Act, in order to establish its right to realize damages on ac-

count of these 14 bales also. The following passages in the judgment delivered by the Division Bench of this Court on 3rd January 1936 support these conclusions:

(a) There is also the significant circumstance that both Amir Chand and Lorind Chand when examined in the case did not raise any objection to the Bank's right to have their bales released from attachment.

(b) Granting that Jawanda Mal was the gratuitous bailee of 96 bales on behalf of Makhan Mal Amir Chand and Lorind Chand Lachhman Das respectively, and that the Bank, being in possession on behalf of Jawanda Mal, had no higher title in these bales than Jawanda Mal himself, the Bank is entitled to recover damages for their wrongful seizure from its possession.

(c) It is thus clear that the plaintiff has not only a locus standi to sue for recovery of damages for the loss caused in respect of the entire quantity of cotton in dispute, but the true measure of damages is the full value of the goods, assessed according to the market rate prevailing at the time of the attachment.

It is obvious therefore that the Bank was allowed damages on account of the plaintiff firm as well and consequently this was a clear case of money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use, as contemplated in Art. 62, Limitation Act. The plaintiff firm therefore had a cause of action against the Bank and the suit could not be thrown out on the ground that no such cause of action existed. Counsel for the Bank contends that the Bank was a pawnee in good faith and that its case was consequently covered by S. 178, Contract Act. I however am not disposed to agree. Jawanda Mal could in no circumstances be treated as a mercantile agent and even if he was so, the Bank's knowledge of the true state of affairs disentitled it to the benefit of that Section. This however does not set the matter at rest. It is still to be seen whether the plaintiff firm is entitled to recover the whole amount claimed by it. As stated above, the suit falls within the purview of Art. 62, Limitation Act, and the terminus a quo in that article is the date when the money is received. It is reliably established that the amount of Rs. 7777.15.0 was received by the Bank on 14th September 1931 and the balance was recovered on 28th April 1936. It is admitted that of the amounts so received the plaintiff firm was entitled to Rs. 786.3.0 out of the first sum and Rs. 911.1.0 out of the second sum. The present suit therefore is clearly time barred so far as the first item is concerned and the firm's suit to that extent must fail. The suit relating to the second item is

2. *Mohori Bibi v. Dharmodas Ghose*, (1903) 30 Cal 539 = 30 I A 114 = 7 C W N 441 = 8 Sar 874 (P O).

within time and the firm is entitled to a decree to that extent.

It may be remarked that counsel for the firm contended that Art. 145, Limitation Act applied to the facts of the present case but I do not agree. Art. 145 applies to the case of a depositary or pawnee and in this case it cannot at all be argued that the Bank was either a depositary or pawnee on behalf of the plaintiff firm. A depositary's depositary is not contemplated in the Act. Counsel for the appellant however relied in this connexion on 61 Cal 119,³ A I R 1924 Nag 12⁴ and A I R 1921 Cal 416.⁵ Apart from the fact that A I R 1921 Cal 416⁵ was dissented from in 61 Cal 119,³ none of these cases is in point. The Calcutta case laid down that the heirs of the depositary suffer from the same disadvantage as the depositary himself and the Nagpur case related to a sapurddar appointed by the Court. I accordingly allow this appeal to this extent that I pass a decree for Rs. 911-1-0 in favour of the plaintiff firm against the Punjab National Bank Ltd., but in view of the fact that the plaintiff firm was also not free from blame in not giving a definite warning to the Bank at the opportune moment, I make no order as to costs.

D.S./R.K. *Appeal partly allowed.*

3. Bibhu Bhusan v. Anadi Nath, (1934) 21 A I R Cal 87=150 I C 398=61 Cal 119=58 C L J 502.

4. Lakshmichand v. Duli Chand, (1924) 11 A I R Nag 12=75 I C 787.

5. Promotho Nath v. Prodymano Kumar, (1921) 8 A I R Cal 416=69 I C 900=26 C W N 772.

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TEK CHAND AND ABDUL RASHID JJ.

Chaudhri Atma Ram and others —

Plaintiffs — Appellants.

v.

Mian Umar Ali — Defendant —

Respondent.

First Appeal No. 25 of 1939, Decided on 24th January 1940, from decree of Senior Sub-Judge, Muzaffargarh, D/- 5th November 1938.

(a) Hindu Law — Joint family — Presumption — Brothers and nephew are presumed to be joint in absence of proof of disruption.

In the case of real brothers and son of deceased brother governed by Hindu law the presumption is that they are members of a joint Hindu family in absence of proof that there has been any disruption of the family. [P 258 C 1]

(b) Hindu Law — Joint family — Presumption — Entry in revenue papers showing members as owning land in equal shares does not

necessarily show that they are co-owners and not coparceners — It is only piece of evidence to be considered along with other evidence.

It cannot be presumed that the entry in the revenue papers showing members of a Hindu family as owning land in equal shares necessarily shows that they held it as co-owners and not as coparceners. Such an entry is only a piece of evidence which has to be considered along with other evidence in the case; standing alone, it is not sufficient to prove separation of status: A I R 1920 PC 46; 18 All 176 and A I R 1925 PC 132, Rel. on; 13 Bom 75 and A I R 1925 PC 49, Ref.; A I R 1938 PC 65, Expl. [P 259 C 1, 2]

(c) Hindu Law — Joint family — Business — "Money-lending" is trading business — Regulation of Accounts Act has no application.

Money-lending or banking is as much a "trading business" as any other, and a joint Hindu family might as well engage in it as any individual or individuals working in partnership. The definition of "trade" as contained in the Regulation of Accounts Act has no application. [P 260 C 1]

(d) Civil P. C. (1908), O. 30, R. 1 — O. 30, R. 1 is only enabling provision — Members can sue jointly in individual names.

Order 30, R. 1 is only an enabling provision. It merely says that a "firm" may sue or be sued in the name of the firm. It is nowhere laid down that this is the only form in which a suit on behalf of, or against, a firm can be brought. Consequently the partnership members can sue jointly in their individual names. As a matter of fact O. 30 merely provides an alternative and a shorthand mode of describing the parties with a view to facilitating the bringing of suits on behalf of or against persons working under a trade name: A I R 1930 Pat 239 and A I R 1933 Lah 356, Rel. on. [P 260 C 2]

(e) Complaint — Amendment — Complaint describing plaintiffs as "joint Hindu family partnership business Atma Ram, Seva Ram, etc." — Amendment by way of transposition of description of individual plaintiff from beginning of heading to end held could be allowed as it was merely case of misdescription.

The plaintiffs, members of joint Hindu family, described themselves in the complaint as "joint Hindu family partnership business Atma Ram, Seva Ram, etc." and applied for amendment of heading as Atma Ram, Seva Ram, etc. proprietors of joint Hindu family partnership business:

Held that it was merely a case of misdescription which could be corrected by the transposition of the description of the individual plaintiffs from the beginning of the heading to the end. The amendment could be made at any stage of the suit as it did not alter the character of the suit nor introduced a new cause of action. [P 261 C 1, 2]

(f) Complaint — Amendment — Joint Hindu family partnership — Pro-note executed in favour of one member only — Suit by all members jointly — Amendment striking off names of members except one in whose favour pro-note was executed and treating suit as instituted by him held could be allowed.

A pro-note was executed in favour of one of the members of a joint Hindu family partnership business. The suit however was instituted in the name of all the members. On the plaintiffs' application for amendment of the complaint by striking off

the names of the members except one in whose favour the pro-note was executed and treating the suit as having been brought by him :

Held that the amendment sought for could be allowed. [P 261 C 2]

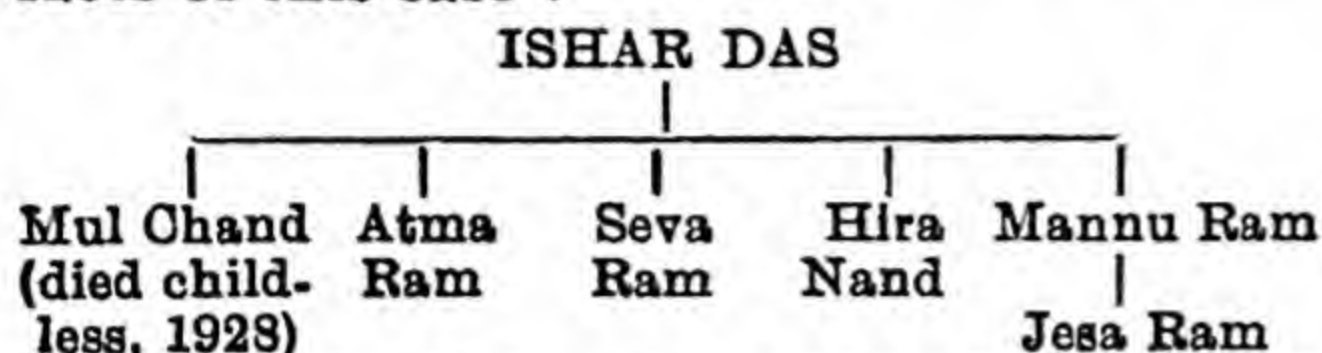
Achhru Ram and V. K. Ranade —

for Appellants.

J. G. Sethi and M. L. Sethi —

for Respondent.

Tek Chand J.—The following pedigree-table will be helpful in understanding the facts of this case :



On 28th February 1935, Mohammad Hussain, father of the defendant executed a pro-note in favour of Atma Ram for Rs. 4723-8-0 bearing interest at 1 per cent. per mensem. On 26th February 1938, a suit for the recovery of Rs. 6432 alleged to be due on foot of this pro-note, was instituted. In the heading of the plaint the plaintiffs were described as the joint Hindu family partnership business Chaudhri Atma Ram, Chaudhri Seva Ram, Chaudhri Hira Nand, sons of Ishar Das, and Jesa Ram, son of Mannu Ram, caste Batra, through Chaudhri Atma Ram and Chaudhri Hira Nand.

In the plaint it was stated that the four persons mentioned above were members of a joint Hindu family who carried on business jointly and that Atma Ram and Hira Nand were the managers and agents of the said family. It was further averred that the pro-note in suit had been executed for valid consideration by the father of the defendant in favour of Atma Ram as the manager of the joint family of the plaintiffs and that Mohammad Hussain had died and the defendant was his heir and had possession of his property. On these allegations, it was prayed that a decree for Rupees 4723-8-0 as principal and Rs. 1708-8-0 as interest or Rs. 6432 in all be passed in favour of the plaintiffs against the defendant recoverable from the estate of his deceased father. The plaint was signed and verified by Atma Ram and Hira Nand and was also signed by Mr. N. N. Krishan, pleader, in whose favour a vakalatnama had been executed by Atma Ram, Hira Nand, Seva Ram, and Jesa Ram.

The defendant took objection to the frame of the suit and denied the plaintiffs' claim on the merits. In support of the first objection he pleaded that the suit could not proceed on behalf of the "joint

Hindu family partnership business" inasmuch as (a) the four persons mentioned in the plaint did not constitute a joint Hindu family, (b) that they did not carry on business jointly, (c) that Atma Ram and Hira Nand were not the managers of the alleged joint Hindu family and (d) that even if a joint family business was carried on by the four persons mentioned above, the suit could not proceed on behalf of the "joint Hindu family partnership business."

On the merits the defendant denied all knowledge of the execution of the pro-note by his father in favour of the plaintiffs and pleaded want of consideration. After examining the parties, the learned Senior Subordinate Judge framed seven issues, of which he has decided the following three only : (1) Whether the separation of the plaintiffs' joint Hindu family has taken place, if so, when and what is its effect on the plaintiffs' claim ? (2) Whether plaintiffs' joint Hindu family is carrying on joint family business ; if not, what is its effect on the plaintiffs' claim ? (3) If issues (1) and (2) are proved in favour of the plaintiffs, whether this suit is maintainable in the name of plaintiffs' joint Hindu family business ?

After a part of the evidence for the plaintiffs had been recorded, on 14th July 1938 an application was made on their behalf under O. 6, R. 17 and O. 1, R. 1, Civil P. C., for amendment of the plaint. In this application it was reiterated that the four persons mentioned above were members of a joint Hindu family and carried on money-lending business and trade jointly, and it was stated that the suit had been filed by all four of them, who had signed the power of attorney in favour of their pleader and were all present at the hearing of the case, though the pro-note was in favour of Atma Ram alone. It was therefore prayed that the plaint be allowed to be amended in either of the following ways : (1) the heading of the plaint may run as follows :

Chaudhri Atma Ram, Seva Ram, Hira Nand, sons of Ishar Das, and Jesa Ram, son of Mannu Ram, members of a joint Hindu family, plaintiffs ; or (2) if the Court thought that the plaintiffs were not entitled to amend the plaint in the form mentioned in (1) above, a decree be granted in favour of Atma Ram plaintiff alone, in whose favour the pro-note in suit had been executed.

The learned Senior Subordinate Judge dismissed the application by his order dated

8th August 1938 (printed at pp. 18 to 20 of the paper-book). The main grounds given by the learned Judge in support of his order were: (1) that the plaintiffs had persisted in urging that the suit, as brought, was in proper form, and (2) that as the limitation for bringing the suit had long since passed, an amendment would deprive the defendant of a valuable right.

The parties then produced evidence on the three preliminary issues as originally framed and, on 5th November 1938, the learned Senior Subordinate Judge gave his decision on these issues. He found that the plaintiffs were members of a joint Hindu family, that even if a joint Hindu family existed, it had not been proved that they were carrying on business so as to entitle them to be styled as a joint Hindu family trading partnership

and thirdly, even if there was a joint Hindu family trading partnership, the suit was not maintainable in the form in which it had been brought, but that it should have been instituted in the name of each individual member of the family trading partnership. On these findings, he dismissed the suit leaving the parties to bear their own costs. From this decree the plaintiffs have preferred a first appeal to this Court and it has been contended on their behalf that the decision of the learned Senior Subordinate Judge is erroneous on all the three points on which it proceeds and, in any case, this was a fit case in which amendment of the heading of the plaint should have been allowed, as prayed in the plaintiffs' application of 14th July 1938. After hearing counsel at length and examining the record we have no doubt that these contentions are well founded and this appeal must succeed.

It will be seen from the pedigree-table given above, that Atma Ram, Sewa Ram and Hira Nand are real brothers and Jesa Ram is the son of a deceased fourth brother, Mannu Ram. They are Aroras by caste, admittedly governed by Hindu law. The presumption, therefore, is that they are members of a joint Hindu family. There is no proof that there has been any disruption of the family. On the other hand, the evidence on the record proves beyond doubt that they are joint in residence, mess and business. They live in the same house and all their dealings are joint. A mass of documentary evidence has been produced which shows that for debts advanced in the name of one, payments have been made to the

others, and on bonds executed in favour of some of them suits have been instituted either by all four jointly, or in the name of the "joint Hindu family partnership business" and decrees passed in their favour. Land revenue has been paid by them jointly, and income-tax has been assessed on the family as a whole, some time in the names of all the adult coparceners and at others of the two eldest members, and in all cases it has been paid out of joint funds. The onus of issue (1) had been placed on the defendant and it was for him to prove that there had been a disruption of the family. He did not produce any evidence to prove this. His sole reliance is on entries in the revenue papers in which the four members of the plaintiffs' family are shown as owning agricultural land "in equal shares."

It was contended that these entries were evidence of severance of the coparcenary status and showed conclusively that they were holding their property as tenants-in-common. This argument found favour with the learned Subordinate Judge who felt bound to give effect to it in view of certain observations of their Lordships of the Privy Council in A I R 1938 P C 65.¹ The learned Judge appears to have entirely misunderstood these observations, which if taken with the context, do not indicate any departure from the law as authoritatively laid down in several former pronouncements of the same high tribunal. The leading decision on this point is 42 All 368² in which their Lordships observed that entries in revenue records

take their place as part of the evidence in the case. They do no more. Their importance may vary with circumstances, and it is not any part of the law of India that they are, by themselves, conclusive evidence of the facts which they purport to record. It may turn out that they are in accord with the general bulk of the evidence in the case; they may supply gaps in it; and they may, in short, form a not unimportant part of the testimony as to fact which is available. But to give them any higher weight than that might open the way for much injustice and afford temptation to the manipulation of records or even of the materials for the first entry.

Their Lordships then referred to several Indian decisions bearing on the point and expressed their approval of the pronouncement of Edge C. J. of the Allahabad High

1. Anurago Kuer v. Darshan Raut, (1938) 25 AIR P C 65=172 I C 977=32 S L R 392 (P C).

2. Nageshar Bakhsh Singh v. Mt. Ganesha, (1920) 7 A I R P O 46 = 56 I C 306=47 I A 57=42 All 368=23 O C 1 (P C).

Court in 18 All 176³ (at pp. 179-80) to the following effect :

A definition of shares in revenue and village papers affords by itself but a very slight indication of an actual separation in a Hindu family, and certainly in no case that has come before us could we have regarded such a definition of shares, standing alone, as sufficient evidence on which to find, contrary to the presumption of Hindu law, that the family to which such definition referred had separated.

The matter came up again before another Board of the Judicial Committee in 88 I C 385⁴ (at page 390) where their Lordships expressed their concurrence with the law as laid down in 42 All 368² and in doing so reiterated their approval of the above quotation from Sir John Edge's judgment. They then cited another observation of the learned Chief Justice that the names of Hindus were entered, not uncommonly, in revenue and village papers in defined shares, and after referring to the provisions of the N. W. P. Land Revenue Acts (corresponding to S. 44, Punjab Land Revenue Act), held that these provisions could not be read as

making the definition of shares of co-sharers in a settlement *khewat* as conclusive of a separation in a joint Hindu family (page 391).

In both these cases, their Lordships also referred to the remarks of Birdwood J. in 13 Bom 75⁵ that the "collector's books were kept (primarily) for purposes of revenue and not of title" as indicating that the definement of shares in these papers is not intended to show that the co-sharers held the land as tenants-in-common and not as coparceners. In this connexion reference may also be made to 48 Mad 254⁶ at p. 257 where their Lordships after enunciating the well-known principle of Hindu law that a division by metes and bounds is not necessary to effect a change in the coparcenary status of a family, laid down that the mere fact that shares of coparceners had been ascertained, if it is not for the purpose of effecting a partition, does not convey a separation of status. It cannot therefore be presumed that the entry in the revenue papers showing members of a Hindu family as owning land "in equal shares" necessarily shows that they held it as co-owners and not as coparceners. Such an entry is only a

piece of evidence which has to be considered along with the other evidence in the case. "Standing alone," it is not sufficient to prove "separation of status." The recent decision of the Judicial Committee in A I R 1938 P C 65¹ did not effect any change in the law, which had been laid down clearly and authoritatively in the cases cited above, as has been erroneously assumed by the learned Senior Subordinate Judge. On the other hand, the rule laid down in those cases was applied to the facts of that particular case. Their Lordships, after once again reiterating

the well-settled rule of Hindu law of the *Mitakshara* School, that the partition of the joint estate consists in defining the shares of the coparceners in joint property and it was not necessary that there should be an actual division of the property by metes and bounds,

observed that

the definition of shares may be proved, *inter alia*, by an entry in the Record of Rights showing the share of each member of the family. Such an entry will be evidence of the severance of the joint status.

All that was meant by this passage was that the entry relied upon in that case (to use the words of Lord Shaw in 42 All 368²) "took its place as evidence" in the case and was considered along with the other evidence in determining whether a particular family was or was not joint. It was not treated as conclusive on the point. Mr. Sethi for the respondent did not contest this position; indeed, he frankly admitted that the decision in A I R 1938 P C 65¹ was not intended to, nor did it in any way effect a departure in the law as it has been understood previously. In the case before us, as has been stated above, besides the so-called "specification of shares" in the revenue records there is nothing whatever to show that there had been a disruption of the family. On the other hand, the evidence is overwhelming that Atma Ram, Sewa Ram, Hira Nand and Jesa Ram lived in commensality and held their property in coparcenary and were members of a joint Hindu family at the time when the suit was brought. The finding of the learned Senior Subordinate Judge on this point must therefore be reversed.

The decision of the learned Judge on issue 2 is still more unsatisfactory, and here again Mr. Sethi expressed his inability to support it. He has found that the plaintiffs carry on money-lending business on an extensive scale, but nonetheless he has held that they cannot be said to have been carrying on a "trading business." In the first

3. Jagendar Singh v. Sardar Singh, (1896) 18 All 176=1896 A W N 23.

4. Bhagwani Kunwar v. Mohan Singh, (1925) 12 A I R P C 192=88 I C 385 (P C).

5. Bhogji v. Bapuji, (1889) 13 Bom 75.

6. Palani Ammal v. Muthu Venkatachala, (1925) 12 A I R P C 49=87 I C 333=48 Mad 254=52 I A 83 (P C).

place, the evidence on the record shows that the plaintiffs, besides money-lending, deal in purchase and sale of grain. This is clear from the statements of three of the plaintiffs, Atma Ram (P. W. 10), Jesa Ram (P. W. 5) and Hira Nand (P. W. 9), and from several documents on the record. But even if this were not so, the plaintiffs must still be held to be carrying on joint family trading business as money-lenders. The learned Judge in assuming that money-lending is not a "trading business" appears to have been misled in applying the definition of "trade," as contained in the Regulation of Accounts Act, to matters which do not fall within the purview of that Act. Admittedly, in this case no question arises to which the provisions of that Act apply, and the restrictive definition of "trade" given therein has no possible application. The ruling in A I R 1938 Lah 322⁷ relied upon by the learned Judge was under the Regulation of Accounts Act and has no bearing on this case. The other case, 147 P R 1903, also referred to by the learned Judge is obviously a misquotation, as no case bearing that number exists in the Punjab Record of that year. It is hardly necessary to say that money-lending or banking is as much a "trading business" as any other, and a joint Hindu family might as well engage in it as any individual, or individuals working in partnership. In many families such business is ancestral and has been carried on from "generation to generation." Issue 2 must therefore be decided in favour of the plaintiffs. The last question for determination is whether the plaintiffs could have brought the suit in the name of "the joint Hindu family partnership business, Atma Ram, Sewa Ram, Hira Nand and Jesa Ram through Atma Ram and Hira Nand."

The learned Senior Subordinate Judge, in holding against the plaintiffs on this point, has relied upon A I R 1938 Lah 563,⁸ decided by me, sitting in Single Bench. Owing to some typing mistakes and omission of words in that judgment certain sentences convey quite a different meaning from what they were intended to do. Though these sentences, as printed, do not affect the ultimate decision of that case, it seems necessary to state at some length the legal position relating to the form in which suits

by or against joint Hindu family trading firms might be brought. Under the law, as it stood before 1908, a trading firm (whether contractual or not) could not sue, or be sued, in the firm's name; the partners or proprietors of the firm had to bring suits, or be sued, in their individual names. In the Code (5 of 1908) which came into force on 1st January 1909, O. 30 was enacted which, with some slight modification (not material for our present purposes) brought the law in this country in line with that in force in England: see O. 48-A of the Rules of the (English) Supreme Court. Rule 1 of O. 30 of the Code lays down that any two or more persons claiming, or being liable, as partners and carrying on business in British India may sue, and be sued, in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action. This provision (as enacted by the Legislature) applied only to contractual partnerships and did not cover a joint Hindu family trading business. Soon after the Code came into force the Punjab Chief Court, in the exercise of its rule-making power (Part 10, S. 125 *et seq* of the Code) added an Explanation to R. 1 of O. 30 to the following effect: "Explanation: This Rule applies to a joint Hindu family trading partnership" (See Chief Court Notification No. 2212-G, dated 12th May 1909.)

From that date therefore the provisions of R. 1 of O. 30 apply, in the Punjab, to joint Hindu family trading firms or partnerships, and persons who are members of such a family trading business can sue, and be sued, in the name of the firm as provided in R. 1, and subject to the limitations laid down in other rules of O. 30. But it must be clearly understood that R. 1 is only an enabling provision. It merely says that a "firm" (which means a contractual partnership in provinces other than the Punjab and includes, in addition, a joint Hindu family trading firm in this province, by reason of the Explanation) may sue or be sued in the name of the firm. It is nowhere laid down that this is the only form in which a suit on behalf of, or against, a firm can be brought. As has been pointed out by the Patna High Court in 9 Pat 717⁹ at p. 720, O. 30, R. 1, merely provides a new procedure. It did

not affect the law on the subject, as it existed before, which was to the effect that a plaintiff

7. Badri Parshad v. Banwari Lal, (1938) 25 A I R Lah 322=176 I C 824=40 P L R 32.

8. Debi Sahai v. Gillu Mall, (1938) 25 A I R Lah 563=177 I C 918=40 P L R 456.

9. Kazmi Begam v. Lachman Lal, (1930) 17 A I R Pat 239=127 I C 575=9 Pat 717.

bringing a suit against a firm may implead all the members of the firm as defendants in that suit.

Conversely, such members could sue jointly in their individual names. Similarly, in 14 Lah 543¹⁰ at p. 551 Addison and Agha Haidar JJ. pointed out that "O. 30, R. 1 was merely permissive. If it is followed, then O. 30, R. 4 applies but not otherwise." Unfortunately, this aspect of the matter is frequently overlooked in the lower Courts and it is erroneously assumed that firms, as described in O. 30 as originally enacted (as well as those included within its purview by the Explanation) must sue, or be sued, only in the form prescribed therein. As a matter of fact, this Order merely provides an alternative and a short-hand mode of describing the parties, with a view to facilitating the bringing of suits on behalf of, or against, persons working under a trade name. The evidence on the record shows that the joint Hindu family of the plaintiffs has been carrying on business under the name and style given in the heading of the plaint. It must therefore be held that the plaintiffs could sue in the name of the "joint Hindu family partnership business, Atma Ram, Sewa Ram, Hira Nand and Jesa Ram," and the suit as brought was maintainable.

In this view of the case it is not necessary to consider at length the further question whether amendment of the plaint should have been allowed in terms of the application made by the plaintiffs on 14th July 1938. It may however be stated that the reasons given by the learned Senior Subordinate Judge for rejecting the application are altogether wrong. As stated already, the names of all the four members of the family had been given in the heading of the plaint and in the body of the plaint it had been clearly stated that they were members of a joint Hindu family. Even according to the view of the law as understood by the learned Judge, it was merely a case of misdescription, which could have been corrected by the transposition of the description of the individual plaintiffs from the beginning of the heading to the end. It is conceded that the suit would have been in proper form, if it had been headed "Atma Ram, Sewa Ram, Hira Nand and Jesa Ram, proprietors of joint Hindu family partnership business, etc." instead of "joint Hindu family partnership business Atma Ram, etc." Such an amendment could not have altered the character of the suit, nor in-

troduced a new cause of action, and therefore should have been allowed to be made at any stage of the suit. In any case, there was no justification for not allowing amendment in the alternative form, namely that the names of Sewa Ram, Hira Nand and Jesa Ram be struck off and the suit be considered as having been brought by Atma Ram alone. The pro-note, on which the suit was founded, was alleged to have been executed by defendant's father in favour of Atma Ram alone and therefore it was competent to Atma Ram to sue in his own name without joining the other members of the family as plaintiffs or describing himself as the manager or agent of the joint Hindu family business.

For the foregoing reasons, this appeal must be accepted, the judgment and decree of the lower Court set aside, and the case remanded to it under O. 41, R. 23, Civil P. C., for decision of the remaining issues. Court-fee on this appeal shall be refunded: other costs shall be costs in the cause.

Abdul Rashid J. — I agree.

G.N./R.K.

Appeal accepted.

A. I. R. 1940 Lahore 261

BHIDE J.

Municipal Committee, Jagadhri —

Defendant — Appellant.

v.

Joti Pershad — Plaintiff — Respondent.

Second Appeals Nos. 1547 and 1548 of 1939, Decided on 15th March 1940, from decree of Senior Sub-Judge, Ambala, D/- 10th July 1939.

Punjab Municipal Act (3 of 1911), Ss. 3 (13) (a) and (b) and 175 — Municipal Committee leasing portion of public street and allowing lessee to build chabutra thereon — Site under chabutra ceases to be portion of public street — Municipal Committee cannot issue notice under S. 175 for demolishing chabutra.

Where the Municipal Committee leases out a portion of the public street and allows the lessee to build a chabutra thereon the site under the chabutra ceases to be a portion of the public street and the Municipal Committee has no power to issue notice under S. 175 for demolishing the chabutra.

[P 262 C 1, 2]

Achhru Ram — for Appellant.

Shamair Chand — for Respondent.

Judgment. — Regular Second Appeals Nos. 1547 and 1548 of 1939 arise out of two suits of a similar character and may be conveniently disposed of together. The suits were for a declaration to the effect that the chabutras in front of plaintiffs' shops were not part of a street and for issue of a perpetual injunction to the defendant

¹⁰ *Ohuni Lal Tulsi Ram v. Amin Chand*, (1938) 20 A I R Lah 856 = 142 I O 649 = 14 Lah 548 = 84 P L R 11.

Municipal Committee restraining it from demolishing the chabutras in pursuance of notices issued under S. 175, Punjab Municipal Act. The trial Court dismissed the suits but on appeal the learned Senior Subordinate Judge has upheld the finding of the trial Court about the defendant's ownership of the site under the chabutras but granted an injunction restraining the defendant from demolishing the chabutras. From this decision these appeals have been preferred by the defendant Municipal Committee. It is no longer disputed before me that the sites on which the chabutras were built by the plaintiffs were public streets as defined in the Municipal Act. It was however contended that when the Municipal Committee decided to allow the plaintiffs to build chabutras on a portion of the public street and gave the land on lease the land ceased to be a portion of the public street and therefore the defendant Committee was not entitled to issue any notice under S. 175, Punjab Municipal Act, for the demolishing of the chabutras. The learned counsel for the appellant conceded that if the land on which the chabutras were built could not be considered to be still a portion of the public street, the Municipal Committee had no power to issue notice under S. 175 for the demolishing of the chabutras.

The sole point for decision in these appeals therefore is whether the land underneath the chabutras is still a portion of the public street. "Public street" is defined in the Municipal Act as a street fulfilling certain conditions. 'Street' is also separately defined as follows:

'Street' shall mean any road, footway, square, Court, alley or passage, accessible whether permanently or temporarily, to the public, whether a thoroughfare or not; and shall include every vacant space, notwithstanding that it may be private property and partly or wholly obstructed by any gate, post, chain or other barrier, if houses, shops or other buildings abut thereon, and if it is used by any persons as a means of access to or from any public place or thoroughfare, whether such persons be occupiers of such buildings or not, but shall not include any part of such space which the occupier of any such building has a right at all hours to prevent all other persons from using as aforesaid; and shall include also the drains and gutters therein or on either side and the land, whether covered or not by any pavement, verandah, or other erection, up to the boundary of any abutting property not accessible to the public.

The land underneath the chabutra does not admittedly fall under the first part of the definition and it seems to me that it cannot fall under the other two portions of the definition as well as the plaintiffs who

have been given the land on lease are entitled to exclude the public from use of the land under the chabutras at all hours and the land cannot now be considered to be accessible to the public as of right. There is no direct authority on the point but after considering the definition of 'street,' it seems to me that the land cannot now be considered to be a portion of the street so long as it is held on lease by the plaintiffs. The plaintiffs are of course tenants of the Municipal Committee and it is open to it to eject the plaintiffs as its lessees according to law. I dismiss the appeals but in view of all the circumstances, leave the parties to bear their costs in this Court.

G.N./R.K.

Appeals dismissed.

A. I. R. 1940 Lahore 262

DIN MOHAMMAD J.

Sita Ram and another — Defendants — Appellants.

v.

Munshi Ram, Plaintiff and others, Defendants — Respondents.

Second Appeal No. 918 of 1939, Decided on 13th December 1939, from decree of Dist. Judge, Ambala, D/- 16th March 1939.

(a) Limitation Act (1908), S. 22—Mortgage suit—Plaintiff impleading legal representatives after period of limitation—Suit is barred—It is immaterial whether in adding party Court acts suo motu or on party's application—Suit decreed against all defendants — Dismissal of suit on appeal by such legal representatives held involved dismissal as against non-appealing defendants also.

Where a mortgagee institutes a suit against the father of the legal representatives of the deceased mortgagor and it is found that he could not be legal representative of the deceased, the property having been gifted to his sons by the mortgagor, the mortgagee cannot implead the legal representatives of the deceased mortgagor after the expiry of the period of limitation. It is immaterial whether in impleading the new party the Court acts suo motu or on the application of a party: *Case law referred.* [P 263 C 2; P 264 C 1]

Dismissal of the suit on appeal by such legal representatives involves the dismissal of the suit against the non-appealing defendants also especially where the mortgaged property is not in their possession or ownership and the decree appealed from pertains to the mortgaged property alone: 69 P R 1902 and A I R 1928 Lah 33, *Rel. on.*

[P 265 C 1]

(b) Hindu Law—Joint family—Karta can represent other members in respect of transactions entered into by him as karta or in respect of joint family property—In suit by mortgagee father cannot represent sons where mortgage property is acquired by sons by gift from mortgagor.

The karta of a joint Hindu family can represent other members of the family in respect of transactions entered into by him as karta of the family or in respect of the joint family property but in no other case. [P 264 C 1]

Therefore in a suit by the mortgagee where the property involved in the suit cannot be described as joint family property the father as karta of the family cannot represent his sons in respect of property which they had personally acquired by gift from the mortgagor: *A I R 1915 Bom 272, Not approved.* [P 264 C 1]

(c) Limitation Act (1908), S. 18—Suit by reversioner challenging mortgage on ground of want of consideration and necessity — Reversioner is not bound to disclose that mortgage property was gifted to him — Even attempt on his part to conceal factum of gift cannot bring case under S. 18.

In a suit by reversioners challenging a mortgage on the ground of want of consideration and necessity, the reversioners are not bound to disclose that the mortgage property was gifted to them by the mortgagor and even an attempt on their part to conceal the factum of gift cannot bring the case within the purview of S. 18. [P 264 C 2; P 265 C 1]

Asa Ram Aggarwal — *for Appellants.*

Tek Chand — *for Respondent*

(*Plaintiff*).

Judgment. — On 27th January 1926, Mt. Thakri mortgaged one-half of a house and a shop for Rs. 1800 to Munshi Ram. It may be observed that the house mortgaged by her had been gifted to her by her son, Ralia Ram, on 8th December 1919, and the shop she had acquired herself later. On 5th February 1929, she gifted this property to Sita Ram and Matu Ram, sons of Asa Ram, a brother of her deceased husband. In 1937, Mt. Thakri died and, on 27th January 1938, the suit out of which this appeal has arisen was instituted by Munshi Ram against Asa Ram and Mt. Rali, daughter of Mt. Thakri. It was stated in the plaint that these two persons were the only legal representatives in possession of the property of Mt. Thakri and were consequently being impleaded as defendants. Both of them however replied that the real legal representatives of Mt. Thakri were Sita Ram and Matu Ram, to whom she had made a gift of the property in question. On 9th March 1938, Sita Ram and Matu Ram also applied for being brought on the record. On 7th April 1938, an order, by consent of the parties, was made impleading Sita Ram and Matu Ram as defendants in the case and the plaint was amended accordingly. Sita Ram and Matu Ram resisted the suit principally on the ground that it was barred by limitation, inasmuch as they had been impleaded after the expiry of limitation. The trial Court repelled this conten-

tion and decreed the suit. On appeal, the District Judge maintained the decree of the trial Court on the following grounds: (a) That S. 22, Limitation Act, is not applicable to those defendants who are impleaded on their own application; (b) That both Sita Ram and Matu Ram were represented by their father Asa Ram and as they were members of a joint Hindu family, it did not matter whether they themselves were impleaded before or after the expiry of limitation; and (c) That the suit being for enforcement of a mortgage bond, the addition of parties after the expiry of limitation did not entail the dismissal of the suit under S. 22.

Counsel for the appellants contends that all these grounds are wrong in law and I agree with him. In support of the proposition that S. 22 does not apply to defendants who are impleaded on their own application, the District Judge has relied on a judgment of the Bombay High Court reported in *A I R 1928 Bom 526*,¹ but I may say with all respect that it does not lay down good law. In *35 Cal 519*,² a Full Bench of the Calcutta High Court held that a Court, acting under para. 2 of S. 32, Civil P. C., which now corresponds to O. 1, R. 10, Civil P. C., is bound by the provisions of S. 22, Limitation Act. The suit before the Calcutta High Court had also been brought on a mortgage bond. A portion of the mortgaged property had been sold to a third person and the Court directed the plaintiff to join the vendee as defendant. This was done more than 12 years after the date of the mortgage bond and it was contended that the suit qua him was barred by limitation. Five Judges of the Calcutta High Court maintained this plea. In *6 Rang 29*³ their Lordships of the Privy Council held an appeal against the respondent, who had been impleaded after the expiry of limitation, to be time barred. In *11 Lah 688*⁴ a Division Bench of this Court, composed of Sir Shadi Lal C. J. and Agha Haidar J. followed *35 Cal 519*² in a suit instituted on a mortgage bond and held that S. 22, Limi-

1. *Bhadin Baba Shaikasan v. Ebrahim Alli Sahab*, (1928) 15 *A I R Bom 526*=112 *I O 786*=30 *Bom L R 1405*.

2. *Ram Kinkar Biswas v. Akhil Chandra*, (1908) 35 *Cal 519*=5 *O L J 242*=11 *C W N 850* (F B).

3. *Chocklingam Chetty v. Seethai Ache*, (1927) 14 *A I R P O 252*=107 *I O 237*=55 *I A 7*=6 *Rang 29* (P C).

4. *Sher Singh v. Sundar Singh*, (1930) 17 *A I R Lah 747*=126 *I O 78*=11 *Lah 688*=32 *P L R 242*.

tation Act applied to the case of all persons brought on the record after the expiry of limitation. The learned Judges further added that it was immaterial whether the Court acted suo motu or on the application of a party.

In the light of the authorities cited above, it is obvious that the provisions of S. 22, Limitation Act did apply to the case of the present appellants. It is also wrong to say that Asa Ram represented his sons, Sita Ram and Matu Ram, in the present suit. The property involved in the suit could, under no circumstances, be described as joint family property and Asa Ram as the karta of that family could not represent his sons in respect of property which they had personally acquired by gift from Mt. Thakri. The karta of a joint Hindu family can represent other members of the family only in respect of a transaction entered into by him as karta of the family or in respect of the joint family property but in no other case. It is true that a Division Bench of the Bombay High Court in a case reported in 39 Bom 729⁶ held that, in a suit to enforce a mortgage lien binding on the whole property in the hands of any heir of the mortgagor, the addition of parties after the expiry of time did not involve the dismissal of the suit under S. 22, Limitation Act. But, here too, I may say with all respect that, apart from the fact that neither Asa Ram nor Mt. Rali, who had originally been impleaded as defendants, were the heirs of Mt. Thakri, the original mortgagor, this decision is wrong. Its correctness in respect of the proposition laid down there that the mortgage decree would be binding on the Mahomedan co-heirs, who were not parties, was even doubted by another Division Bench of the same Court in a case reported in 43 Bom 575⁶ at p. 581. Both the Calcutta and the Lahore cases referred to above were mortgage suits and we in the Punjab are bound to follow the authority of our own Court in preference to the authority of any other High Court.

It is well settled in this Province that S. 22, Limitation Act applies to all money suits, especially where a party is substituted for another : see among others A I R 1932

5. Virchand Vajekaran v. Kondu Kasam, (1915) 2 A I R Bom 272=31 I C 180=39 Bom 729=17 Bom L R 685.

6. Sabduralli v. Sadashiv Supde, (1919) 6 A I R Bom 135=51 I C 223=43 Bom 575=21 Bom L R 369.

Lah 314,⁷ A I R 1934 Lah 657⁸ and A I R 1937 Lah 369,⁹ and inasmuch as the appellants in this case were impleaded after the expiry of limitation, a suit against them could not proceed, especially as they were the only legal representatives of the deceased in whose possession the property of the deceased was and they were the only proper parties to be brought on the record as defendants—see in this connexion 58 All 594.¹⁰ Counsel for the respondents has in addition urged that neither the surrender in favour of the widow nor her surrender in favour of the appellants was absolute and that therefore their father Asa Ram and Mt. Thakri's daughter, Mt. Rali, were among the proper persons to be brought on the record. This contention however is not sound. The deed of gift, Ex. D.2, clearly and unequivocally indicates that Mt. Thakri had acquired an absolute ownership in respect of the house relinquished in her favour by her son Ralia Ram, and the shop, as stated above, had been acquired by Mt. Thakri herself. It further shows that an absolute ownership was conferred upon the appellants too. In the face of these facts, it cannot be reasonably urged that Mt. Thakri's estate was a limited one or that the right conferred on the appellants suffered from any defect.

Counsel for the respondents has further urged that, in the previous suit instituted by Sita Ram and Matu Ram, they had not disclosed the factum of gift and had challenged the deed of mortgage on the ground of want of consideration and necessity only as reversionary heirs of Ralia Ram and that consequently the plaintiff having been deceived by them was entitled to extension of time. In the first place, it was not necessary for the appellants to refer to their gift in their previous suit and, secondly, even if by any stretch of language it can be presumed that there was some attempt on the part of the appellants to conceal the factum of gift, S. 18, Limitation Act does not apply and it is only under that Section that the benefit of fraud can be claimed for a belated suit. This contention also there-

7. Northern Bank of India Ltd. v. Ramesh Chander (1932) 19 A I R Lah 314=137 I C 89=33 P L R 253.

8. Ali Muhammad v. Ali Muhammad, (1934) 21 A I R Lah 657=155 I C 285=35 P L R 598.

9. Mohindar Singh v. Kirpal Singh, (1937) 24 A I R Lah 369=173 I C 357=39 P L R 585.

10. Manni Gir v. Amar Jati Chela, (1936) 23 AIR All 94=160 I C 1030=58 All 594=1936 A L J 431.

fore cannot prevail. On the ground stated above, the suit of the respondent Munshi Ram as against the appellants must fail.

The only question that remains to be considered is, what is the effect of the dismissal of the suit on the decree made against Asa Ram and Mt. Rali, inasmuch as they have not appealed and the original decree was made against all the defendants. Under O. 41, R. 33, Civil P. C., the Appellate Court has ample power to pass any decree and to make any order as the case may require, and it is obvious that it is useless to maintain a decree against Asa Ram and Mt. Rali, seeing that the mortgaged property is not in their possession or in their ownership and that the decree obtained by the plaintiff Munshi Ram pertains to the mortgaged property alone. The dismissal of the suit against the present appellants involves therefore the dismissal of the suit against those defendants too. This conclusion is supported by 69 P R 1902¹¹ and A I R 1928 Lah 33.¹² I accordingly allow this appeal, set aside the decrees of the Courts below and dismiss the plaintiff's suit in toto. In view of the fact however that the plaintiff is deprived of a considerable amount of money on a mere technicality of law, I do not propose to saddle him with the costs of the successful defendants and I accordingly order that the parties will bear their own costs throughout.

G.N./R.K.

Appeal allowed.

11. Ram Chand v. Subhan Bakhsh, (1902) 69 P R 1902.

12. Devi Dayal v. Narain Singh, (1928) 15 A I R Lah 33=100 I C 859.

A. I. R. 1940 Lahore 265

DIN MOHAMMAD J.

Hukam Chand-Bansi Dhar —

Plaintiffs — Petitioners.

v.

Toyo Menka Kaisha Ltd., Karachi and another — Defendants — Respondents.

Civil Revn. No. 848 of 1939, Decided on 4th January 1940, for revision of order of Sub-Judge, 1st Class, Amritsar, D/- 26th November 1938.

(a) Arbitration Act (1899), S. 19—Suit on award declaring it to be null and void—Suit can be stayed under S. 19—Arbitration proceedings can continue.

Any proceedings taken after the institution of a suit on a reference made prior to the institution of the suit are no doubt null and void; but a suit can still be stayed and the parties cannot be compelled to waive their right to move the private tribunal upon which they had agreed at the time the contract was entered into between them. The

arbitration proceedings can legally continue on the stay of the suit in spite of the decision that the award already made is a nullity: A I R 1937 Lah 851, Rel. on. [P 265 C 2]

(b) Arbitration Act (1899), S. 19—Order staying suit under S. 19 can be set aside by Court on ground of fraud or misrepresentation—High Court can interfere under S. 151, Civil P. C.

An order staying the suit, if made on a fraudulent misrepresentation can be reversed by the Court making the order, if it is satisfied of the fraud and misrepresentation of the other side and the suit can in the circumstances be revived. Similarly, the Court is empowered under S. 151, Civil P. C., to make any order as may be necessary for ends of justice or to prevent abuse of the process of the Court. Nothing in the Arbitration Act bars this action. [P 266 C 1]

Mehta Puran Chand — *for Petitioners.*

Kahn Chand — *for Respondents.*

Order.—An order for the stay of a suit having been made under S. 19, Arbitration Act, the plaintiff has moved this Court on revision. Counsel for the petitioner contends that inasmuch as the award had been declared to be null and void by the Court below, the suit should not have been stayed because no arbitration proceedings could in the circumstances continue. This proposition however is not sound in law. Reference in this connexion may be made to 20 Lah 351,¹ where Tek Chand Ag. C. J., has clarified the whole position in respect of that matter. Any proceedings taken after the institution of a suit on a reference made prior to the institution of the suit are no doubt null and void; but a suit can still be stayed and the parties cannot be compelled to waive their right to move the private tribunal upon which they had agreed at the time the contract was entered into between them. I am therefore definitely of the opinion that the arbitration proceedings can legally continue on the stay of the suit in spite of the decision that the award already made is a nullity.

Counsel for the petitioner has next urged that the order of stay should not have been made as the respondent was not "ready and willing to do all things necessary to the proper conduct of the arbitration" as required by S. 19, Arbitration Act. In support of this contention, he refers to the subsequent conduct of the respondent in not taking any step whatever in the matter of arbitration during the full one year that has elapsed since the order of stay was made. Counsel for the respondent however

1. Firm Jowahir Singh Sundar Singh v. Fleming Shaw & Co. Ltd., Amritsar and Karachi, (1937) 24 A I R Lah 851=176 I C 852=I L R (1939) 20 Lah 351=41 P L R 746.

urges that the reason why no proceedings could be taken in the matter was that not only was this petition submitted by the petitioner, which re-opened the whole matter, but he had also instituted a regular suit against him, in which a summons was issued to him on 19th January 1939. The inactivity of the respondent so far may therefore be excused in these circumstances. But it cannot be said that he can indefinitely avoid the arbitration proceedings and thus abuse the order of the Court staying the suit. Counsel for the respondent says that the order of stay made under S. 19 is a permanent order, which cannot be reviewed even by the Court making the order and that that being so, it is not open either to the Court below to revive the suit even if the arbitration proceedings are not carried on, or to this Court to impose any condition on that order. I however do not agree. To concede the proposition advanced by the respondent's counsel would evidently lead to a grave miscarriage of justice and countenance fraud.

A party to an arbitration proceeding may succeed in securing an order under S. 19 on the ground of his readiness and willingness to do all things necessary to the proper conduct of the arbitration and then after having obtained that order, may revolt and thus deprive the opposite side of a legal remedy for all time. This result could never be contemplated by law. An order staying the suit, if made on a fraudulent misrepresentation, can certainly be reversed by the Court making the order, if it is satisfied of the fraud and misrepresentation of the other side, and the suit can in the circumstances be revived. Similarly, this Court is empowered under S. 151, Civil P. C., to make any order as may be necessary for the ends of justice or to prevent abuse of the process of the Court. Nothing in the Arbitration Act bars this action. I accordingly direct that with a view to implement the assurance impliedly given before the order of stay was made, the respondent should see that the arbitration proceedings are carried out and finished within a reasonable time and in case of his default, it will be open to the petitioner to move the Court below to review its order of stay and revive the suit. With these remarks I dismiss the petition. In the circumstances of the case however there will be no order as to costs.

G.N./R.K.

*Order accordingly.***A. I. R. 1940 Lahore 266**

YOUNG C. J. AND TEK CHAND J.

Gurdit Singh and others — Defendants
— Appellants.

v.

Committee of Management Gurdwara
Nawin Padshahi, Bichhuana through
Sardar Ajit Singh — Plaintiff —
Respondent.

First Appeal No. 48 of 1939, Decided on 19th January 1940, from decree of Sikh Gurdwaras Tribunal, Lahore, D/- 11th November 1938.

(a) Interpretation of Statutes — Directory or imperative — Distinction — Statute creating public duties is directory while statute creating private rights is imperative — Use of word "shall" does not necessarily imply that particular provision is imperative.

The question whether mandatory enactments ought to be construed to be directory only or obligatory, depends upon the general scope and object of the statute to be construed and these are the guides upon which a Court can decide whether the provisions are directory or imperative. It is thus that the intention of the Legislature can be determined. The use of the word "shall" does not necessarily imply that a particular provision is imperative. The distinction between statutes creating public duties and those conferring private rights is that in general the provisions of the former are directory and of the latter imperative and that in the absence of an express provision the intention of the Legislature is to be ascertained by weighing the consequences of holding a statute to be directory or imperative. [P 267 C 2]

(b) Punjab Sikh Gurdwaras Act (8 of 1925), S. 99 — S. 99 is directory and not mandatory — Notice under S. 99 not issued to members — All members present at meeting — President authorized to file suit — S. 99 held sufficiently complied with.

Section 99 is directory and not imperative, its purpose being to ensure that all members of the committee had notice of any meeting. Therefore the fact that all the members of the committee were present when the resolution authorizing the president to conduct a suit was passed makes the resolution in accordance with law and renders the issue of notice under S. 99 unnecessary. [P 268 C 1]

(c) Punjab Sikh Gurdwaras Act (8 of 1925), Ss. 12, 7, 10 and 14 (1) — Tribunal under S. 12 is set up to decide claims made in accordance with provisions of Act and not merely matters arising in petitions under S. 14 (1) — Tribunal has jurisdiction to decide claim under S. 7 as it is made under the Act and also because that claim would be before tribunal in petition filed under S. 10.

The Sikh Gurdwaras Tribunal set up by S. 12 has authority to decide a petition under S. 7 when a counter-petition under S. 8 or S. 10 has been filed and forwarded to the tribunal. Under S. 12 the tribunal is expressly constituted for the purpose of deciding claims made in accordance with the provisions of the Act. It is not constituted merely to decide matters arising in petitions received by it

from the Provincial Government under Ss. 5, 6, 8, 10 or 11, in accordance with S. 14 (1). These latter petitions are received by the Government and forwarded by them for decision, but the petition under S. 7 is a claim and is also before the tribunal, when under S. 10 (1) a counter-petition is forwarded to it for disposal, because under S. 10 (1) the petition forwarded under this latter Section is based upon a right, title or interest in any property included in the list attached to the petition forwarded to Government under S. 7. The tribunal is set up for the purpose of deciding all claims made and a claim under S. 7 in connexion with the property said to belong to the Gurdwara is a claim in accordance with the provisions of the Sikh Gurdwaras Act : *A I R 1935 Lah 279, Expl., and Dissent.* [P 269 C 1, 2]

Bhagat Singh — *for Appellants.*

Narindar Singh and Harnam Singh Wasu
— *for Respondent.*

Young C. J. — This is a first appeal from a decision of the Sikh Gurdwaras Tribunal in a suit under S. 25-A, Sikh Gurdwaras Act, by the Gurdwara of Bichhuana for possession of the Gurdwara buildings and certain land belonging to the Gurdwara. The suit was brought by the Committee of Management of the Gurdwara of Bichhuana through its President Sardar Ajit Singh. The tribunal framed three issues :

1. Whether Ajit Singh has been fully authorized to institute the case against the defendants ?
2. Whether the plaintiff is entitled to possession under S. 25-A ?
3. To what compensation, if any, are the defendants entitled ?

The tribunal decided that Ajit Singh was authorised to institute the suit ; that the plaintiff was entitled to a decree for possession of the property in dispute and that there was no evidence of any improvements which would entitle the defendants to compensation. Against this decision the defendants appeal. A petition was originally filed under S. 7, Sikh Gurdwaras Act, claiming that the institution known as the Gurdwara Nawin Padshahi in Bichhuana was a Sikh Gurdwara. Under S. 7 (2) of the Act, a list of property was attached to the petition which the petitioners claimed to belong to the Gurdwara. Two petitions were received by Government disputing the plaintiff's claim, one under S. 8 of the Act and another under S. 10. The first petition was decided in July 1932 and in that petition it was decided that the institution was a Sikh Gurdwara. The petition under S. 10 was decided by the tribunal on 10th November 1933. In that petition it was decided on an issue properly framed that the pro-

perty in dispute belonged to the Sikh Gurdwara. The present proceedings under S. 25-A were then instituted.

In this appeal Sardar Bhagat Singh, on behalf of the appellants has pressed two points : firstly that the President of the Gurdwara, i. e., Sardar Ajit Singh, had not been authorized to institute the suit, and secondly that the suit was not governed by S. 25-A, in that the tribunal mentioned above, which decided that the property belonged to the Gurdwara, had no jurisdiction under the Act to try or decide any such issue. The question of improvements, and therefore compensation to the defendants, was not pressed. The objection that Sardar Ajit Singh was not authorized to bring the suit was based upon S. 99, Sikh Gurdwaras Act. That Section enacts that a meeting of the Committee shall be called by the President by seven days' notice in writing. It was agreed (i) that a meeting of the Committee was necessary in order to authorize any person to bring the suit, (ii) that no such seven days' notice was in fact given, and (iii) that in fact all the members of the Committee were present at the meeting. It was argued by Sardar Bhagat Singh that the meeting not having been properly convened under the provisions of the Act, the resolution passed by that Committee, authorising Sardar Ajit Singh to bring the suit was therefore null and void.

The question whether mandatory enactments ought to be construed to be directory only or obligatory, depends upon the general scope and object of the statute to be construed and these are the guides upon which a Court can decide whether the provisions are directory or imperative. It is thus that the intention of the Legislature can be determined. The use of the word "shall" does not necessarily imply that a particular provision is imperative. In (1877) 2 C P D 562 at p. 566, also reported in 46 L J C P 541¹ at p. 543, Lord Campbell, Lord Chancellor, remarked that the distinction between statutes creating public duties and those conferring private rights is that in general the provisions of the former are directory and of the latter imperative and that in the absence of an express provision the intention of the Legislature is to be ascertained by weighing the consequences of holding a statute to be directory or imperative. In this case the Committee met together. They were concerned with public duties and not

1. *Caldow v. Pixell*, (1877) 2 C P D 562=46 L J C P 541=36 L T 469=25 W R 773.

with private rights. It would appear to have been meticulous, almost amounting to absurdity, for the Committee having all met to issue orders for seven days' notice to be given in writing to each of those members then present, to abandon the meeting and hold it again after the expiration of seven days after each of them had received the notice in writing. We are satisfied on a consideration of the Sikh Gurdwaras Act as a whole, that the purpose of S. 99 is to ensure that all members of the Committee had notice of any meeting, and under the circumstances of this case as given above that it was unnecessary to have issued notice under S. 99 and that S. 99 is directory and not imperative. The fact that all the members of the Committee were present when the resolution appointing Sardar Ajit Singh to conduct the suit was passed, makes the resolution in accordance with law. With regard to the second point raised by counsel, it is necessary to look at the provisions of the Sikh Gurdwaras Act. Under Section 7

any fifty or more Sikh worshippers of a Gurdwara may forward to the Provincial Government a petition praying to have the Gurdwara declared to be a Sikh Gurdwara.

Under S. 7 (2) the petition shall be accompanied by a list of all rights, titles or interests in immovable properties situated in the Punjab, which the petitioners claim to belong, within their knowledge, to the Gurdwara. Under S. 7 (3), the Provincial Government is empowered thereafter to publish the petition and the accompanying list by notification in every district in which any of the immovable properties mentioned in the list is situated. Under S. 7 (4) the Provincial Government must also send by registered post a notice of the claim to any right, title or interest included in the list to each of the persons named therein as being in possession of such right, title or interest. Under S. 8, certain persons, mentioned therein, may forward a petition claiming that the Gurdwara is not a Sikh Gurdwara. Under S. 10 any person may forward a petition claiming a right, title or interest in any property included in the list published under S. 7. If no claim is forwarded, the Government may publish a notification under S. 10 (3) specifying the rights, titles, or interests in any properties in respect of which no such claim has been made. Under S. 12 of the Act the Provincial Government has power to direct the constitution of a tribunal for the purpose of

deciding claims made in accordance with the provisions of this Act. Under S. 14, the Provincial Government shall forward to the tribunal all petitions received by it under the provisions of Ss. 5, 6, 8, 10 or 11 and the tribunal shall dispose of such petitions by order in accordance with the provisions of this Act. Under S. 16 (1) it is provided that if in any proceeding before a tribunal it is disputed that a Gurdwara should or should not be declared to be a Sikh Gurdwara, the tribunal shall, before enquiring into any other matter relating to the said Gurdwara, decide whether it should or should not be declared a Sikh Gurdwara. Under S. 25-A it is provided that

when it has been decided under the provisions of this Act that a right, title or interest in immovable property belongs to a notified Sikh Gurdwara, or any person, the Committee of the Gurdwara concerned, or the person in whose favour the declaration has been made, may, within a period of one year from the date of the decision or the date of the constitution of the Committee, whichever is later, institute a suit before the tribunal claiming to be awarded possession of the right, title or interest in the immovable property in question as against the parties to the previous petition, and the tribunal shall . . . pass a decree for possession accordingly.

This latter provision was inserted in the Act at a later stage in order to give a successful claimant before the tribunal a short and easy method of getting possession of the property declared to be his. It has been argued by Sardar Bhagat Singh that the question of the right, title or interest of the Gurdwara to the property in dispute cannot, by the Sikh Gurdwaras Act, be placed before the tribunal and that therefore the tribunal has no jurisdiction to decide whether the property belongs to the Sikh Gurdwara or not. This argument is based upon S. 14 (1) set forth above. It is argued that the Provincial Government has only to forward to the tribunal the petitions received by it under the provisions of Ss. 5, 6, 8, 10 or 11: that the petition under S. 7 is omitted, and that therefore the questions arising in petitions under S. 7 are at no time before the tribunal and therefore the matters raised in S. 7 cannot be decided by the tribunal.

If this were the provision, it would appear to us that the whole purpose of the Act, which was to provide a convenient and easy method of deciding disputes relating to Gurdwaras, would be defeated, and S. 25-A would be without meaning as regards the Committee of Management of a Gurdwara. We think however that on a proper consideration of all the sections alluded to above

it is clear that the Sikh Gurdwaras Tribunal set up by S. 12 has authority to decide a petition under S. 7, when a counter-petition under Ss. 8 or 10 has been filed and forwarded to the tribunal. It is to be noted that under S. 12 the tribunal is expressly constituted for the purpose of deciding claims made in accordance with the provisions of this Act. It is not constituted merely to decide matters arising in petitions received by it from the Provincial Government under Ss. 5, 6, 8, 10 or 11, in accordance with S. 14 (1). These latter petitions are received by the Government and forwarded by them for decision, but the petition under S. 7 is a claim and is also before the tribunal, when under S. 10 (1) a counter-petition is forwarded to it for disposal; because under S. 10 (1) the petition forwarded under this latter Section is based upon a right, title or interest in any property included in the list attached to the petition forwarded to Government under S. 7.

The provisions of S. 12 are also perfectly clear. The tribunal is set up for the purpose of deciding all claims made, and a claim under S. 7 in connexion with the property said to belong to the Gurdwara is a claim in accordance with the provisions of the Sikh Gurdwaras Act. Further, S. 25-A in plain words recognises the right of the tribunal to pass a decree for possession in favour of any person in whose favour a declaration has been made. Taking therefore the provisions of the Sikh Gurdwaras Act as a whole, we have no hesitation in deciding that there is no foundation for the argument that the Tribunal had no jurisdiction to decide that the property included in the list attached to the petition under S. 7 in this case belonged to the Gurdwara Bichhuana.

The appellants here relied upon a decision of *Monroe and Currie JJ.* in 16 Lah 968.² In that case there was no issue framed as to the claim of the Gurdwara that the property belonged to it. A petition had been filed under S. 10, but that had been withdrawn. It was clear therefore that it would have been impossible for the tribunal in that case to have decided that the property belonged to the Gurdwara. The learned Judges however in their judgment decided although it was wholly unnecessary to the decision of that case that there was no jurisdiction in the tribunal to

hear and decide such a claim. The remarks of the learned Judges were therefore obiter and are not binding upon us. In any event, we would respectfully disagree with the decision of that Bench on this point. That decision was based on the omission in S. 14 of the Act, of any allusion to S. 7. As we have pointed out above however in our opinion, the claim under S. 7 (2) would be before the tribunal in any petition filed under S. 10, and if an issue was framed upon the point and the Court decided that issue, their decision would be, in our opinion, within their jurisdiction. The jurisdiction of the tribunal is not confined to a decision of the petitions received by it under S. 14. That Section is not exhaustive. Its jurisdiction is, under S. 12, to decide all claims made in accordance with the provisions of the Sikh Gurdwaras Act. For these reasons therefore we must dismiss this appeal with costs.

G.N./R.K.

Appeal dismissed.

*** A. I. R. 1940 Lahore 269**

DIN MOHAMMAD J.

Mt. Ghulam Fatima — Plaintiff

— Appellant.

v.

Mt. Gopal Devi and another —

Defendants — Respondents.

Second Appeal No. 770 of 1939, Decided on 30th November 1939.

*** (a) Transfer of Property Act (1882), S. 92 — Every subsequent mortgagee paying off previous mortgagee succeeds to right of priority held by previous mortgagee.**

The privilege conferred by S. 92 is not confined to the first person only who redeems the prior mortgagee and can be inherited by his successors-in-interest. Every subsequent mortgagee who pays off the previous mortgagee succeeds to the entire rights possessed by his predecessors-in-interest and if those rights include a right of priority, he will be clothed with that right too. [P 271 C 1]

(b) Transfer of Property Act (1882), S. 78— Neglect is to be determined in every case on its own facts—Prior mortgagee held guilty of gross neglect and therefore postponed to subsequent mortgagee.

Neglect is apparently something different from fraud; it may include honest inadvertence. Neglect is to be determined in every case on its own facts and no precedent can serve as a safe guide in this matter. [P 271 C 2]

A mortgagor after mortgaging his house to *M* subsequently mortgaged the same house to successive mortgagees. In all the mortgages effected subsequent to the mortgage of *M*, it had been expressly mentioned by the mortgagor that his house was free from incumbrance. Further to every mortgagee subsequent to *M* the title deeds were given along with possession. *M* however had allowed the mortgagor to retain the title deeds in his possession as well as the house :

2. *Shiromani Gurdwara Parbandhak Committee v. Jagat Ram*, (1935) 22 A I R Lah 279=156 I O 1042=16 Lah 968=38 P L R 44.

Held that the neglect which induced the subsequent mortgagees to deal with the mortgagor was evidently gross and consequently on the principles enunciated in S. 78, the subsequent mortgagee was legally entitled to ignore M's mortgage.

[P 272 C 1]

(c) **Transfer of Property Act (1882), S. 41 — Principle applies to mortgages.**

The principle of S. 41 applies to mortgages: *A I R 1935 Lah 410 and A I R 1936 Lah 405, Rel. on.*

[P 272 C 1]

(d) **Maxim — Of two equally innocent or equally guilty persons law favours one who is in actual possession.**

Of the two innocent persons or equally guilty persons if the law has to make its choice as whom to penalise, the law will choose the person whose indiscretion has enabled the fraud and favours him who is in possession: (1895) 1 Q B 521; *A I R 1919 Mad 247 and A I R 1926 All 591, Rel. on.*

[P 272 C 1, 2]

(e) **Transfer of Property Act (1882), S. 3 as amended in 1929 — Transfer of Property Act does not not apply to Punjab—S. 3 as amended in 1929 therefore does not affect that Province.**

The Transfer of Property Act is not in force in the Punjab and hence S. 3 of that Act as amended in 1929 does not affect that Province. Consequently the state of law as existed prior to 1929 according to which registration did not amount to notice continues to hold good in that Province: *A I R 1935 Lah 410 and A I R 1921 P C 112, Rel. on.*

[P 272 C 1, 2]

Barkat Ali — *for Appellant.*

Achhru Ram — *for Respondent 1.*

Judgment. — The facts bearing on the questions of law involved in this case are these. Haji Mohammad Abdullah purchased a house No. 3491 situate in Sheranwala Gate from Allah Bakhsh on 24th June 1909 (Ex. P/1). On 21st May 1920, Haji Mohammad Abdullah deposited the title deeds of this house with the Punjab National Bank in an over-draft account. On 1st April 1926, he mortgaged this house to Mt. Gopal Devi by way of collateral security for the loans advanced by her to Mt. Khurshaid Begum, a daughter of Haji Mohammad Abdullah (Ex. D/1). On 13th December 1928, Haji Mohammad Abdullah mortgaged the same house to Mr. Cooper with possession for Rs. 6000 and authorized the mortgagee to redeem the previous mortgage of the Punjab National Bank (Exhibit P/2). Mr. Cooper consequently paid Rs. 3000 odd to the Bank and secured the title deeds which had been deposited with it. In that deed it was expressly mentioned that the only encumbrance on the house was that of the Punjab National Bank. On 21st March 1931, Haji Mohammad Abdullah mortgaged this house to Mt. Sardar Begum with possession for Rs. 1500 (Ex. P/3) and on the same day Mt. Sardar Begum paid off Mr. Cooper and obtained the title deeds of the

house from him. On 25th May 1932, this house was once more mortgaged to Mt. Ghulam Fatima, the present appellant, for Rs. 2000, of which Rs. 50 had already been paid, Rs. 1500 were to be paid to the previous mortgagee and Rs. 450 were paid in cash before the Sub-Registrar (Ex. P/7). Mt. Sardar Begum was paid off on 30th May 1932 (Ex. P/2-A). On 3rd January 1934, Mt. Ghulam Fatima obtained a mortgage decree against Haji Mohammad Abdullah and on 16th May 1935, the house was sold in execution of the decree and purchased by Mt. Ghulam Fatima herself. In the meantime, on 23rd March 1933, Mt. Gopal Devi had obtained a final decree on the foot of her own mortgage and after the sale had been effected in favour of Mt. Ghulam Fatima, started execution proceedings therein asking for the attachment of the same house. On 21st October 1937, Mt. Ghulam Fatima instituted the present suit for a declaration that the house in suit was not liable to attachment and sale in the execution of Mt. Gopal Devi's decree. Mt. Gopal Devi resisted this suit on various grounds and it was ultimately decreed against her on 25th July 1938. On 3rd April 1939, the Additional District Judge accepted Mt. Gopal Devi's appeal from that order. Hence this appeal.

Counsel for the appellant has urged (a) that Mt. Ghulam Fatima was subrogated to the rights of the Punjab National Bank and inasmuch as the mortgage in favour of the Bank was prior to the mortgage in favour of Mt. Gopal Devi, Mt. Ghulam Fatima's mortgage was not affected in the least by Mt. Gopal Devi's mortgage, (b) that Mt. Gopal Devi was guilty of gross neglect and on that basis she, in spite of being a prior mortgagee, was liable to be postponed to the subsequent mortgagee, (c) that on the basis of the principle enunciated in S. 41, T. P. Act, Mt. Ghulam Fatima who had acted in good faith could not be touched, and (d) that the maxim of law, that in adjudicating upon the relative claims of two innocent persons or two equally guilty persons, the law favours the person in possession and penalizes the person whose indiscretion enables the fraud, applies to this case. These points will be discussed in the order in which they are stated above.

The principle of subrogation is explained in S. 92, T. P. Act, which provides that the persons referred to in S. 91, who include subsequent mortgagees, have on redeeming

the property subject to the mortgage the same rights as the mortgagee whose mortgage they redeem. In the present case it is contended on behalf of the appellant that Mr. Cooper stepped into the shoes of the Punjab National Bank when he redeemed the mortgage in favour of the Bank, that Mt. Sardar Begum on redeeming Mr. Cooper's mortgage stepped into his shoes, that Mt. Ghulam Fatima in redeeming Mt. Sardar Begum's mortgage stepped into her shoes and that inasmuch as Mr. Cooper had been clothed with priority on the principle of subrogation, Mt. Sardar Begum succeeded to all his rights on subrogation and so did Mt. Ghulam Fatima on redeeming Mt. Sardar Begum's mortgage. Reliance has been placed in this connexion on 10 Cal 1035,¹ 50 Mad 626² and 19 Lah 155³ at page 161. The principle enunciated in these judgments is not disputed by counsel for the respondent but he urges that the privilege conferred by S. 92 is confined to the first person only who redeems the prior mortgage and that it is not inherited by his successors-in-interest. He however has not been able to cite any authority in support of this proposition and ordinarily this proposition does not appear to be sound. Every subsequent mortgagee who pays off the previous mortgagee succeeds to the entire rights possessed by his predecessor-in-interest and if those rights include a right of priority, he will be clothed with that right too. I accordingly have no hesitation in holding that when Mt. Ghulam Fatima paid off Mt. Sardar Begum, she inherited all the rights and privileges which Mt. Sardar Begum enjoyed and as she had succeeded to the rights and interests of Mr. Cooper, who admittedly had stepped into the shoes of the Punjab National Bank, Mt. Ghulam Fatima obtained priority over Mt. Gopal Devi in that manner. A decision on this point is sufficient to dispose of the appeal but as I am inclined to grant a certificate under Cl. 10, Letters Patent, of this Court, I propose to decide all the questions involved in the case in view of their importance. The principle involved in the plea based on gross neglect is contained in S. 78, T. P. Act, which lays down that

where, through . . . gross neglect of a prior mortgagee, another person had been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

It is urged by counsel for the appellant that Mt. Gopal Devi neither took possession of the title deeds nor of the property mortgaged to her and thus allowed the mortgagor to deal with the property in any manner he liked. This, it is urged, was a gross neglect on her part entitling all persons dealing with the mortgagor subsequently to priority over her. Reference in this connexion has been made to 56 Cal 868⁴ at pages 879-80, 883 and 885, A I R 1928 Sind 179⁵ at page 183, 43 Cal 1052⁶ and A I R 1938 Mad 87.⁷ As against these, counsel for the respondent relied on 2 C W N 750⁸ at p. 753, 31 Mad 7,⁹ 98 I C 19¹⁰ and A I R 1936 Rang 152.¹¹ In 2 C W N 750,⁸ Jenkins J. relied on certain English decisions and held that neglect as contemplated in S. 78, T. P. Act, involves an element of fraud and unless such neglect is proved, S. 78 does not come into operation. This judgment was, however, criticised in 43 Cal 1052⁶ and 56 Cal 868⁴ and if I may say so, with all respect, rightly so. As explained by Page J. in 56 Cal 868,⁴ English decisions might authorize the interpretation of 'neglect' in that limited manner, but Indian decisions do not justify that course. 'Neglect' is apparently something different from fraud. It may include honest inadvertence, what to say of its being necessarily dishonest. 31 Mad 7⁹ proceeded on the basis that there was a practice in vogue in that province that title deeds were never made over to the mortgagee. 98 I C 19¹⁰ and A I R 1936 Rang 152¹¹ are also distinguishable on one ground or another.

'Neglect' is to be determined in every case on its own facts and no precedent can serve as a safe guide in this matter. In the present case in all mortgages effected sub-

1. Gokal Dass Gopal Dass v. Puran Mal Prem-sukhdas, (1884) 10 Cal 1035 = 11 I A 126 = 4 Sar 543 (P C).

2. Kotappa v. Raghavayya, (1927) 14 A I R Mad 631 = 102 I C 316 = 50 Mad 626 = 52 M L J 532.

3. Karamchand v. Ramsingh, (1937) 24 A I R Lah 665 = 174 I C 226 = I L R (1938) 19 Lah 155 = 39 P L R 899.

4. Lloyds Bank Ltd. v. P. E. Guzdar & Co., (1930) 17 AIR Cal 22 = 121 IC 625 = 56 Cal 868.

5. Cowasji Jehangir & Co. v. Tyabalia Mandviwalla, (1928) 15 A I R Sind 179 = 112 I C 722 = 23 S L R 97.

6. Nanda Lal v. Abdul Aziz, (1916) 3 A I R Cal 33 = 34 I C 115 = 43 Cal 1052.

7. Samarapuri Chetti v. Thangavelu Chetti, (1938) 25 A I R Mad 87 = 176 I C 757.

8. Manindra Chandra Nandi v. Troyluckho Nath, (1898) 2 C W N 750.

9. Rangaswami Naiken v. Annamalai Mudali, (1908) 31 Mad 7 = 17 M L J 499.

10. A. L. R. M. Chettiar Firm v. L. P. R. Chettiar Firm, (1926) 13 A I R Rang 195 = 98 I C 19 = 4 Rang 238.

11. Bank of Chettinad Ltd. v. Ma Ba Lo, (1936) 23 AIR Rang 152 = 163 IC 645 = 14 Rang 494.

sequent to the mortgage in favour of Mt. Gopal Devi, it had been expressly mentioned by Mohammad Abdullah that the house was free from encumbrance. Further, to every mortgagee the title deeds were delivered along with possession. These circumstances were enough for any person to be assured of the validity of the title of his alienor as well as of the genuineness of the assurances given by him. Had Mt. Gopal Devi not conducted herself in that incautious or indiscreet manner in which she did in allowing Haji Mohammad Abdullah to retain the title deeds in his possession as well as the house, the subsequent mortgagees would not have been deceived as to the true state of affairs. This neglect which induced the subsequent mortgagees to deal with Haji Mohammad Abdullah was, in my view, evidently gross and consequently on the principle enunciated in S. 78, T. P. Act, Mt. Ghulam Fatima is legally entitled to ignore Mt. Gopal Devi's mortgage.

That the principle of S. 41, T. P. Act, applies to mortgages is clear from the two judgments of this Court reported in A I R 1935 Lah 410¹² and A I R 1936 Lah 405.¹³ I need not however dwell on this matter at any length as it is of very minor importance in the decision of this case. The legal maxim relied upon by the appellant no doubt prevails. Of the two innocent persons, even if Mt. Gopal Devi be treated as innocent in spite of her indiscretion if the law has to make its choice as whom to penalize, the law will choose the person whose indiscretion has enabled the fraud : see (1895) 1 Q B 521¹⁴ at page 529 and 53 I C 379¹⁵ at p. 381. Similarly, of the two innocent persons the law favours him who is in possession. Counsel for the respondent urges in this connexion that even Mt. Ghulam Fatima was not free from blame inasmuch as it was her duty to have looked into the registration records to find out whether the property had already been mortgaged or not. Reliance is placed on S. 3, T. P. Act, as amended in 1929, but as remarked in A I R 1935 Lah 410¹² the amendment does not affect this province and conse-

quently the state of affairs as existed prior to 1929 continues to hold good in this province. Previously, as held in 48 Cal 1,¹⁶ registration did not amount to notice. But even if for the sake of argument it be held that Mt. Ghulam Fatima was also to blame in this matter, again the principle of law, that where each party is equally in fault the law favours him who is actually in possession, comes to her rescue : see 48 All 735¹⁷ at pages 759 and 760.

From whatever point of view, therefore, the case is looked at, it is evident that the decree of the Additional District Judge proceeded on erroneous grounds. I accordingly allow the appeal, set aside the judgment and decree of the Additional District Judge and decree Mt. Ghulam Fatima's suit with costs throughout. If Mt. Gopal Devi chooses to file a Letters Patent appeal against this order, I shall be willing to grant her the necessary certificate.

D.S./R.K.

Appeal allowed.

16. Tilakdhari v. Khedan, (1921) 8 A I R P C 112 = 57 I C 465 = 47 I A 239 = 48 Cal 1 (P C).

17. Mewa Ram v. Ram Gopal, (1926) 13 A I R All 591 = 97 I C 90 = 48 All 735 = 24 A L J 777.

A. I. R. 1940 Lahore 272

BHIDE J.

Mehtab and others — Appellants.

v.

Ahmad Khan and others — Respondents.

Second Appeal No. 1080 of 1939, Decided on 1st February 1940.

(a) Civil P. C. (1908), O. 1, R. 8—Some defendants appointed to represent the rest under O. 1, R. 8—Death pendente lite of some of represented defendants—Suit does not abate—It can proceed without bringing legal representatives on record.

Where some of the defendants are appointed to represent the rest of the defendants under O. 1, R. 8, the death of any of the defendants pendente lite who were represented as aforesaid is immaterial. The suit in such circumstances does not abate and can proceed without impleading their legal representatives : A I R 1931 Lah 610 and A I R 1939 Lah 572, *Rel. on.* [P 273 C 1]

(b) Civil P. C. (1908), O. 1, R. 8—Two out of twelve defendants appointed under O. 1, R. 8 dying pendente lite—Remaining defendants should apply to Court for directions whether other persons should be added.

Two of the defendants who died pendente lite were out of the twelve representatives appointed under O. 1, R. 8 :

Held that the remaining representative defendants should have applied to the Court for directions as to whether they should conduct the case on behalf of all the defendants as before or whether any other persons should be added : A I R 1931 Mad 452, *Foll.* [P 273 C 1]

D. N. Aggarwal — *for Appellants.*

S. Mohsin Shah — *for Respondents.*

12. D. A. V. College Registered Society, Lahore v. Umrao Singh, (1935) 22 A I R Lah 410 = 157 I C 92 = 37 P L R 168.

13. Arur Singh v. Santi, (1936) 23 A I R Lah 405 = 166 I C 147 = 38 P L R 1097.

14. Henderson & Co. v. Williams, (1895) 1 Q B 521 = 14 R 375 = 72 L T 98 = 43 W R 274 = 64 L J Q B 308.

15. Palaniveluppa Goundan v. Nachappa Goundan, (1919) 6 A I R Mad 247 = 53 I C 379.

Judgment.—The plaintiffs, who are proprietors of a patti in village Sakras, sued in this case for an injunction directing the defendants to close certain moris which they had made in a bund from which the plaintiffs irrigated their lands, alleging that the moris interfered with the irrigation of their land and caused inconvenience in other ways. The defendants pleaded that they had constructed the moris in accordance with a certain compromise. The trial Court found the issues in favour of the plaintiffs and granted them a decree. From this decision, the defendants appealed to the District Court. An objection was raised on behalf of the appellants before the learned District Judge that nine of the defendants had died during the pendency of the suit and as their legal representatives had not been brought on the record within the prescribed period of limitation the suit had abated in toto. This objection was upheld by the learned District Judge and the suit was dismissed. From this decision the present appeal has been preferred.

The learned counsel for the appellants pointed out that, in the present suit, twelve persons had been appointed to represent the defendants under O. 1, R. 8, Civil P. C. He pointed out that, in such circumstances, the death of any of the persons who were represented by these twelve men was immaterial and there was no necessity to implead their legal representatives. In support of this contention he relied on 13 Lah 195,¹ which was recently followed in A I R 1939 Lah 572.² Two of the defendants who died were however out of the twelve representatives who were appointed under O. 1, R. 8, Civil P. C. As regards these two persons, the learned counsel was not able to cite any authority to show that their death did not affect the order passed under O. 1, R. 8, Civil P. C. According to the view taken in 54 Mad 527,³ it would appear that when two of these persons died, the remaining persons should have applied to the Court for directions as to whether they should conduct the case on behalf of all the defendants as before or whether any other persons should be added. The learned counsel for both parties agreed before me that

this procedure would be proper in the circumstances and they had no objection to this procedure being followed in the present case.

In the circumstances, I accept this appeal and, setting aside the decision of the learned District Judge and the trial Court, remand the case with the direction that the question of appointing fresh representatives, if any, instead of the two deceased persons out of the twelve persons who were originally appointed to represent the defendants under O. 1, R. 8, Civil P. C., should be considered and a proper order passed. The Court should then proceed to decide the case according to law from the stage of the death of the two persons named above. Costs will follow final decision. The parties are directed to appear before the trial Court on 22nd February 1940.

G.N./R.K.

Appeal accepted.

*** A. I. R. 1940 Lahore 273**

BHIDE J.

Governor-General in Council —

Petitioner.

v.

Guranditta Mal — Respondent.

Civil Revn. No. 636 of 1939, Decided on 9th January 1940, from order of Dist. Judge, Sialkot, D/- 21st March 1939.

*** Provincial Insolvency Act (1920), S. 9—**
'Debt'—Claim by Government against employee of Post Office in respect of sum embezzled by him—Amount claimed is not debt.

For the purpose of S. 9 the 'debt' must be a liquidated sum. Where an employee in a post office is alleged to have embezzled certain amount, the claim by the Government in respect of this amount is in the nature of unliquidated damages. The amount claimed therefore cannot be described to be a debt : *A I R 1932 Oudh 107, Rel. on.*

[P 274 C 1]

Partap Singh, for Advocate-General —
for Petitioner.

Hem Raj Mahajan — *for Respondent.*

Order. — This was an application on behalf of the Governor-General in Council for the adjudication of one Guranditta Mal as insolvent. The allegation in the petition was that Guranditta Mal, who was employed in a post office, had embezzled a sum of Rs. 12,335-9-0 and was therefore a debtor to the Crown to the extent of that sum. The trial Court held that the sum alleged to be due from the respondent could not be considered to be a debt within the meaning of the term as used in the Provincial Insolvency Act and, therefore, the petition was

1. Afzalunnisa v. Fayazuddin, (1931) 18 A I R Lah 610 = 132 I O 657 = 13 Lah 195 = 33 P L R 802.

2. Fazal Rahim Khan v. Hussaina, (1939) 26 A I R Lah 572.

3. Venkata Krishna Reddi v. Srinivasachariar, (1931) 18 A I R Mad 452 = 130 I O 761 = 54 Mad 527 = 61 M L J 135.
1940 L/35 & 86

not maintainable. This decision was affirmed by the learned District Judge, and a petition for revision of the latter order has been now filed.

The only point which requires decision is whether the Courts below were right in holding that the amount alleged to have been embezzled by the respondent could be considered to be a debt within the meaning of the term as used in the Provincial Insolvency Act. There is no precise definition of the term in the Provincial Insolvency Act. All that is stated in the definition given in the Act is that it includes a judgment debt. The Government have admittedly not obtained any decree in the present case against the respondent. The main point is whether the Government could have sued the respondent for recovery of the amount embezzled by him as a 'debt.' It seems to me that the amount having been misappropriated by the respondent by commission of an offence the Government could only sue him for recovery of damages. The present claim of the Government is therefore in the nature of unliquidated damages. Admittedly, there was no contractual relation between the parties in the present case and no authority has been cited that, in such circumstances, the amount claimed could be legally considered to be a 'debt.' For the purpose of S. 9, Provincial Insolvency Act, under which the petition was filed the 'debt' must be a liquidated sum. The learned District Judge has relied on A I R 1932 Oudh 107¹ which supports the view taken by him. In the absence of any authority to the contrary, I see no reason to dissent from the view taken by the learned District Judge, and, therefore, dismiss the petition; but, in view of all the circumstances, I leave the parties to bear their costs in this Court.

D.S./R.K.

Petition dismissed.

1. Rajaram v. Chandi Prasad, (1932) 19 A I R Oudh 107=198 I C 627=9 O W N 102.

* A. I. R. 1940 Lahore 274

SKEMP J.

Ram Chand — Convict — Petitioner
v.
Emperor.

Criminal Revn. Petn. No. 948 of 1939,
Decided on 18th October 1939, for revision
of order of Sess. Judge, Ludhiana, D/- 18th
April 1939.

* (a) Criminal P. C. (1898), S. 439 — Accused dying pending revision against sentence of fine — Revision continues.

If pending the revision against the sentence of fine the accused dies, the revision continues : A I R 1919 Lah 347, Rel. on. [P 274 C 2]

(b) Deed — Construction—Will or settlement—Deed held one of settlement.

The document is not a will but a deed of settlement if the executant has stated that he had already given his property to his sons. [P 274 C 2]

(c) Stamp Act (1899), S. 64—For conviction under S. 64 intent to defraud must be proved.

In order to maintain a conviction under S. 64 it is necessary to prove intent to defraud. This intent can only be inferred from the circumstances. [P 274 C 2]

M. L. Puri — *for Petitioner.*

Abdul Aziz Khan for Advocate-General
— *for the Crown.*

Order. — One Ram Chand was convicted under S. 64, Stamp Act, and sentenced to Rs. 500 fine. He appealed to the Sessions Judge who reduced the fine to Rs. 250. He then came here on revision through Rai Bahadur Lala Mukand Lal Puri. Pending the revision he died but as the sentence is one of fine the revision continues : 8 P R Cr 1919.¹ On 23rd December 1936 Ram Chand executed a document in favour of his sons which in the document is described as a wasiyatnama. He took the draft to a petition writer asking him to copy it out word by word. The document which consists of a few lines only was presented to the Sub-Registrar who registered it as a will. About two years later a Stamp Auditor inspecting documents discovered that in reality the document was not a will but a deed of settlement as Ram Chand stated that he had already given his property to his three sons. There is no doubt that this view is correct in law and that in reality the document is a deed of settlement.

But in order to maintain a conviction under S. 64, Stamp Act, it is necessary to prove intent to defraud. This intent can only be inferred from the circumstances, but it seems to me that the circumstances summarized above fall far short of establishing intent to defraud. There was no secrecy about the preparation of the document which was described and attested as a will, the attesting witnesses being lawyers' clerks, and it was taken by a petition-writer to be formally drawn up. I accept this revision, set aside the conviction and direct that the fine if paid be refunded to legal representatives of Ram Chand.

D.S./R.K.

Petition allowed.

(1) Daulat Ram v. Emperor, (1919) 6 A I R Lah 347 = 49 I C 774=8 P R Cr 1919=95 P L R 1918=20 Cr L J 214.

A. I. R. 1940 Lahore 275

SKEMP J.

Jiya Lal — Defendant — Appellant.

v.

Babu Janeshwar Das, Plaintiff and others, Defendants — Respondents.

First Appeal No. 258 of 1939, Decided on 19th March 1940, from order of Dist. Judge, Hissar, D/- 3rd October 1939.

(a) Punjab Relief of Indebtedness Act (7 of 1934), Ss. 5 and 6 — Transaction in 1914 — Ss. 5 and 6 have effect of amending S. 2 (3) (a), Usurious Loans Act, and apply to suits instituted after commencement of Punjab Relief of Indebtedness Act.

Section 6, Punjab Relief of Indebtedness Act, clearly meant to apply the amendment to S. 3, Usurious Loans Act, to all suits instituted after the commencement of the former Act. The effect is the same as if S. 2 (3), Usurious Loans Act, had been amended in S. 5, Punjab Relief of Indebtedness Act. Therefore, it cannot be said that the Punjab Relief of Indebtedness Act does not apply to suits instituted after its commencement even though the transaction is of the year 1914.

[P 276 C 1]

(b) Usurious Loans Act (1918), S. 3 — Whether bargain is fair or unfair—Test.

The proper test to determine whether a bargain is fair or unfair is to take into consideration the circumstances as they existed at the time it was made.

[P 276 C 1]

F. C. Mittal — *for Appellant.*Achhru Ram — *for Respondent**(Plaintiff).*

Judgment.—This is a first appeal from an order. On 28th July 1914 Abdul Hakim mortgaged his fifth share in a larger holding, (his share amounting to 28 bighas, 16 biswas) to the father of the present appellant for Rs. 797. According to the terms of the mortgage deed, the mortgage was with possession and the profits on the land were to be deemed equal to the interest on Rs. 500 out of the amount secured. On the balance i. e. on Rs. 297 simple interest was to be paid at one per cent. per mensem. This arrangement remained in force until April 1937, when Babu Janeshwar Dass, a Mahajan of Hansi town and a practising lawyer, bought the equity of redemption from the heirs of Abdul Hakim for a thousand rupees. On 4th May 1937 he sued for redemption joining as defendants both the mortgagors and the mortgagees. After setting forth the facts narrated above, he pleaded that interest was excessive, that the transaction was unconscionable and that the mortgagee had received larger profits than the law now in force allowed. It was

mentioned in the plaint that part of the property mortgaged had been acquired by Government and that a sum of Rs. 224-15-0 was in deposit with the Collector. It is admitted that this sum has since been paid to the mortgagees and that a credit should be given to it in the account.

On the points now material the learned Subordinate Judge held that the suit was governed by the Usurious Loans Act, 1918, as amended by Ss. 5 and 6, Punjab Relief of Indebtedness Act, 1934. He further held that the bargain was not unconscionable and that interest was not excessive; it was necessary to look at the transaction in the light of the circumstances prevailing at the time it was made. He granted the plaintiff a decree for redemption on payment of the amount secured, namely Rs. 797 minus Rupees 224-15-0 = Rupees 572-1-0. Both parties appealed to the learned District Judge who agreed that the suit was governed by Ss. 5 and 6, Punjab Relief of Indebtedness Act, but held that it was necessary to reopen the accounts and examine them carefully and then determine whether the interest had been excessive. He remanded the case for this purpose. The mortgagee has appealed through Mr. Faqir Chand Mital, while the plaintiff Babu Janeshwar Dass has been represented before me by Mr. Achhru Ram. Mr. Faqir Chand Mital's first point is that the Punjab Relief of Indebtedness Act does not apply to the transaction in question. The Usurious Loans Act was passed in 1918 and S. 2 (3) of that Act runs :

'Suit to which this Act applies' means any suit, (a) for the recovery of a loan made after the commencement of this Act ; or (b) for the enforcement of any security taken, on any agreement, whether by way of settlement of account or otherwise, made after the commencement of this Act in respect of any loan made either before or after the commencement of this Act.

Section 3, Usurious Loans Act, laid down the conditions on which the Court might reopen a transaction. The Punjab Relief of Indebtedness Act, 1934, which came into force on 19th April 1935, amended S. 3, Usurious Loans Act. The amended Section now provides :

Notwithstanding anything in the Usury Laws Repeal Act, 1855, where in any suit to which this Act applies whether heard *ex parte* or otherwise, the Court has reason to believe, (a) that the interest is excessive; or (b) that the transaction was, as between the parties thereto, substantially unfair, the Court shall exercise powers of reopening the transaction. S. 6 of the Act provides :

The provisions of this part of the Act shall apply to all suits pending on or instituted after the commencement of this Act.

"This part of the Act" is Part 3 and consists of Ss. 5 and 6, Amending Act. Mr. Faqir Chand Mital's point is that S. 2 (3), Usurious Loans Act, has not been amended and still runs as quoted above i. e., "a suit for the recovery of a loan made after the commencement of this Act." The mortgage in question was entered into in the year 1914. The Usurious Loans Act came into force in 1918. Therefore he says the Punjab Relief of Indebtedness Act does not apply because S. 6 does not delete S. 2 (3) (a), Usurious Loans Act. In my opinion, this argument is not well founded. In agreement with the Courts below and with Mr. Achhru Ram I think that S. 6, Punjab Relief of Indebtedness Act, clearly meant to apply the amendment to S. 3 to all suits instituted after the commencement of the former Act. The effect is the same as if S. 2 (3), Usurious Loans Act, had been amended in S. 5, Amending Act.

The next point is whether the learned District Judge was right in remanding the case to take accounts. In order to succeed the plaintiff has to prove under the law as amended that the interest is excessive or that the transaction was substantially unfair. The question is whether to look at the transaction as the parties did when they entered into the contract or whether to examine it in the light of everything which has happened since. It is understood that a factory has been built on part of the land in question, increasing the profits. I think that the proper test to determine whether a bargain is fair or unfair is to take into consideration the circumstances as they existed at the time it was made. The contract provided that the rents of the land should be equal to the interest on Rs. 500 and that the balance of Rs. 297 should bear interest at 12 per cent. per annum. The rate of 12 per cent. per annum is specifically permitted by the Usurious Loans Act and is probably a guide to the whole transaction; for, it is not likely that the estimated return on Rs. 500 would differ materially from the agreed rate on Rs. 297. The learned Subordinate Judge has pointed out that for the first four or five years after the bargain the profits on the land amounted to about 12 per cent. His judgment says Rs. 63.12.0 per annum. Counsel says the correct figure was Rs. 58.12.9 per annum, whereas 12 per cent. on Rs. 500 would be Rs. 60 per

annum, I am therefore of opinion that the plaintiff is not entitled to have the whole accounts examined since the mortgage of 1914 and accept this appeal with costs, setting aside the order of the District Judge and restoring that of the Subordinate Judge. The learned Subordinate Judge reopened the transaction to this extent that he disallowed all interest on the sum of Rs. 297 a point not attacked before me.

G.N./R.K.

Appeal accepted.

A. I. R. 1940 Lahore 276

DALIP SINGH J.

Ramzani — Defendant — Petitioner.

v.

*Mt. Nur Ahmadi, Plaintiff and others,
Defendants — Respondents.*

Civil Revn. No. 121 of 1939, Decided on 2nd May 1939, for revision of order of Hony. Sub-Judge, Fourth Class, Rohtak, D/- 26th November 1938.

(a) Review—Review of order is competent.

Review of an order is competent and it depends upon circumstances whether the order passed in review is a correct order or not. [P 277 C 1]

(b) Arbitration—Parties agreeing that in case of difference between arbitrators, Court should decide case—Difference between arbitrators — Court cannot appoint another person as umpire.

Where in a deed of reference to arbitration the parties have agreed that in case of difference between the arbitrators, the Court should itself decide the case, the Court, in case of difference between the arbitrators, has no jurisdiction to appoint another person as umpire. [P 277 C 1, 2]

Qabul Chand — *for Petitioner.*

F. C. Mittal — *for Respondent*

(*Plaintiff*).

Order.—In this case the facts are a little curious. The plaintiff sued the defendants for pre-emption of land sold by Hakim-ud-Din defendant. On 18th February 1938 the case was fixed for evidence and on that date the parties put in a deed of reference to arbitration by two named arbitrators Sultan Singh and Abdul Hamid Khan. It was provided in the deed of reference that if there was a difference of opinion between the arbitrators then "*jo adalat faisla farma-wegi woh ham fariqain ko manzur hai.*" In the statements of the parties following on this deed of reference it was stated by all the parties that if the arbitrators differed the Court should be umpire. On that date the Court was that of the Honorary Subordinate Judge, Lala Basheswar Nath. I do not consider by these statements that

the parties really meant that in that case Lala Basheshar Nath, Honorary Subordinate Judge, was to act as an umpire over the arbitrators. I think all that the parties meant was to say in polite language that if the arbitrators differed, the Court should decide the case according to law. The arbitrator Sultan Singh put in an award which is dated 26th March 1938 on 14th April 1938. Abdul Hamid Khan put in an award dated 13th April 1938 by registered post reaching the Court on 19th April 1938. The arbitrators differed in these two awards, but the learned counsel for the respondent now raises the contention that as a matter of fact Abdul Hamid Khan had agreed to the first award and therefore there was no difference of opinion between the arbitrators. This point does not appear to have been decided by the Court, but on 22nd April 1938 the Subordinate Judge, Mr. Suri, to whom the case had been transferred, cancelled the arbitration and fixed the case for evidence on 26th April 1938. A review was filed of the order of 22nd April 1938 on 26th April 1938 and Mr. Suri, Subordinate Judge, admitted this review. The case was then transferred back to the Honorary Subordinate Judge, Lala Basheshar Nath. Issues were struck on 10th June 1938. On 31st July 1938 the review was accepted and an order was passed for referring the case to an umpire appointed by the Court, Lala Uggar Sain.

It is contended here, firstly, that this review was not competent to the Court. I am unable to agree with this. Review of an order is competent and it depends upon circumstances whether the order passed in review is a correct order or not. But it cannot be held *a priori* that no review was competent. It is next argued that the Court could not delegate its functions to another arbitrator; in other words that according to the statements of the parties the Court itself was to be the umpire and it could not delegate these functions to someone else. I have already however held that in my opinion the parties did not intend that the Court should act as an umpire though they used those words and therefore no question arises of the Court being able to delegate its functions or not. The only point really is whether the Court was competent to appoint somebody as an umpire when the arbitrators differed. It appears to me that as the deed of reference made no provision for this contingency by way of appointing an umpire, but expressly stated that the Court should then decide the matter, the

Court had no jurisdiction to appoint Lala Uggar Sain as arbitrator. Thirdly, it is contended that Lala Uggar Sain's actions were without jurisdiction because he made no endeavour to consult the previous arbitrators as he should have done under the terms of the Court's order of 31st July 1938 appointing him as arbitrator. It is however unnecessary in view of my previous decision to deal with this point. The award was filed on 4th October 1938 and on 14th October objections were put in and on 17th October 1938 issues were struck:

1. Was the appointment of an umpire invalid?
2. Did the umpire act against the orders of the Court?
3. Is the award liable to cancellation?

On 26th November 1938, without deciding these issues, the Court merely accepted the award and passed a decree. It appears to me that this cannot stand and I hereby therefore set aside the decree passed in terms of the award of Lala Uggar Sain and set aside that award too. I remand the case back to a stipendiary Subordinate Judge to be appointed by the learned Senior Subordinate Judge to dispose of the case according to law. The learned counsel for the respondent wishes to contend that the arbitrators did not really differ originally and Abdul Hamid Khan having signed the original award propounded by Sultan Singh arbitrator could not change his mind subsequently and put in a fresh award. This point would be open for the learned Subordinate Judge to decide because I do not consider that the decision by the Honorary Subordinate Judge on this point is at all satisfactory. If the Court comes to the conclusion that the original arbitrators really decided the case in one fashion it will accept the award if no objections are taken to it and pass a decree according to that award. If on the other hand it holds that the arbitrators differed, it will proceed to dispose of the case according to law in the ordinary fashion. Costs will abide the event. Parties are warned to appear before the Senior Subordinate Judge on 20th May and obtain a date.

D.S./R.K.

Case remanded.

A. I. R. 1940 Lahore 278

DALIP SINGH J.

Munshi — Defendant — Appellant.

v.

*Bhagat Singh, Plaintiff and others,
Defendants — Respondents.*

Second Appeal No. 243 of 1939, Decided on 4th December 1939, from decree of District Judge, Hoshiarpur, D/- 7th January 1939.

(a) Second Appeal — Lower Appellate Court misreading evidence and holding that admission had been made whereas in fact no such admission had been made—Second appeal lies.

It is true that misconstruction of certain historical materials would not be a ground for a second appeal. But, if it is a question of misreading of evidence and holding that an admission has been made, whereas as a matter of fact no such admission had been made at all, in other words, the plaintiff had stated a certain fact and the defendant had controverted it and the lower Appellate Court under some misapprehension had held that the other defendant in his evidence had admitted the said fact, though as a matter of fact the defendant had made no such admission, it cannot be held that in such circumstances no second appeal would lie : *A I R 1930 P C 91, Disting.*

[P 279 C 1, 2]

(b) Civil P. C. (1908), S. 100 — Document not one of title misconstrued — No second appeal lies (*Obiter*).

Even if the first Appellate Court has misconstrued a document which is not a document of title, no second appeal can be based on this misconstruction : *A I R 1930 P C 91, Rel. on.*

[P 279 C 1]

(c) Civil P. C. (1908), S. 100 — Finding of fact.

Whether the plaintiff in a pre-emption suit is collaterally related to the vendor or not is a question of fact.

[P 279 C 1]

D. N. Aggarwal — *for Appellant.*

Achhru Ram and Chandra Gupta—

for Respondent (Plaintiff.)

Judgment. — The plaintiff in this case sued to pre-empt a certain sale of property on the ground of being a proprietor in the patti and the village in which the land in dispute is situate and secondly on the ground of being a collateral of the vendor. The trial Court held that he had no superior right by virtue of being a proprietor in the patti or the village as the vendee was also at the time of the suit a proprietor in the patti or the village, as the case might be, and that the plaintiff had failed to prove that he was any collateral of the vendor and the pedigree-table propounded by him to prove the said relationship was not proved. The Court therefore dismissed the suit with costs.

In appeal the learned District Judge agreed with the trial Court in all its findings

and held that the pedigree-table propounded by the plaintiff was not proved; but lastly decided on the strength of the kaifiat deh, Ex. P-9, prepared in the settlement of 1884, that all the proprietors holding land in this village were descendants of the original founder of the village, one Bharo. Construing this kaifiat deh the learned District Judge appears to have considered that it was made by all the proprietors of the village and as it was stated that the proprietors of Kalal qaum were descended from Bharo, therefore as the predecessor-in-interest of the present plaintiff was a proprietor at the time when the statement was made, he too was a descendant of Bharo and therefore was a collateral of the vendor and hence had a superior right of pre-emption to the vendee. He therefore allowed the appeal and decreed the plaintiff's claim leaving the parties to bear their own costs throughout. The vendee has come in second appeal and as pointed out in my order dated 31st May 1939, the question really turns on the proper interpretation of the kaifiat deh.

The learned District Judge considered that the words "*ham malikan qaum Kalal*" referred to all the proprietors of Kalal caste. Time was given to the learned counsel for the appellant to produce a statement which he said he had instructions existed on which the kaifiat was based. No such statement has been produced before me; but the learned counsel for the appellant has put in other documents showing that in the pedigree-table subsequent to 1884 prepared in 1905-1906 the gotts of various Kalal proprietors are given. These gotts are not the same and he therefore contends that these documents, if admitted, would strengthen his claim that the learned District Judge has wrongly interpreted the kaifiat deh as applying to all proprietors of Kalal caste. The learned counsel for the respondents objects that this was not contemplated in the order dated 31st May 1939, that this is seeking to produce fresh evidence in appeal and that no application has been made under O. 41, R. 27. The matter however is not free from difficulty and if I considered it necessary to elucidate the matter further, I might have exercised my discretion under O. 41, R. 27, to admit these documents which are extracts from the pedigree-table in the settlement record and therefore presumably correct in order to throw light on the somewhat difficult question of the interpretation of the kaifiat deh.

On reading the said kaifat deh carefully and with full reference to the context, I am clear that the interpretation put upon it by the learned District Judge is not correct and that the words "*ham malikan qaum Kalal*" do not refer to all the proprietors of the Kalal caste. If carefully read, the kaifat deh appears to refer to two kinds of proprietors: one, which might be called for clearness, hereditary proprietors, descendants from the original founder of the village or brought into the village subsequently by reason of collateral relationship; and it refers to a second group of proprietors who have acquired proprietorship by reason of sale or gift or other transactions from the original hereditary proprietors. These are mentioned separately in the pedigree-table to which reference is made in the kaifat deh and there is really nothing to show that these persons were collaterally related to the original founder of the village. Therefore, it would follow that there is nothing to show that the pre-emptor is collaterally related to the vendor.

I have however been faced with the ruling of their Lordships of the Privy Council reported in 11 Lah 199¹ and it has been strongly contended before me by the learned counsel for the respondents that even if the learned District Judge has misconstrued the kaifat deh, this is not a document of title and therefore no second appeal can be based on this misconception. I must admit that I have been impressed by this objection and at first sight it would appear that the objection is well founded. After all the question to be decided was whether the plaintiff was collaterally related to the vendor or not and this is a question of fact. Misconstruction of certain historical materials would not, according to the ruling of their Lordships of the Privy Council, which binds the Courts in India, be a ground for a second appeal. In this particular case however it seems to me that the learned District Judge really holds that there is an admission by the predecessors-in-interest of the vendor that the predecessors-in-interest of the pre-emptor were collaterally related to them. As a matter of fact, on my reading of the kaifat deh no such admission exists. It is not therefore entirely a question of drawing a wrong inference from a certain document, not being a question of title but a question of misreading of evidence

and holding that an admission has been made, whereas as a matter of fact no such admission has been made at all. If, for instance, the plaintiff had stated a certain fact and the defendant had controverted it and the District Judge under some misapprehension had held that the defendant in his evidence had admitted the said fact, though as a matter of fact the defendant had made no such admission, I do not think it could be held that in such circumstances no second appeal would lie. Similarly, in this case the learned District Judge's finding that the predecessors-in-interest of the vendor had admitted their collateral relationship with the predecessors-in-interest of the pre-emptor, on which the case turns, is not really based on any material on the record. I would therefore hold that the ruling of their Lordships of the Privy Council does not apply in the circumstances of this case.

I would accept the appeal and dismiss the plaintiff's suit leaving the parties to bear their own costs as the matter is by no means free from difficulty. I would also on this point allow a Letters Patent appeal, if applied for within limitation. The cross-objections are dismissed. No order as to costs.

D.S./R.K.

Appeal accepted.

A. I. R. 1940 Lahore 279

ADDISON J.

Firm Mohan Lal Om Parkash —

Defendant — Petitioner.

v.

*Firm Bala Bux Bajrang Lal, Plaintiff
and others, Defendants —*

Respondents.

Civil Revn. Petns. Nos. 173, 249 and 250 of 1939, Decided on 8th November 1939, for revision of decree of Addl. Judge, Small Cause Court, Amritsar, D/- 30th November 1938.

Debtor and Creditor — Suit by assignee of part of debt for that part is not maintainable.

There can be no out and out assignment of part of a debt without the consent or acknowledgment of the debtor, except, in the sense that the assignee may in equity be looked upon as a joint creditor with the assignor. A suit by one joint creditor for his part of the debt is not competent. Hence, a suit by assignee of part of debt for that part is not maintainable. [P 280 C 1]

Shamair Chand — *for Petitioner.*

Madan Lal and J. L. Kapur —

for Respondents.

Order. — Civil Revision Petitions Nos. 173, 249 and 250 of 1939 will be disposed

1. *Wall Mahomed v. Mahomed Baksh*, (1930) 17 A I R P O 91=122 I O 316=57 I A 86=11 Lah 199 (P C).

of by this order. In the case of the first and the third, the plaintiff took an assignment of part of a debt due by defendant 1 to defendants 2 and 3 and sued for that part of the debt assigned. In the case of the second, the plaintiff took an assignment of part of the debt due by defendant 1 to defendant 2 and sued for that part of the debt assigned. Each suit was resisted by defendant 1 on the ground that it did not lie. This plea was rejected and the Small Cause Court has given decrees against defendant 1 in all three cases. Against this decision defendant 1 has put in these three revision petitions. It was clearly stated in each plaint that it was the duty of defendant 2, or defendants 2 and 3, as the case may be, to have that part of the debt assigned acknowledged by defendant 1. In each plaint therefore it was claimed that, if a decree was not passed against defendant 1, it should be passed against defendant 2 or defendants 2 and 3 as they had not obtained the acknowledgment of the debtor to the amount assigned.

I am clear that there can be no out and out assignment of part of a debt without the consent or acknowledgment of the debtor, except in the sense that the assignee may in equity be looked upon as a joint creditor with the assignor. It is not disputed that a suit by one joint creditor for his part of the debt is not competent. It follows that these revision petitions must be accepted and the judgments of the Small Cause Court set aside, decreeing the suits against defendant 1, on the ground that these suits were not competent against him. This however does not end the matter. Relief was also claimed against defendants 2 and 3 in the first and third cases and against defendant 2 in the second case on the ground that they had not had the debt which was assigned acknowledged by the debtor. It is in evidence that another assignment by the same assignor was acknowledged by the debtor. But in none of the three cases before me did the creditor get the part of the debt assigned acknowledged by his debtor. All three deeds of assignment are clear that, if this was not done, the assignor would be liable. While setting aside the decrees therefore against defendant 1, I substitute other decrees making defendants 2 and 3 liable for the amounts decreed in Civil Revision Nos. 173 and 250 of 1939 and making defendant 2 liable for the amount decreed in Civil Revision Petition No. 249 of 1939. In the circumstances of

these cases I direct that parties will bear their own costs throughout.

D.S./R.K.

Order accordingly.

*** A. I. R. 1940 Lahore 280**

DALIP SINGH J.

Anjuman Imdad Qarza Bahmi of Chak No. 127 through Sardar Harjit Singh, Official Receiver, Lyallpur — Decreeholder — Appellant.

v.

Abdul Ghani — Judgment-debtor — Respondent.

Exn. Second Appeal No. 1565 of 1938,
Decided on 27th November 1939.

*** Co-operative Societies Act (1912), S. 42 (2) (b)**—Court cannot refuse to execute award passed by liquidator under S. 42 (2) (b) on ground that member against whom it was made had prior to it been declared insolvent and discharged under S. 44, Provincial Insolvency Act.

The executing Court can only question the decree of a Court on the ground of lack of inherent jurisdiction and cannot question it on the ground of illegal exercise of jurisdiction or a material irregularity in the exercise of jurisdiction: *A I R 1925 Cal 907, Rel. on.* [P 280 C 2 ; P 281 C 1]

A Court called upon to execute an award under S. 42 (2) (b) passed by a liquidator, cannot refuse to execute such an award on the ground that the member against whom the award had been made had prior to the award been declared an insolvent and therefore discharged under S. 44, Provincial Insolvency Act, from the liability to pay any debt. The reason is that such matter is not one of lack of inherent jurisdiction in liquidator but only a question of illegal exercise of jurisdiction.

[P 280 C 2]

Shamair Chand — for Appellant.

Chandra Bhan — for Respondent.

Judgment. — The only question arising in this case is whether a Court called upon to execute an award under S. 42 (2) (b), Co-operative Societies Act, passed by a liquidator, can refuse to execute such an award on the ground that the member against whom the award had been made had prior to the award been declared an insolvent and therefore discharged under S. 44, Provincial Insolvency Act, from the liability to pay any debt. The point involved raises a somewhat difficult question of inherent jurisdiction vested in a Court or any other person and the question of the illegal exercise of that jurisdiction or irregular exercise of jurisdiction.

It appears to me, in the circumstances of this case, that the matter is not one of lack of inherent jurisdiction but only a question of illegal exercise of jurisdiction. Now, it is clear law that the executing Court

can only question the decree of a Court on the ground of lack of inherent jurisdiction and cannot question it on the ground of illegal exercise of jurisdiction or a material irregularity in the exercise of jurisdiction. This is the law as laid down in the Calcutta Full Bench ruling, 53 Cal 166,¹ which has, I believe, been followed by this Court. Now, it is correct that under the provisions of the Provincial Insolvency Act this debt was provable in the insolvency. The liquidator could have taken action under S. 33, Provincial Insolvency Act, and either proved this debt or had it excluded if it came within the provisions of that Section from the schedule of debts. The liquidator was in existence and he did not do so. He neither proved the debt nor did he have it excluded under the provisions of S. 33. In spite of this, after the discharge of the insolvent, the liquidator has proceeded to assess him to liability. It appears to me that the liquidator was clearly wrong in doing so because the debt was a provable debt and S. 44 clearly contemplates the discharge of the insolvent from all provable debts whatsoever. But this does not mean that the jurisdiction conferred on the liquidator by S. 44 (2) (b), Co-operative Societies Act, has been taken away. As has been pointed out by their Lordships of the Privy Council, a Court, and in this case the liquidator, has a jurisdiction to decide rightly as well as to decide wrongly. It is true that the liquidator has erred very sadly in the matter, but that does not confer jurisdiction on the executing Court to question his decree. The result is very harsh no doubt, for an insolvent is being burdened with a liability to which under the law he should not be held liable; but then the provisions of the Co-operative Societies Act are quite clear and no Civil Court can question the irregular exercise of jurisdiction or the mistake in law of the liquidator.

I therefore accept the appeal and hold that the executing Court had no power to go into the question of jurisdiction. As I believe that this is a matter of first impression and the point is a difficult one, I would allow a Letters Patent appeal, if applied for. The learned counsel for the appellant wishes me to add that the effect of this decision is that the executing Court should execute the award. This is certainly

correct. Costs will be borne by the parties throughout.

D.S./R.K.

Appeal allowed.

A. I. R. 1940 Lahore 281

DIN MOHAMMAD J.

Bahadari and another — Convicts
Appellants

v.

Emperor.

Criminal Appeal No. 960 of 1938, Decided on 2nd December 1938, from order of Magistrate, 1st Class, Gujranwala, D/- 30th August 1938.

(a) Criminal Trial—Evidence—Identification—Manner of holding identification parades throwing suspicion on conduct of police—Evidence of identification of accused is not entitled to any weight in determining their guilt.

If the manner in which the identification parades were held, throws a lot of suspicion on the conduct of the police the evidence of the identification of the accused persons by the prosecution witnesses is not entitled to any weight in determining their guilt.

[P 283 C 1]

(b) Penal Code (1860), Ss. 460 and 302 — Person causing death at time of committing lurking house-trespass by night — He does not escape being tried under S. 302 or S. 304.

Section 460 does not provide for an offence but merely lays down a principle of constructive liability. If a person causes the death of another at the time of committing lurking house trespass by night or house-breaking by night, it does not mean that he escapes being tried under S. 302 or S. 304, Penal Code, as the case may be, and that he can only be tried under S. 460, Penal Code.

[P 283 C 1]

Ram Lal Anand II — *for Appellants.*

Mohammad Monir, Assistant to the Advocate-General — *for the Crown.*

Judgment. — The appellants, Bahadari and Shahabu, were convicted under S. 460, Penal Code, and each sentenced to seven years' rigorous imprisonment. The case for the prosecution is that on the night of 1st April 1938, the appellants accompanied by one or two other persons went to the Mehtianwala well and started opening a hole into one of the walls of the cattle enclosure. They were detected by one Muhammad Din and he woke up some of his companions who were sleeping there. Of these, Khushi Muhammad pursued the culprits but was seriously injured. The culprits after injuring Khushi Muhammad came back to the cattle enclosure and removed four bullocks. They then went straight to the dera of one Lal which is situated at a distance of a mile and a half from the place of occurrence. Bahadari and a Sikh left shortly after but Shahabu and

1. Goura Chand Halder v. Profulla Kumar Roy, (1925) 12 A I R Cal 907=89 I C 685 = 53 Cal 166=42 C L J 1=29 C W N 948 (F B).

another Sikh spent the whole day there and left with the bullocks in the evening. Both Bahadari and Shahabu, when examined under S. 342, Criminal P. C., denied the commission of the offence and while Bahadari attributed the case to the enmity that Lal bore him, Shahabu stated that he did not know why he was being implicated in the case.

I have gone through the record very carefully and have come to the conclusion that this conviction cannot be sustained. The case for the prosecution as regards the incidents at the well is based mainly on the statements of Muhammad Din, Ahmad Din and Allah Ditta who are said to have witnessed the occurrence, and in respect of the accused's presence at the dera of Lal, on the statements of Lal, Imam Din Mirza, Nawab and Haji. Muhammad Din could not identify any of the culprits. Allah Ditta did not identify Bahadari but identified Shahabu only on 26th May 1938, prior to which at least two identification parades in relation to Shahabu had been organized. An identification held in such circumstances is not entitled to any weight whatsoever. Ahmad Din no doubt identified Bahadari and later on 26th May identified Shahabu too but his identification of Shahabu is also not of much value for the same reason as has been stated in the case of Allah Ditta, and his identification of Bahadari becomes of no importance in view of the other circumstances disclosed in the case. It may also be remarked that Shahabu bore small-pox marks and it was therefore not difficult to pick him out in the circumstances mentioned above. It is further significant that, in the first place, out of the persons who were present at the well, Hussain, Sardara and Lal were not produced and secondly, although both Ahmad Din and Allah Ditta had in their statements made to the police at the earliest possible opportunity (marked Exs. D/B and D/C respectively) clearly stated that Khushi Muhammad named Maulu and Lal as his assailants and pointed towards the east, at the trial they denied having made any such statement at all. It may be noted that the dera of Lal P. W. is situated towards the east of the well. Further, although it had been definitely averred by Muhammad Din who made the first information report that the number of the culprits was three, all these witnesses raised it to four and both these modifications appear to have been intentionally introduced.

The statements of Lal, Imam Din, Mirza, Haji and Nawab also are entitled to no credence whatsoever. Lal and his cousin Maulu were the persons implicated by Khushi Muhammad in his dying declaration. Imam Din is a servant of Lal, Haji is his kamin and Mirza and Nawab are his nephews. Considering that Maulu is a lambardar and that Lal is his first cousin, it is not strange that their servants and relatives had come forward to extricate Lal out of the dangerous position in which he had been placed. For Lal to have shifted his burden on to the shoulders of Bahadari was an easy affair. It is admitted that he had suspected Bahadari of the theft of his buffaloes one and a quarter year ago and he would have had no tender corner for him. Lal has himself admitted that he remained with the police for three days and Imam Din has stated that Lal went to the police station with Rs. 25 and that it was only after two days that a head constable was brought by him and their statements were recorded.

The manner in which the identification parades were arranged in this case cannot but be strongly condemned. Bahadari was arrested on 22nd April and was produced for identification on the 25th but it is strange that on that day only Muhammad Din, Ahmad Din and Nawab were required to identify him; of these, Muhammad Din and Nawab failed to identify him and Ahmad Din alone picked him out correctly. Later, on 7th May another identification parade was arranged and on that day Imam Din alone from among the members of the dera of Lal was required to identify Bahadari. He correctly identified him but Bahadari pointed out to the Magistrate at once that Imam Din knew him already and the Magistrate recorded a note to this effect in his memorandum of identification. On 19th May after Shahabu had been arrested he alone was put up for identification and from among the witnesses, seven persons were required to identify him and neither Ahmad Din nor Allah Ditta was included among them. On 24th May one Sohan Singh, tracker, was asked to identify the tracks of Shahabu and it was only two days later that Ahmad Din was called upon to identify Shahabu and Allah Ditta to identify both Shahabu and Bahadari. From the memoranda of the identification parades it does not appear whether Haji, Mirza or Lal was ever required to identify Bahadari. It is also not clear why identification was carried out

piecemeal. On 25th April when the first identification parade was held Bahadari had been in custody for at least three days and if Muhammad Din, Ahmad Din and Nawab could be taken to the jail for his identification, surely the other witnesses could also have been taken for the same purpose on that occasion.

It is again inexplicable why on 7th May Imam Din alone was taken to jail for the identification of Bahadari from among the remaining witnesses. It is again mysterious that on 19th May while witnesses had been taken to the jail at Gujranwala for the identification of Shahabu, those of them who had not been called upon to identify Bahadari were not even on that date required to do so. Later, even on 26th May when Ahmad Din was asked to identify Shahabu two memoranda were prepared, one relating to Ahmad Din and the other to Allah Ditta who was required to identify both Shahabu and Bahadari on the same day but at a different time. The manner in which the identification parades were held throws a lot of suspicion on the conduct of the police and consequently the evidence of the identification of the accused persons by the prosecution witnesses is not entitled to any weight in determining their guilt. No stolen bullocks have been recovered and there is thus no definite evidence on the record to connect the appellants with the offence. The only basis of their conviction is afforded by the oral statements made by the prosecution witnesses and, as I have indicated above, they cannot be implicitly relied upon. On the grounds stated above I give the benefit of the doubt to the appellants and acquit them.

Before I conclude, I may remark that on the facts stated, the Magistrate had no jurisdiction to try this case and had I been convinced that there was a *prima facie* case against the appellants, I would have been compelled to reverse both the finding and sentence of the appellants and order them to be committed for trial. S. 460 does not provide for an offence but merely lays down a principle of constructive liability. If a person causes the death of another at the time of committing lurking house-trespass by night or house-breaking by night, it does not mean that he escapes being tried under S. 302 or S. 304, I. P. C., as the case may be, and that he can only be tried under S. 460, I. P. C. If this were so, accused persons would escape capital punishment by pleading that they committed murder

when they were committing house-trespass or house-breaking and that they consequently could not be tried under S. 302 or S. 304, I. P. C. The Magistrate should have seen at the time of framing the charge against the accused persons as to what offence was committed by them on the allegations made by the prosecution. Failing him, it was the duty of the prosecuting agency to advise him as to the proper Section under which the accused should be charged and as to the proper procedure to be adopted by him. Death having been caused in the circumstances alleged in this case, it was the duty of the Magistrate to have committed the accused for trial to the Court of Session, for that Court alone was competent to try an offence of the nature disclosed against the appellants.

D.S./R.K.

Order accordingly.

A. I. R. 1940 Lahore 283

SKEMP J.

Gurdas Ram — Accused — Petitioner

v.

Emperor.

Criminal Misc. No. 35 of 1940, Decided on 14th February 1940.

(a) Government of India Act (1935), S. 270 — Applicability.

Section 270 only applies to proceedings "before the relevant date," i.e. 1st April 1937. [P 284 C 2]

(b) Criminal Trial—Transfer—District Magistrate's order dismissing application for transfer is judicial—Copy of order ought to be given to party on requisition.

An order of a District Magistrate dismissing an application for transfer is a judicial order a copy of which ought to be given to a party on requisition. It is absurd for the Court to refuse to supply the copy on the ground that District Magistrate's sanction was necessary. [P 284 C 2]

(c) Criminal P. C. (1898), S. 526 (1) (a)—Magistrate's refusal to supply copy of order of District Magistrate dismissing application for transfer and statement of prosecution witness held sufficient ground for transfer under Sec. 526 (1) (a).

The Magistrate refused to supply a certified copy of the District Magistrate's order dismissing the party's application for transfer of the case on the ground that District Magistrate's sanction was necessary and also refused to supply a copy of the statement of a prosecution witness :

Held that party had a reasonable apprehension from all that had happened that he may not receive a fair trial in the Magistrate's Court and the case was fit for transfer under S. 526 (1) (a). [P 285 C 1]

R. L. Anand — *for Petitioner.*

Mohammad Monir, Assistant to the Advocate-General — *for the Crown.*

Order. — This order will dispose of five applications for transfer of cases pending in the Court of Sheikh Mohammad Akram, Magistrate of the First Class, Hoshiarpur. For some time past, there has been an agrarian agitation in part of the Hoshiarpur district between tenants and landlords. These cases have arisen as a result of that agitation. There was a previous case in another village Panjavar, Tahsil Unao, in which the same Magistrate wrote :

Insidious propaganda is however now making a head among those tenants. Irresponsible agitators incited the tenants to claim much more than that to which they are otherwise entitled. They were even advised to make use of force to assert their exaggerated claims. The present case is an offshoot of this agitation.

In that case, the Magistrate convicted several accused and sentenced them each to three months' rigorous imprisonment. On appeal, the learned Sessions Judge reduced the sentence to the terms already undergone. The present cases arise from village Changarwan, Tahsil Dasuya, which was said before me to be 25 or 26 miles distant from the first village. There are five cases, three under S. 107, Criminal P. C., and two cross cases arising out of a fight in which one Mangal Singh received fatal injuries. A Head Constable on 20th June 1939 lodged an information report that there was imminent danger of a breach of the peace in this village in connexion with the impounding of certain cattle belonging to the tenants and he asked that the police might be sent to the spot the same evening. The Tahsildar and the police reached the spot at 3 P. M. that afternoon and the hour and the date in conjunction indicate that the local authorities regarded the matter as serious. When they arrived, the tenants who are Changs, a sub-caste of Girth, were not present and it is stated that the police went to their houses some miles away. An altercation and then a fight took place in which Mangal Singh was fatally injured. He died on 20th July 1939, in the jail hospital (and not in police custody as is most wrongly asserted in the application for transfer). Out of this fight two cross cases arose, one under Ss. 332 and 447, a Crown case against the Changs for attacking the police, and the other under Ss. 325 and 147 against the police and the land owners. After Mangal Singh's death, his real brother Kanshi Ram lodged a complaint under S. 302 which at his request was ordered to be tried along with the previous complaint under S. 325.

On 2nd September 1939, the Magistrate issued notices against some of the accused, but on revision the learned Sessions Judge directed that the Magistrate should allow evidence to be taken against all the accused. On 21st September 1939, the Magistrate made an order that the Crown would not pay the costs of the complainant's witnesses. Another revision was taken to the Sessions Judge but withdrawn and on 22nd November 1939 the Magistrate modified his order. However, on 11th December 1939, six Chang witnesses attended; their statements were not taken because of an objection by the police accused that the prosecution could not proceed by reason of S. 270, Government of India Act. Official witnesses who were present had their expenses paid but the Magistrate told the Chang witnesses that their expenses would be paid on the next hearing and they do not appear to have been paid yet. For various reasons the objection about S. 270 was postponed until 17th January and overruled by the Magistrate on 18th January. The point that S. 270 only applies to proceedings "before the relevant date," i. e. 1st April 1937, does not appear to have been taken before him. If it had been, this futile objection could have been dismissed forthwith.

On 4th January 1940 the District Magistrate dismissed an application for transfer made to him. On 8th January the petitioner applied for a certified copy of this order. On the 10th this was returned by the copying office, on the 11th the Ahlmad reported that the records had gone to the Court of Sheikh Mohammad Akram and Sheikh Mohammad Akram then refused to supply a copy on the ground that the District Magistrate's sanction was necessary. This I think is absurd. Clearly it was a judicial order and a copy ought to have been given. The tenants wished to make a further application for transfer in the High Court and could not do so without a copy of the District Magistrate's order. Sheikh Mohammad Akram also wrongly refused to give a certified copy of the statement of a prosecution witness named Shanti Sarup. In his explanation he said that the accused could inspect the record but if they or their counsel wanted a certified copy there could be no possible objection to giving one. The complaint arising out of the injuries to Mangal Singh was instituted on 6th July and nothing effective has been done up to

date. The objection under S. 270 was not taken until 11th December 1939.

I think that the tenants have a reasonable apprehension from all that has happened that they may not receive a fair trial in the Court of Sheikh Mohammad Akram and I direct that the two cases under the Penal Code be transferred to the Court of another Magistrate of the First Class to be selected by the District Magistrate of Hoshiarpur. It is suggested that if Mr. Skeaf is available the cases might be sent to him. This order also covers complaint under S. 302 relating to the death of Mangal Singh although no separate application was made in the High Court about that petition. I decline to transfer the cases under S. 107, Criminal P. C. The evidence in one of them is complete and *prima facie* there seems to be a very good case for putting members of both parties on reasonable security to keep the peace.

G.N./R.K.

Order accordingly.

A. I. R. 1940 Lahore 285

TEK CHAND AND ABDUL RASHID JJ.

Lala Ram Sarup — Plaintiff —

Appellant.

v.

Lala Shiv Dayal Mehra and another —
Defendants — Respondents.

First Appeal No. 44 of 1939, Decided on 1st March 1940, from decree of Sub-Judge First Class, Amritsar, D/- 22nd November 1938.

(a) Mortgage—Equitable mortgage — Registration — If writing itself constitutes bargain between parties, it requires registration — If it is merely evidence of completed transaction it does not—Question is one of fact—Writing held required registration.

An "equitable mortgage" is created by the deposit of title deeds. It does not require to be reduced to writing, but a memorandum or other writing is usually passed, either contemporarily with the deposit of the title deeds or subsequently. It is in each case a question of fact, as to whether the writing itself constitutes the bargain between the parties or whether the mortgage had been completed by the deposit of title-deeds and the advance of money on such deposit, and the writing is merely evidence of an already completed transaction. In the former case, the writing falls within S. 17, Registration Act, and, if unregistered is inadmissible: *A I R 1928 P C 50 and A I R 1939 P C 167, Rel. on.* [P 287 C 1]

In the latter case, there is no bar to its being received in evidence: *A I R 1931 P C 36; A I R 1916 P C 115 and A I R 1930 Lah 920, Ref.* [P 287 C 1]

After reciting the details of the properties the mortgagor's letter ran "now I am creating an

equitable mortgage. and am depositing the title-deeds." The letter together with title-deeds was handed over to the mortgagee:

Held that not only were the writing of the letter and the deposit of the title-deeds contemporaneous transactions, but the letter was the sole repository of the terms of the bargain, and since it was not registered, it was inadmissible to prove the mortgage transaction and its terms could not be proved aliunde under S. 91, Evidence Act, by parole evidence. [P 287 C 1; P 288 C 1]

(b) Transfer of Property Act (1882), S. 128 — Donor executing pro-note in plaintiff's favour and subject to its payment gifting his entire property to defendants — Defendants cannot retain benefit and repudiate burden.

The donor executed a pro-note in favour of the plaintiff and subject to the payment of the amount due thereunder made a gift of his entire property in favour of the defendant:

Held that the defendants could not retain the benefit and at the same time repudiate the burden. The maxim *qui sentit commodum, sentire debet et onus* (he who receives the advantage ought to suffer the burden) fully applied to the case. Further the defendants, being universal donees were on the principle embodied in S. 128 liable to pay his debts out of his estate in their hands. [P 288 C 1]

M. L. Puri and Qabul Chand —

for Appellant.

J. N. Aggarwal and Chandra Gupta —

for Respondents.

Tek Chand J. — This appeal arises out of a suit instituted by Ram Sarup, plaintiff-appellant, for recovery of Rs. 8688-2-3 by sale of properties described in detail in the plaint. The suit has been dismissed. The plaintiff appeals. The relevant facts are that one Raghunandan Lal, Aggarwal of Lahore, was the father-in-law of the plaintiff Ram Sarup, who is an Engineer employed in Jind State. Raghunandan Lal had no son and his wife had died some years ago. He had three daughters Puran Devi, who is married to the plaintiff Ram Sarup, Shakuntla Devi, married to Roshan Lal of Lahore and Savitri Devi, married to Atma Ram of Ambala District. Some years ago Raghunandan Lal and Ram Sarup had entered into a partnership: Ram Sarup supplied the entire capital, while the working was principally in the hands of Raghunandan Lal. The partnership purchased certain immovable properties at Atari, on which a grain market, known as the Harish Ganj market, was constructed. The partnership also had a brick-kiln and a timber shop. On 21st April 1935, the accounts were gone into and a sum of Rs. 7102-12-0 was found due by Raghunandan Lal to Ram Sarup for which he executed a pro-note bearing interest at 10 annas per cent.

per mensem. On the same day, he deposited with Ram Sarup the title deeds of the properties at Atari and also handed over to him a letter (Ex. P/2) with a view to create an "equitable mortgage" over his half share of these properties.

Ten months later, on 15th February 1936, Raghunandan Lal executed a registered deed of gift (Ex. D/1) in favour of Lala Shiv Dayal Mehra, Advocate, Lahore (defendant 1) and Shrimati Sohag Rani, wife of Pandit Maharaj Kishen, Kashmiri Brahman of Lahore (defendant 2). In this deed he recited that he owed Rs. 7102-12-0 to Ram Sarup for which he had executed a pro-note and that he had also created an equitable mortgage in his favour on the properties mentioned above. He then went on to say that "subject to the preservation of Ram Sarup's rights to the extent of Rs. 7500" he gifted one-half share in plots Nos. 13 and 14 to Lala Shiv Dayal for services rendered to him from time to time, and the rest of his property, moveable and immovable, to Shrimati Sohag Rani, who "for the last twelve years had been serving me in all respects and had been helping me financially also." In the concluding portion of the deed it was stated that the donees, Shiv Dayal and Sohag Rani, had accepted the gift and put their signatures thereto. The deed was signed by Raghunandan Lal and attested, among others, by Shiv Dayal and Sohag Rani, Shiv Dayal noting in his own hand that he had signed it "in token of acceptance and also as attesting witness." Raghunandan Lal died on 30th July 1936, and on 20th February 1938, the present suit was instituted by Ram Sarup for recovery of Rs. 8688-2-3 made up as follows:

Rs. 7102-12-0	principal sum secured on the pro-note and equitable mortgage.
Rs. 1530-15-0	interest due thereon till the date of the suit.
Rs. 54-7-3	expenses incurred, in excess of the amount received after the death of Raghunandan Lal.

Besides the donees, Shiv Dayal and Sohag Rani, the three daughters of Raghunandan Lal, namely, Puran Devi, Shakuntla Devi and Savitri Devi and his son-in-law Roshan Lal were also impleaded as defendants. The suit, as originally brought, was on the basis of the pro-note and the equitable mortgage mentioned above. At the commencement of the proceedings these ladies and Roshan Lal stated that they had been unnecessarily impleaded in the suit, as they had not succeeded to the property of the deceased and were not interested in the properties in dispute

or in any other properties which Raghunandan Lal might have left.

Shiv Dayal also stated that as Raghunandan Lal had made a gift of the whole of his property in favour of himself and Sohag Rani, the daughters and the son-in-law had no interest in the property left by Raghunandan Lal.

On this, the learned Subordinate Judge held that the only persons against whom relief was or could be asked were Shiv Dayal and Sohag Rani and therefore on 30th March 1938, he ordered that the other persons were not necessary parties to the suit and, accordingly, their names were struck off the record. The plaintiff then amended the plaint, in which he based his claim, substantially, on three alternative grounds. He alleged that the properties in suit had been equitably mortgaged with him. Secondly, he averred that if for any reason the equitable mortgage were held to be invalid, he, as a partner, had a "charge" over Raghunandan Lal's half share in the partnership properties and was entitled to bring them to sale for payment of the amount due to him. Thirdly, he contended that Shiv Dayal and Sohag Rani had taken possession of the whole of Raghunandan Lal's estate and therefore were his legal representatives and as such liable to pay the amount due to the plaintiff to the extent of his property in their possession. Shiv Dayal and Sohag Rani denied the alleged equitable mortgage or that the plaintiff had a "partner's lien" which could be enforced against these properties in suit. They also traversed the allegation that they were the "legal representatives" of the deceased against whom a decree could be passed for any amount that might be found due by him to the plaintiff. The learned Subordinate Judge found that the sum of Rs. 7102-12-0 was due by Raghunandan Lal to the plaintiff for which he had executed the pro-note (Ex. P. 1) on 21st April 1935. He held however that the letter (Ex. P/2) contained the whole of the bargain of the alleged equitable mortgage, but being unregistered it was inadmissible in evidence and that proof of the transaction could not be given *aliunde*. He found against the plaintiff on the alternative claims put forward by him and, in the result, dismissed the suit, leaving the parties to bear their own costs. On appeal, it has been strenuously contended by Mr. Mukand Lal Puri before us, that Ex. P/2 did not require registration and that the equitable mortgage has been fully proved by this document as well as

by other evidence on the record. This contention is devoid of force, and I have no doubt that the decision of the lower Court on this point is correct. As has been stated above, Raghunandan Lal and Ram Sarup met on 21st of April 1935 and on going through the accounts, it was found that Rs. 7102.12.0 was due by Raghunandan Lal for which sum he executed the pro-note (Ex. P/1) in favour of Ram Sarup. It is stated by the plaintiff's own witnesses that "at the same sitting" the letter (Ex. P/2) was written by Raghunandan Lal and was handed over to Ram Sarup. In this letter, after describing in detail the properties owned by him and Ram Sarup jointly, he stated as follows :

Rs. 7102.12.0 in all is now due from me to you. I am creating a complete equitable mortgage of my one-half share in the said properties given at Nos. 1 to 5 in favour against the said debt due from me. Besides, I have handed over to you one pro-note in lieu of the said amount carrying interest at the rate of annas ten percent. per mensem. I am also depositing the sale deeds with you.

This letter together with the title deeds was handed over to the plaintiff. In the face of the contents of this letter, it is idle for the appellant to contend that it contained merely a recital of an already completed equitable mortgage. Not only were the writing of the letter and the deposit of title deeds contemporaneous transactions, but it is clear that the letter was the sole repository of the terms of the bargain. The letter however was not registered and therefore it is clearly inadmissible to prove the mortgage transaction. The learned counsel for the parties have cited a number of rulings before us but it is not necessary to discuss them in detail here. The law on the subject is well-settled and the decision in each case turns on its peculiar facts. An 'equitable mortgage' is created by the deposit of title deeds. It does not require to be reduced to writing, but a memorandum or other writing is usually passed, either contemporarily with the deposit of the title deeds or subsequently. It is in each case a question of fact, as to whether the writing itself constitutes the bargain between the parties or whether the mortgage had been completed by the deposit of title deed and the advance of money on such deposit, and the writing is merely evidence of an already completed transaction. In the former case, the writing falls within S. 17, Registration Act, and, if unregistered, is inadmissible. In the latter case, there is no bar to its being received in evidence. For instances of cases

of the former class, reference may be made to the decisions of the Privy Council in 50 Cal 338¹ and 43 C W N 806.² In the first of these cases at the time of the loan a letter was written by the debtor to the creditor as follows :

We hand you herewith title deeds relating to . . . and also a pro-note of Rs. 63,000 ; this please hold as security against the advance made

Their Lordships held that the letter contained the bargain between the parties, and as it was unregistered it could not be received in evidence. In 43 C W N 806² the parties, professing to create a mortgage by deposit of title deeds, contemporaneously entered into a contractual agreement in writing, which was made an integral part of the transaction and was itself an operative instrument and not merely evidential. It was held by their Lordships that such a document must, under the statute, be registered. As instances of the second class may be cited 54 Mad 257³ and 43 Cal 895⁴ at p. 900. In these cases the writing was nothing more than a written record of the particulars of the deeds, which were the subject of an agreement, constituted by the act of deposit and the payment of money, and it was therefore held that it did not require registration. Reference may also be made to 11 Lah 564,⁵ which is the leading case of this Court on the subject. In that case lists, showing that the documents included therein had been deposited by way of security, were held to be merely evidence of the purpose for which the deeds had been deposited. It was further held that the mere fact that a memorandum evidencing the equitable mortgage is contemporaneous with the deposit of title deeds does not per se render the memorandum inadmissible in evidence for want of registration.

The case before us clearly falls within the former category. The letter (Ex. P/2) bears close resemblance to the letter in 50 Cal 338.¹ After reciting the details of the

1. Subramanian v. Lutchman, (1929) 10 A I R P O 50=71 I C 650=50 I A 77=50 Cal 338=1 Rang 66 (P O).
2. Hari Shankar Paul v. Kedar Nath, (1939) 26 A I R P O 167 = 181 I C 935 = I L R (1939) Kar 287=66 I A 184=I L R (1939) 2 Cal 243=43 C W N 806 (P O).
3. Sundarachariar v. Narayana Ayyar, (1931) 18 A I R P O 36=131 I C 328=58 I A 68 = 54 Mad 257 (P O).
4. Pran Jivandas Jagjivandas v. Chan Ma Phee, (1916) 3 A I R P O 115=85 I C 190 = 43 I A 122=43 Cal 895=8 L B R 458 (P O).
5. Ralli Brothers v. Punjab National Bank Ltd., (1930) 17 A I R Lah 920=129 I C 21=11 Lah 564=31 P L R 934.

properties it says "now I am creating an equitable mortgage" . . . and "am depositing the title deeds" etc. It is clear that it was by this writing that immovable property of the value of more than Rs. 100 was mortgaged and therefore it was compulsorily registrable. As this document is not admissible, its terms cannot under S. 91, Evidence Act, be proved *aliunde* by parole evidence. The plaintiff therefore cannot found a claim for recovery of money on the basis of the alleged equitable mortgage.

He is however on firmer ground when he claims on the pro-note (Ex. P/1), subject to the payment of the amount due on which the gift of the remaining property of Raghunandan Lal had been made by him to the two defendants and accepted by them. These defendants cannot now retain the benefit and at the same time repudiate the burden. The maxim *qui sentit commodum, sentire debet et onus* (he who receives the advantage ought to suffer the burden) fully applies to the case. Further, the defendants, being universal donees from Raghunandan Lal, are, on the principle embodied in S. 128, T. P. Act, liable to pay his debts out of his estate in their hands. It is laid down in that Section that where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by, and liabilities of, the donor at the time of the gift to the extent of the property comprised therein. Mr. Jagan Nath Aggarwal for the respondents contended that this rule was inapplicable to this case, as the defendants had not been proved to be universal donees. But this contention is clearly untenable. As has been stated above, the gift deed itself stated that subject to the payment of the debt due to the plaintiff, all moveable and immovable properties of the deceased had been gifted to the defendants. This was corroborated by the defendant Shiv Dayal himself in his statement on 30th March 1938 when he said that Raghunandan Lal had made a gift of the whole of the property in favour of myself and defendant 2, as stated in the deed. Defendants 3 to 6 (the daughter and the other son-in-law of Raghunandan Lal) have no interest in the property left by Raghunandan Lal deceased.

Subsequently, when examined as a witness, Shiv Dayal said that after the death of Raghunandan Lal, he and Sohag Rani had been demanding accounts of the properties of the partnership from the plaintiff. This they obviously did in their capacity as the universal donees and the legal representatives of the deceased. Again, we find

that on 28th October 1938 Sohag Rani published a public notice in a newspaper (Ex. D-2) in which it was stated that Raghunandan Lal had "permanently gifted away his entire share" in the properties which are now the subject-matter of this suit to her and that if any person unlawfully made purchase or sale of any portion of these properties without her permission, he would be dealt with according to law. All this evidence makes it absolutely clear that these defendants are the "universal donees" from Raghunandan Lal and as such are bound to discharge the debt, due by him to the plaintiff, out of his properties which have come in their hands. In this view of the case it is not necessary to discuss the other points raised in the case, namely as to whether the plaintiff as a partner had a 'charge' or "partner's lien" on the properties in suit, or that the defendants having "intermeddled" with the estate of the deceased were his "legal representatives" and, therefore, liable to pay his unsecured debts to the extent of his property which has come in their hands.

On the findings given above, the plaintiff is entitled to recover from the properties in dispute the sum of Rs. 7102-12-0 due on foot of the pro-note mentioned above together with interest from the date of its execution till the institution of the suit, which comes to Rs. 1530-15-0, or Rupees 8633-11-0 in all. The claim for Rs. 54-7-3, however, cannot be sustained and must be disallowed. In the plaint a prayer for future interest from the date of the suit till realization was also made, but the learned counsel for the appellant did not address us on the point, and we do not think that in the circumstances future interest should be allowed. For the foregoing reasons, I would accept this appeal, set aside the judgment and decree of the Court below and grant the plaintiff a decree for Rupees 8633-11-0 with proportionate costs in both Courts, against Lala Shiv Dayal and Shrimati Sohag Rani (defendants 1 and 2), recoverable from the properties mentioned in the plaint.

Abdul Rashid J.—I agree.

G.N./R.K.

Appeal accepted.

A. I. R. 1940 Lahore 289

RAM LALL J.

Harnam Singh and others — Convicts
Petitioners

v.

Emperor.

Criminal Revn. No. 1552 of 1939, Decided on 22nd February 1940; case reported by Sess. Judge, Hoshiarpur, D/- 26th October 1939.

Criminal P. C. (1898), Ss. 350 and 537 — Judgment written by Judge when under orders of transfer pronounced by his successor — Irregularity is covered by S. 537.

When a judgment is written by a Judge when he was under orders of transfer but which was pronounced by his successor on the date fixed for announcement, the irregularity, if any, in such case is covered by the provisions of S. 537: *A I R 1923 All 276; 7 Cr L J 459; A I R 1925 Oudh 62 and A I R 1939 Lah 81, Rel. on.* [P 289 C 1; P 290 C 2]

Nanak Chand Pandit — *for Petitioners.*
D. N. Aggarwal — *for Respondent*
(Complainant).

Facts. — Mian Harnam Singh and his son Prahlad Singh, Bachittar Singh and his son Arjan Singh, Rajputs of Garhi Mansiwal, police station Garhshankar, were convicted under Ss. 448/352, I. P. C., and sentenced to pay a fine of Rs. 5 each under each offence. In default of payment of fine, they were ordered to undergo one week's simple imprisonment for each offence. Their case was heard by Mohammad Aziz-ud-Din Magistrate, Third Class, Garhshankar, who wrote his judgment on 28th May 1939. He added a note under the judgment that he was under orders of transfer and expected to be relieved before 30th May 1939 when this case was fixed for pronouncement of judgment. He left his judgment to his successor, who was also Mohammad Aziz-ud-Din, who pronounced it on the date fixed in the presence of the complainant and the four petitioners. The appeal preferred by the petitioners to the Additional District Magistrate was dismissed summarily under S. 421, Criminal P. C. They have now made the present petition to review the order of the Additional District Magistrate.

Report. — The legal point taken by the counsel for the petitioners is that the conviction is bad in law, inasmuch as the succeeding Magistrate delivered the judgment written by his predecessor without adopting it as his own and did not give an opportunity to the petitioners under S. 350, Criminal P. C., to have a de novo trial to which they were entitled under the law.

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The point urged is supported by the authority reported in *A I R 1939 Rang 249*¹ which lays down that under S. 350, Criminal P. C., it is quite possible that the succeeding Magistrate may take the judgment left by his predecessor and compare it with the evidence recorded in the case and discover that it expresses what he himself would have decided on the case. In that case, if there is no demand for a new trial on the part of the accused, he may deliver that judgment as his own. In fact by so doing it becomes his own judgment, but where the succeeding Magistrate has delivered judgment, not as his own judgment, but as that of his predecessor without signing it himself or dating it, the defect in the delivery of such judgment goes beyond a mere irregularity curable under S. 537. It is not contemplated in the Code that a Magistrate shall deliver any judgment other than his own and if he does so, it is not an irregularity in the form of delivery: it is not delivering judgment at all. In this case, the succeeding Magistrate no doubt signed the judgment, but there is nothing to show that he even read it through. Accordingly, I submit the records of the case for quashing the conviction and sentence of the petitioners, if the Hon'ble High Court approves the law laid down in the above authority.

Order. — This is a reference by the learned Sessions Judge of Hoshiarpur recommending that a conviction and sentence of a number of persons convicted by a Magistrate of the Third Class, Garhshankar, who wrote his judgment on 28th May 1939 when he was under orders of transfer but which was pronounced by his successor on the date fixed for announcement, be quashed on the ground that the Magistrate who announced the judgment did not give an opportunity to the accused persons to ask for a de novo trial to which they were entitled under the law. It appears to me that there is no ground for holding that any prejudice has been caused to the accused persons by the procedure adopted nor was the learned counsel, who appeared before me on their behalf, able to show how his clients were prejudiced. The learned Magistrate appended the following note to his judgment:

As I am under orders of transfer from this place and it is expected that I will be relieved before the date fixed for announcement of judgment in this

1. Chinnayar v. Mg. Mya Thi, (1939) 26 *A I R Rang* 249=183 *I C* 216=40 *Cr L J* 829=1939 *R L R* 570.

case, I leave it to my worthy successor to announce the above judgment on the date fixed for announcement.

The date fixed in the case was 30th May 1939, for announcement of judgment and on that date the judgment was announced in the presence of the accused persons. At that time no demand for any de novo trial was made. In fact an appeal from the conviction was preferred to the Additional District Magistrate who dismissed the appeal. It appears to me that the irregularity, if any, in this case is covered by the provisions of S. 537, Criminal P. C. The point is covered by authority. In A I R 1923 All 276² a Magistrate fell ill before the date of the announcement of judgment and the judgment was, therefore, delivered and signed by his successor, and it was held that S. 537, Criminal P. C., covered the irregularity. In this Allahabad case reference was made to another unreported case of the same Court where a Magistrate after signing the judgment had gone off into camp and another Magistrate had delivered the judgment on his behalf; it was held in that case too that the irregularity was covered by S. 537, Criminal P. C. In a case reported in 7 Cr L J 459³ a Division Bench of the Madras High Court held that where a case was adjourned for judgment but before that date the Magistrate was transferred and was succeeded by another who signed and delivered the judgment prepared by his predecessor, in the absence of prejudice the irregularity was held to be cured. In 11 O L J 725⁴ a Magistrate was transferred to another district and his judgment was pronounced by another; it was held that the accused in that case could not even ask for a de novo trial.

In the Calcutta Court apparently a different view seems to prevail. There it has been held that a Magistrate might adopt as his own a judgment written by his predecessor but he could only do so if the accused did not ask for a re-trial. This view seems to have been followed in a recent Rangoon case reported in A I R 1939 Rang 249¹ where it has been held that if there is no demand for a new trial on the part of the accused, a Magistrate may deliver a judgment prepared by his predecessor as his

2. Nur Muhammad Khan v. Emperor, (1923) 10 A I R All 276=71 I C 525=24 Cr L J 173=21 A L J 137.

3. In re Sankara Pillai, (1908) 18 M L J 197=7 Cr L J 459.

4. Chandika Prasad v. Emperor, (1925) 12 A I R Oudh 62=81 I C 899=25 Cr L J 1075=28 O O 109=11 O L J 725.

own and by doing so make it his own judgment. In other words, he could adopt the conclusion recorded by his predecessor if the accused did not want a re-trial. In the present case no request for re-trial was made and in any case it appears to me that when there is no suggestion of prejudice caused to the accused, the quashing of proceedings might result in harassing the accused persons to undergo a petty trial in which eventually a sentence of Rs. 5 only was imposed. I am of the opinion, therefore, that the irregularity, if any, in the case was covered by S. 537, Criminal P. C., and I prefer to follow the view of the Allahabad and the Madras Courts. I am supported in this conclusion by an unreported decision by Blacker J., in Criminal Revn. No. 1623 of 1937⁵ where the learned Judge held that the omission of a Magistrate to "pronounce" judgment was a mere irregularity. In these circumstances I decline to accept the recommendation of the learned Sessions Judge of Hoshiarpur.

D.S./R.K.

Order accordingly.

5. Gian Singh v. Amar Singh, Reported in (1939) 26 A I R Lah 21=179 I C 990=40 Cr L J 288=I L R (1938) Lah 567=40 P L R 996.

A. I. R. 1940 Lahore 290

DALIP SINGH J.

*Firm Ralla Ram Daulat Ram through
Daulat Ram — Defendant —*

Petitioner.

v.

*Jaswant Rai, Plaintiff and others,
Defendants — Respondents.*

Civil Revn. No. 487 of 1939, Decided on 30th November 1939, for revision of order of Senior Sub-Judge, Ferozepore, D/- 11th February 1939.

(a) Civil P. C. (1908), O. 41, R. 23 — Order remanding case and ordering stamp on appeal to be refunded—Revision lies.

Revision is competent from an order remanding case under O. 41, R. 23 and directing stamp on appeal to be refunded, even after a finding has been given on the issue remanded. [P 291 C 1]

(b) Civil P. C. (1908), O. 8, R. 6—Accounts of one and same person—Fact of accounts being separate would not attract O. 8, R. 6.

If the accounts were of one and the same person, the mere fact of the accounts being separate or in different names would not attract the provisions of O. 8, R. 6. [P 291 C 1]

D. N. Aggarwal — *for Petitioner.*

R. P. Khosla —

for Respondent (Plaintiff).

Order.—A preliminary objection is raised that revision is incompetent because on re-

mand the trial Court has found the issue framed against the defendant and the defendant can appeal and raise the grounds raised in revision. This is not correct. The order of remand as stamp was refunded presumably purports to be under O. 41, R. 23, and therefore would become final if not attacked by way of appeal or revision. I therefore overrule the preliminary objection. On the merits, the trial Court found as a fact that the khatas though separate were of one and the same person. It is stated before me that Daulat Ram is the sole proprietor of the firm Ralla Ram Daulat Ram. The Appellate Court without noticing the evidence of Kundan Lal, the person keeping the two accounts on which the trial Court had relied held that as the accounts were separate, set off could not be claimed. But if the accounts were of one and the same person, the mere fact of the accounts being separate or in different names would not attract the provisions of O. 8, R. 6 or come within A I R 1927 Lah 228.¹ I therefore accept the revision. The account itself indicates that the accounts were of one and the same person as one item in the account of Daulat Ram alone purports to be of the firm Ralla Ram Daulat Ram. The decree of the trial Court is restored with proportionate costs throughout.

D.S./R.K.

Revision allowed.

1. Alliance Bank of Simla v. Mohan Lal, (1927) 14 AIR Lah 228=101 I C 762=8 Lah 105=28 P L R 427.

A. I. R. 1940 Lahore 291

BHIDE J.

*Was Dev through Mt. Vidya Vati —
Defendant — Appellant.*

*Firm Dheru Mal-Baij Nath and another
Plaintiffs and others, Defendants —
Respondents.*

Second Appeal No. 30 of 1940, Decided on 21st March 1940, from decree of Dist. Judge, Jullundur, D/- 5th October 1939.

(a) Second Appeal—New plea.

A plea not taken in the Court below or not even raised in the grounds of appeal cannot be allowed to be taken up in second appeal. [P 292 C 1]

(b) Transfer of Property Act (1882) — Applicability to Punjab.

The Act is not in force in the Punjab but the principle of the Act can alone be held to be applicable in this province. [P 292 C 1]

(c) Transfer of Property Act (1882), S. 56—Principle can be applied to auction-purchaser buying in good faith.

Although S. 56 seems to apply only to voluntary transfers the equitable principles of the Section can be applied even to an auction-purchaser who buys property in good faith : 7 All 711, Rel. on. [P 292 C 1]

Bhagat Ram — *for Appellant.*

Achhru Ram — *for Respondents
(Plaintiffs).*

Judgment.—The facts giving rise to this appeal are briefly as follows: Kharaiti Ram, defendant 1, borrowed Rs. 1000 from the Punjab Co-operative Bank at Jullundur and deposited certain title deeds of his property, namely one shop (described as 'Dohatta') and a house, by way of equitable mortgage. The plaintiff firm Dheru Mal-Baij Nath stood surety for the loan. Thereafter the Bank gave notice to the plaintiffs and defendant Kharaiti Ram demanding payment, and the debt was paid by the plaintiffs. Subsequently the Bank transferred to the plaintiffs the pro-note as well as the title deeds deposited with them duly endorsed in favour of the plaintiffs. In the meantime, in execution of a money decree obtained by one Lajpat Rai against Kharaiti Ram, the shop (which had been mortgaged in favour of the Punjab Co-operative Bank and the mortgagee rights in which were later on transferred to the plaintiff firm, as stated above) was sold and was purchased by Moti Ram father of Was Dev, defendant 3, on 22nd April 1935. On 9th July 1937 the plaintiff firm instituted the present suit for recovery of Rs. 1372-9-0 against Kharaiti Ram and Was Dev, adding the Punjab Co-operative Bank as a pro forma defendant. The claim was contested by Kharaiti Ram and Was Dev on various pleas. Ultimately Kharaiti Ram entered into a compromise with the plaintiff firm waiving his pleas and agreeing to a decree being passed in favour of the plaintiff firm on condition that the plaintiff firm shall first proceed in execution against the shop. The issues, so far as they related to Was Dev, were decided against him and a decree was passed eventually in the plaintiffs' favour, directing the sale of the mortgaged property with the condition that the shop should be sold first to satisfy the plaintiffs' claim and if any balance remained after the sale of the shop the house was also to be sold for payment thereof. From this decision an appeal was preferred to the District Judge.

The only point argued before the learned District Judge was that according to the principle of S. 56, T. P. Act, the house and not the shop should be sold first in order to

satisfy the plaintiffs' claim. The learned District Judge held that the principle of S. 56 was not applicable as the shop had been purchased by Moti Ram in an auction sale. He therefore affirmed the decision of the trial Court and dismissed the appeal. A second appeal has now been preferred to this Court by Was Dev. The learned counsel for the appellant first tried to argue that the plaintiffs had not proved that the equitable mortgage in favour of the Bank was duly transferred in their favour and that only the pro-note had been transferred to the plaintiffs; but no such plea appears to have been taken in the Court below and the point was not even raised in the grounds of appeal before the learned District Judge. In the circumstances, I see no reason to allow this point being taken up at the stage of second appeal. As regards the question of the applicability of S. 56, T. P. Act, it is true that the Act is not in force in this province but the principles of the Act can alone be held to be applicable in this province. According to the wording of S. 56, T. P. Act, it would appear that the Section only applies when a person, who is the owner of two or more properties, mortgages them to one person and then sells one or more of the properties to another person. According to its wording, the Section would seem to apply only to the case of voluntary transfers, and it has been held by the Allahabad High Court that the Section does not apply to auction-sales in execution of decrees: see 51 All 606¹ and 43 All 589.²

The learned counsel for the appellant, however, contended that although the Section may not apply in terms to the facts of the present case, the equitable principle of the Section should be held to be applicable even to an auction-purchaser who buys property in good faith. In support of this contention the learned counsel has relied on 7 All 711.³ The facts of that case appear to be similar to those of the present case. S. 56, T. P. Act, was not considered in that case; but after considering the provisions of S. 81 of the Act, it was held that the principles applicable to a puisne encumbrancer in the marshalling of securities should be applied to a bona fide purchaser

for value without notice. In the present instance there is nothing to show that the shop in question was not purchased by Moti Ram in good faith. The mortgage charge was not notified at the time of the auction-sale and he had no notice of it. The only argument on which the learned counsel for the respondents relied was that a purchaser at an auction-sale only gets the right, title or interest of the judgment-debtor. But even if this be so, I do not see why the principle laid down in 7 All 711³ should not be applied on equitable grounds in the present case, when it appears that the shop was purchased in good faith by Moti Ram. The compromise between Kharaiti Ram and the plaintiffs to the effect that the shop should be proceeded against first in execution appears to be collusive and was evidently made with intent to benefit Kharaiti Ram at the expense of Was Dev. The learned counsel for the respondents himself conceded that Was Dev would be entitled to contribution from Kharaiti Ram according to the principle laid down in S. 82, T. P. Act. In the circumstances, I do not see why he should not be allowed the benefit of the principle of marshalling at this stage instead of being driven to the necessity for instituting a suit for contribution after the sale of the shop. Following the principle laid down in 7 All 711,³ I accept the appeal and modify the decrees of the Courts below to the extent of directing that out of the mortgaged property the house should be sold first and if the proceeds are not found sufficient to satisfy the plaintiffs' claim, then the shop should be sold for the payment of the balance. In view of all the circumstances I leave the parties to bear their costs throughout.

G.N./R.K.

*Appeal accepted.***A. I. R. 1940 Lahore 292**

DALIP SINGH AND BLACKER JJ.

Behari Lal — Petitioner.

v.

Sheikh Abdul Qadir Hamyari —

Respondent.

Criminal Revn. No. 1142 of 1939, Decided on 2nd November 1939; case referred by Blacker J., D/- 21st September 1939.

(a) Criminal P. C. (1898), S. 195 — Charges under Ss. 465 and 466, Penal Code, against Subordinate Judge—Complaint by Court is not necessary.

Where a Subordinate Judge has abetted an offence under S. 193, Penal Code, and is also alleged to have committed offences under Ss. 465 and 466, Penal Code, complaint by the Court, so

1. Naubat Lal v. Mahadeo Prasad, (1929) 16 A I R All 309=116 I C 297=51 All 606=1929 A L J 419.

2. Rama Shankar Prasad v. Ghulam Husain, (1921) 8 A I R All 323 = 63 I C 209 = 43 All 589=19 A L J 584.

3. Rodh Mal v. Ram Harakh, (1885) 7 All 711 = 1885 A W N 198.

far as the offences under Ss. 465 and 466 are concerned, is not necessary, as he is not a party to the proceeding before the Court. [P 297 C 1]

(b) **Criminal P. C. (1898), S. 195** — Offence committed in course of suit — Suit transferred to another Court which finally disposed of it — Such Court is competent to make complaint under S. 195.

If a case or proceeding has been before various Courts and an offence is alleged to have been committed in that proceeding or case falling under the various sections prescribed in S. 195, Criminal P. C., then all the Courts have jurisdiction to make the complaint though, normally speaking, the proper Court to make the complaint is the Court which finally tried and determined the suit. Hence, where an offence is committed in the course of a suit before a Court and that suit is subsequently transferred to another Court the latter Court is competent to make a complaint under S. 195: *A I R 1929 Cal 724, Rel. on.* [P 297 C 1]

(c) **Criminal P. C. (1898), S. 476** — Successors in office of senior Subordinate Judge can make complaint.

Successors in office of senior Subordinate Judge are perfectly competent to deal with the proceeding under S. 476 and order or not order a complaint under S. 195 as they think fit. [P 297 C 2]

(d) **Criminal P. C. (1898), S. 476-A** — Offence of abetting offence under S. 193, Penal Code, committed by Subordinate Judge in course of suit — District Judge transferring suit to senior Subordinate Judge while retaining proceeding under S. 476 with himself — Power of senior Subordinate Judge to make complaint is taken away.

Where a subordinate Judge is alleged to have abetted an offence under S. 193, Penal Code, in course of a suit and the District Judge as superior Court has transferred the suit to senior Subordinate Judge but has retained the proceedings under S. 476 to himself, the effect of this order is to take away the power of senior Subordinate Judge to make complaint and hence the latter Court's order refusing to make complaint on the ground of lack of jurisdiction is right. [P 297 C 2; P 298 C 1]

(e) **Criminal P. C. (1898), S. 476** — For Court to take action under S. 476, application is not necessary.

Under S. 476 there is no necessity for an application and the Court can be moved otherwise to take action under S. 476. [P 298 C 2]

(f) **Criminal P. C. (1898), S. 476-B** — Superior Court overlooking right of appeal under S. 476-B — High Court can revise its order and can make complaint itself.

Where a superior Court has overlooked the alternative of an appeal before him under S. 476-B it would be quite within the powers of the High Court to revise the order of such Court on the ground that it had refused to exercise jurisdiction which was vested in it by law, and High Court can then make a complaint itself, or send it to the Sessions Judge for disposal of the appeal. [P 299 C 1]

Muhammad Monir, Assist. Advocate-General — for the Crown.

K. L. Gauba — for Respondent.

ORDER OF REFERENCE.

Blacker J.—In spite of the fact that the petitioner did not appear before me, this case is, in my opinion, of such public importance that it should not be allowed to drop. In view of the public importance and the difficulty of one of the legal points involved with which I will deal later, I am also of opinion that this is a case which should be dealt with by a Bench of more than one Judge.

The facts of the case may be briefly stated. In 1930 a declaratory suit with regard to a temple was filed by Pandit Behari Lal, the petitioner in the present proceedings, against Radha Mohan, one of the respondents. This case was in the Court of Sheikh Abdul Qadir, who was then a Subordinate Judge at Delhi. In due course, Radha Mohan filed a written statement in reply to Behari Lal's plaint. When however he started his evidence, it struck counsel for the plaintiff-petitioner that that evidence was not consistent with the pleadings in the written statement. He accordingly inspected the record and found that a new written statement had been substituted for the original written statement which was quite at variance with it, and more consistent with the evidence which was being produced. In view of this discovery Behari Lal, the petitioner, moved the then Sessions Judge, Mr. Middleton, to transfer the case and also to enquire into the substitution which appeared to have been effected with the active help of the presiding Judge himself. Mr. Middleton took the case into his own Court and started an enquiry into the allegations of forgery and fabrication of evidence. He was transferred before he could complete this enquiry and he passed no orders on the application. It has been stated during the course of the proceedings that he made a report on the matter to the High Court. I have enquired from the Registrar but no such report is on record and in any case it could only be an administrative report and would be irrelevant in these proceedings. Mr. Middleton was succeeded as District and Sessions Judge by Chaudhri Niamat Khan. The Chaudhri transferred the case to the Court of the then Senior Subordinate Judge, Lala Ram Kanwar, and passed an order reserving to himself the power to hold an enquiry into the allegations of fraud and forgery. This order, which I think must be held to be an order which the

learned District Judge had no legal power to pass, seems to me to have been at the root of all the trouble that has subsequently occurred in this case. Lala Ram Kanwar proceeded to dispose of the civil suit and in his judgment he has dealt at length with the question of the substitution of this document. He has given reasons which prima facie seem to me sound for holding that the written statement which now appears on the file is in fact a forged document which was substituted. He has also given reasons which also prima facie appear sound for holding that the Presiding Judge must have been concerned in the matter. As it is the implication of the Presiding Judge which gives this case its very great importance, I may here state what those reasons are.

The original statement apparently had on the back of it one order dated the day the statement was filed and the beginning of another order continued on the next page which was written at a later date. These orders appear on the back of the present statement and according to Lala Ram Kanwar they are in the handwriting of Sheikh Abdul Qadir. It seems to me fairly clear that if there was in fact a substitution, these orders could not have been written on the back of the new document by Sheikh Abdul Qadir unless he had himself copied the orders from the original document and therefore knew that the substitution had taken place.

The next stage in the proceedings was an application to Lala Ram Kanwar to make a complaint against Radha Mohan, the Subordinate Judge and a third person. Lala Ram Kanwar, who had already in his judgment in the civil case shown that he fully believed that a forgery had taken place, nevertheless rejected this application. It is clear that he did not reject it on the merits but because he thought that in view of Chaudhri Niamat Khan's order, which has been referred to above, he had no jurisdiction to deal with it. The case then came before Mr. Beckett who by this time had become the District and Sessions Judge at Delhi. Unfortunately the petitioner does not appear to have put it before Mr. Beckett in the form of an appeal against Lala Ram Kanwar's orders rejecting the application. If he had done that, there would not have been the slightest difficulty at all. Mr. Beckett could either have accepted or rejected the appeal: If he had rejected the appeal, the matter would

have ended there; if he had accepted the appeal, there would have been a perfectly valid complaint to which nobody could have taken exception. Mr. Beckett however felt a legal difficulty. S. 476-A, Criminal P. C., lays down that the superior Court can only make a complaint in a case where the original Court has either not made a complaint or has not rejected an application for making a complaint. In the present case whatever his reasons may have been, Lala Ram Kanwar had rejected the application for making a complaint. This, Mr. Beckett thought, effectively barred the jurisdiction of the District Court in the absence of an appeal. Mr. Beckett took the view which I think was probably correct, as far as the initiation of criminal proceedings was concerned, that the District Court had no jurisdiction to deal with the matter. He therefore held that the Senior Subordinate Judge, who had heard and decided the case, was the proper authority to enquire into these proceedings, and he accordingly passed an order transferring the proceedings back to that Court. In the meanwhile Lala Ram Kanwar had been succeeded as Senior Subordinate Judge by Sardar Sewa Singh. Sardar Sewa Singh filed a complaint under Ss. 193, 465 and 466, Penal Code, against the two present respondents, and he also, as Sheikh Abdul Qadir was a Government servant, got the sanction of the Local Government for his prosecution under S. 197. The complaint was put before Mr. Lewis, Additional District Magistrate, and he in a fairly detailed order has decided that there was no valid complaint before him and he has discharged both respondents. This is the order against which two petitions for revision are filed.

As a matter of fact it is not really necessary to consider Mr. Lewis's order in detail because although he may in the end have come to a correct conclusion that the present complaint was null and void, he has misdirected himself in law on several points and I am unable to uphold the reasoning by which he has reached this conclusion. On the case being called before me the petitioner was absent and Mr. K. L. Gauba, counsel for the respondent Sheikh Abdul Qadir urged upon me with some force that I should therefore dismiss the petitions. He said that the petitioner had not cared to pursue it, that even the Crown was not concerned, that the matter was very old and that Sheikh Abdul Qadir had suffered a good deal on account of these proceedings

hanging over his head. This last argument however appears to me to be quite irrelevant. I am of opinion that these are proceedings which should not be permitted to drop unless the Court comes to the conclusion that it is now impossible in law to proceed with them. The matter does not merely concern Sheikh Abdul Qadir, the petitioner and Radha Mohan; it is in my opinion a matter of very great public importance. An allegation has been made against a member of the judiciary the nature of which is such as, if it is true or even believed in, must very greatly shake the confidence of the public in this Province in the whole administration of justice. Nobody would be more pleased than myself if Sheikh Abdul Qadir were proved to be innocent of the charge against him because as a member of the judiciary I feel that this charge is a slur on myself and on every other member of the judiciary of the Province just as it is upon the respondent and it would not only be Sheikh Abdul Qadir's fair name which would be cleared by his acquittal but that of the whole judiciary of the Province. On the other hand, if in fact Sheikh Abdul Qadir has committed this offence, it is one of such a serious nature, that I think there can be no two opinions as to the imperative necessity of his being punished and adequately punished for it. I think therefore that if it is possible in law for this prosecution to proceed, it should proceed.

It now remains to examine the legal points involved. The first question is whether a complaint was necessary at all. This I think must be answered in the affirmative. The allegation was that an offence of fabricating false evidence by means of forgery had been committed by Radha Mohan with the abetment of the Subordinate Judge. This, as far as Radhe Mohan is concerned, is an offence punishable under S. 193, Penal Code, and therefore under S. 195, Criminal P. C., a Magistrate could only take cognizance of it on the complaint of the Court in which the proceeding in relation to which the offence was committed was being held. As far as Sheikh Abdul Qadir is concerned, there is no doubt that his offence also comes under the same Section or is an abetment of it and therefore cl. (b) of S. 195 would apply. It should however be noticed that Ss. 465 and 466 have been added in the complaint and these are offences for which a complaint by the Court is only necessary in a case when they

have been committed by a party to the proceedings. The learned Magistrate appears to have rather curiously misdirected himself on this point and from the language of his remarks upon this cl. (c) (he has said cl. (b) but he obviously means cl. (c)) he seems to think that no complaint could be made by the Court under these Sections against a person who is not a party to the proceedings. It should not be necessary to point out to a Magistrate of his experience that the clause means just the opposite, namely that in such a case a complaint by the Court is not necessary and any member of the public (including the Judge) is competent to make a complaint. Sub-s. (4) to S. 195 however has to be considered. It seems to me on the allegations that the true position of Sheikh Abdul Qadir was that of an abettor of the offence committed by Radha Mohan. Under this sub-section therefore even though Sheikh Abdul Qadir was not a party to the proceedings, he would be an abettor of an offence committed by a party to the proceedings and therefore the provisions of this Section would apply and a complaint by the Court would be necessary in his case.

The next point to be considered is whether Sardar Sewa Singh was in the ordinary course of events competent to make this complaint. To this question I think the answer should be clear. Under S. 559, Criminal P. C., Sardar Sewa Singh as the successor-in-office of Lala Ram Kanwar could exercise all the powers that Lala Ram Kanwar could have exercised. This matter was fully discussed before a Bench consisting of Tek Chand J., and myself in *Faqir Singh's case* and we there held that whether one Court was the successor-in-office of another was a question of fact and that where there was in fact a succession of officers holding the post of Senior Subordinate Judge it was sufficiently established that any one of those officers was the successor-in-office of any of his predecessors. It then remains to be seen whether Lala Ram Kanwar could in the ordinary course have filed this complaint. Here again I think the answer is "yes." The learned Additional District Magistrate again seems to me to have misdirected himself in thinking that it is only the Court in which the offence is committed that can complain. The language of the Section itself makes this perfectly clear. It is not merely the Court in which the offence is actually committed which can make the complaint but

the Court in which the proceeding was being held in which the offence was committed. It is clear that the proceeding in which the offence was committed was the suit by Behari Lal against Radhe Mohan and it is equally clear that this suit was a proceeding in the Court of Lala Ram Kanwar. That being so, according to the plain language of the Section, Lala Ram Kanwar could have made a complaint: Apart from this however, even if the view be not accepted that the complaint was made in a proceeding which was in Lala Ram Kanwar's Court, the Section is actually wider than that and speaks about an offence committed not only in but also in relation to any proceeding in the Court in question. There is no doubt in my mind that an offence committed in the suit whilst it was in Sheikh Abdul Qadir's Court was at any rate committed in relation to the proceedings which were later held in the Court of Lala Ram Kanwar. I therefore think it is clear that Lala Ram Kanwar could make this complaint and if he could make it, Sardar Sewa Singh could also make it.

Now comes what appears to me to be the crux of the whole case and this I think is a matter of very great difficulty. The question is: what is the effect of the order of Lala Ram Kanwar rejecting the application not on the merits but on a mistaken idea that he had no jurisdiction to deal with it? Did this order of his bar any subsequent proceedings by his successor-in-office, Sardar Sewa Singh? Actually there does not appear to be anything in the Criminal Procedure Code that I can find which bars a Court from making a complaint of its own motion even after it has rejected an application by an interested party to do so, though ordinarily this would be a somewhat extraordinary procedure and might be held to amount to a review of its own order, a procedure which is not usually held to be contemplated in criminal proceedings. On the other hand, it might be argued that Mr. Beckett's order had the effect of setting aside Lala Ram Kanwar's order to the effect that he had no jurisdiction. But then the answer to this would I think possibly be that such an order was beyond Mr. Beckett's jurisdiction and that Mr. Beckett could have only reported the matter to the High Court and recommended to the High Court that it should set aside Mr. Ram Kanwar's order in revision and direct him to enquire into the matter afresh. Another view which might possibly be held is that Mr. Beckett's

order was wrong in that S. 476-A would only refer to a case in which the trial Court had rejected the application on the merits and not because it thought it had no jurisdiction. This is possibly a view which one would like very much to hold, but I doubt whether it is consistent with the language of the statute itself. S. 476-A does not specify in any way the grounds on which the application is to be rejected and therefore it must be assumed that it includes rejection for any reason whatsoever and not merely on the merits. I am therefore to some extent inclined to the view that this order of Lala Ram Kanwar, not having been appealed against, acted as a bar to further proceedings. The District Judge could not take action as there was no appeal before him and Lala Ram Kanwar himself or his successor could not review that order. The question, however, I think is one of very great difficulty and as the case, as I have said above, is of considerable importance I think that it should be heard by a larger Bench and I recommend to the Hon'ble Chief Justice accordingly. I also think that in view of the great public importance of the case the Crown should be asked to direct the Advocate-General or one of his Assistants to appear and argue this case for the Crown.

I do not know whether it is in my province to suggest it but it would seem to me that even if it is held that the Additional District Magistrate has come to a right conclusion and that there was no valid complaint before him, this Court should not let the matter drop. I think this Court has ample revisional powers to set aside Lala Ram Kanwar's order or the order of Mr. Beckett whichever appears to it to be the order which is at fault and to send the case back to either Court for further enquiry and the making of a fresh complaint, or even in revision to make that complaint itself.

Judgment of Division Bench.

Dalip Singh J. — The facts of this case are sufficiently given in the referring order of my learned brother and it is unnecessary to recapitulate them here. The points arising in this case have been very appropriately summarised by the learned Assistant Advocate-General. They are as follows: (1) Whether a complaint was necessary for the prosecution of Radha Mohan and Abdul Qadir? (2) Whether the Senior Subordinate Judge was the competent Court to make a complaint, if necessary? (3) If the Senior Subordinate Judge was the competent Court

was Sardar Sewa Singh or Mr. Abdul Rab, who succeeded the original Senior Subordinate Judge Lala Ram Kanwar, who tried the case competent to make the complaint as successors of the Senior Subordinate Judge? (4) What is the effect of Lala Ram Kanwar's order refusing to make a complaint for lack of jurisdiction? (5) Whether the High Court can make the complaint itself or revise, if necessary, any of the orders passed either by Lala Ram Kanwar or Chaudhri Niamat Khan or Mr. Beckett?

On the first point the learned Assistant Advocate-General contends that a charge under S. 193 could not be taken cognizance of by the Court without a complaint against either Radhe Mohan or Abdul Qadir but he contends that the charges under S. 465 and S. 466 did not need a complaint by a Court as against Abdul Qadir though they did need a complaint by a Court as against Radha Mohan as Abdul Qadir was not a party to the proceedings before the Court and he was not an abettor nor charged with criminal conspiracy with anybody but was a principal offender under S. 465 or S. 466, or both. It is unnecessary in view of the conclusions to which I have come on other points to go deeply into this matter. It is sufficient to say that as at present advised, I am inclined to consider that the contention of the learned Assistant Advocate-General is correct and that no complaint was necessary against Abdul Qadir so far as the charge under S. 465 and under S. 466 was concerned because according to the order of Sardar Sewa Singh he was a principal offender under those sections for having forged himself the orders passed and written on the back of the replication which purported to be on a date on which they were not so passed or written.

On the second point as to whether the Senior Subordinate Judge was a competent Court to make the complaint it seems to me that the words of the Section itself are perfectly clear. The suit was no doubt originally in the Court of Mr. Abdul Qadir but it was transferred to the file of the learned District Judge, Mr. Middleton. It was then remitted by order of Chaudhri Niamat Khan to Lala Ram Kanwar, Senior Subordinate Judge, and that learned Judge finally disposed of the case. Now, under S. 195 a complaint has to be made of an offence "alleged to have been committed in . . . any proceeding in any Court." The offence was committed in the suit which was in the Court of the Senior Subordinate

Judge and therefore it appears to me that the Senior Subordinate Judge was competent to make this complaint. Several rulings were cited by the learned Assistant Advocate-General. I think the law is correctly laid down in A I R 1929 Cal 724,¹ where it is pointed out that if a case or proceeding has been before various Courts and an offence is alleged to have been committed in that proceeding or case falling under the various Sections prescribed in S. 195, Criminal P. C., then all the Courts have jurisdiction to make the complaint though, normally speaking, the proper Court to make the complaint is the Court which finally tried and determined the suit. I see no reason on the plain words of the Section to hold otherwise. The learned counsel for Sheikh Abdul Qadir sought to contend that the offence must be committed in the presence of the Presiding officer of the Court and if a case is transferred from one Court to another, then only that Court in which the acts constituting the offence were committed has jurisdiction to make a complaint. If this was so, the Legislature could have expressed their intention quite clearly and different words would have been used. I have no hesitation in rejecting this contention.

The third point was whether Sardar Sewa Singh and Mr. Abdul Rab were competent to make the complaint as successors of the learned Senior Subordinate Judge, Lala Ram Kanwar. This point was not contested by the learned counsel for Sheikh Abdul Qadir and in view of the Division Bench ruling and other rulings of various High Courts could not really be contested. It appears to me quite clear that both Sardar Sewa Singh and Mr. Abdul Rab were perfectly competent to deal with the proceeding under S. 476 and order or not order a complaint as they thought fit.

The fourth point is really the difficult one in the case. In order to decide this point, namely the effect of Lala Ram Kanwar's order refusing to make a complaint for lack of jurisdiction, it is necessary to go into the reasons for Lala Ram Kanwar having so held. It is clear from a perusal of Lala Ram Kanwar's orders that he came to the conclusion that he had no jurisdiction because of the order of Chaudhri Niamat Khan which had directed the parties to make an application to him that is to the District Judge under S. 476, Criminal P. C.,

1. *Amanat Ali v. Emperor*, (1929) 16 A I R Cal 724=1929 Or C 360=122 I O 627=81 Or L J 480=88 O W N 1058.

if so advised, after the termination of the case in the Court of the Senior Subordinate Judge. It is clear that the District Judge as a Court superior to Sheikh Abdul Qadir had jurisdiction to deal with the matter under S. 476-A. Lala Ram Kanwar therefore was perfectly right in thinking that though he might have concurrent jurisdiction with the superior Court, namely the District Judge because he himself had tried the suit yet, in view of the order of the District Judge retaining the proceeding under S. 476 with himself and directing the parties to apply direct to him at the termination of the case, the Senior Subordinate Judge's jurisdiction vested in him by law was taken away by the order of the District Judge. I therefore cannot consider that Lala Ram Kanwar's order in the matter was wrong.

We now come to Mr. Beckett's order. The petitioner Behari Lal being dissatisfied with the order of Lala Ram Kanwar took the course of filing an application before Mr. Beckett, then District Judge. In that he took two alternative courses that is, if Lala Ram Kanwar's order was right he asked the learned District Judge to treat the application as an original application to his Court following the orders of Chaudhri Niamat Khan. If Lala Ram Kanwar's order was wrong he asked the learned District Judge to treat the application as an appeal from the order of Lala Ram Kanwar under S. 476-B. It is unfortunate that Mr. Beckett overlooked the alternative heading of the application as well as the note of the counsel. Mr. Beckett thought that the only point before him was whether Chaudhri Niamat Khan's order that the proceeding should be before the District Judge under S. 476, Criminal P. C., should or should not stand. On that point he came to the conclusion that the District Judge was not the proper Court for these proceedings. He appears to have held that the District Judge was not authorized by law to take these proceedings, evidently overlooking the provisions of S. 476-A and certainly overlooking the provisions of S. 476-B, Criminal P. C. But be that as it may, he then *suo motu* sent the case to be dealt with by the Senior Subordinate Judge who, according to him, was the only Court with jurisdiction to deal with the matter. It is true that Mr. Beckett used the word "transfer" of the case from his Court to that of the Senior Subordinate Judge and as proceedings under S. 476 and kindred sections have been held

to be criminal proceedings he had no jurisdiction to "transfer" the proceedings at all. But then, as pointed out by the learned Assistant Advocate-General, if Mr. Beckett was right in thinking that the proceedings under S. 476 before himself were without jurisdiction he could not transfer them to some other Court for there was nothing before him to transfer. He could not take cognizance of proceedings which he had no jurisdiction, according to himself, to take notice of. He could merely have returned them for presentation to the proper Court. I think it would be meticulous to contend or hold that because of the use of the word "transfer" by Mr. Beckett, the District Judge, the order of Mr. Beckett became a nullity. What really happened was that Mr. Beckett, thinking that the proceedings should not be before the District Judge, in other words holding an opinion contrary to the preceding District Judge, Chaudhri Niamat Khan, ordered the proceedings to be carried on by the Senior Subordinate Judge.

Now, Mr. Beckett was perfectly within his rights in changing his mind or changing the order of his predecessor as regards the procedure of a certain case. It was a case of concurrent jurisdiction in two Courts. The Senior Subordinate Judge could take action on the facts under S. 476, the District Judge could take action on the same facts under S. 476-A. It was a matter of detail purely as to which Court took action under what proceedings. It must be borne in mind that under S. 476 there is no necessity for an application and the Court can be moved otherwise to take action under S. 476, Criminal P. C. When therefore the proceedings now reached the Senior Subordinate Judge, Sardar Sewa Singh, the bar which had existed at the time of Lala Ram Kanwar's orders had been removed by the order of Mr. Beckett and therefore Sardar Sewa Singh had jurisdiction to deal with the proceedings under S. 476, Criminal P. C. He did so and I can see nothing wrong in his complaint or in the fact that Mr. Abdul Rab signed the complaint after Sardar Sewa Singh had written the order directing a complaint. I therefore would hold that the order of the learned Magistrate discharging the accused on the ground of the absence of a complaint is incorrect.

In view of this finding, it is unnecessary to discuss the other solutions proposed by the learned Assistant Advocate-General. It is sufficient to say that in view of the fact

that Mr. Beckett had overlooked the alternative of an appeal before him it would be quite within the powers of the High Court to revise the order of Mr. Beckett on the ground that he had refused to exercise the jurisdiction which was vested in him by law, and this Court could then make a complaint itself, or send it to the Sessions Judge for disposal of the appeal. No doubt the complaint here might be differently drafted to that drafted and signed by Mr. Abdul Rab, but the substance materially would be much the same and no prejudice could be caused to the petitioner. If necessary, therefore, I would also hold that the High Court could order that the complaint already drafted be taken as a complaint of the High Court and the Magistrate could then proceed on the complaint as already put into Court. However, as I have stated, it is unnecessary to go deeply into this matter. I therefore would set aside the order of the learned Magistrate discharging the accused and would direct him to proceed with the complaint and dispose of it according to law.

Blacker J. — I agree.

D.S./R.K.

Order set aside.

*** A. I. R. 1940 Lahore 299**

DALIP SINGH and DIN MOHAMMAD JJ.

Pandit Amarnath Bhardwaj —
Petitioner.

v.

Governor-General in Council and others
— Respondents.

Civil Revn. No. 1027. of 1938, Decided on 6th February 1940; referred by Dalip Singh J., D/- 11th May 1939.

* Land Acquisition Act (1894), S. 18—Collector under S. 18 is not Court subordinate to High Court so as to be controlled under S. 115, Civil P. C.: 67 P R 1916=A I R 1916 Lah 37=36 I C 213, Overruled.

A Collector under S. 18 cannot be treated as a Court and *a fortiori* he is not subordinate to the High Court so as to be controlled under S. 115, Civil P. C.: *Case law reviewed*; 67 P R 1916=A I R 1916 Lah 37=36 I C 213, Overruled.

[P 308 C 1]

M. C. Mahajan and C. L. Aggarwal —
for Petitioner.

M. Sleem (Advocate-General) and Bishen Narain — *for Respondents (for the Crown and Special Land Acquisition Collector, respectively).*

Din Mohammad J. — The facts bearing upon the question of law involved in this case are simple. An application under S. 18, Land Acquisition Act 1894, was made to the Collector by the petitioner requiring

him to refer for the determination of the Court his objections to the award made by him under S. 11 of the Act. The Collector dismissed the application on the ground that it was time-barred. Thereupon, a petition for revision of the order of the Collector was made to this Court which came for hearing before one of us and was referred to a Division Bench in view of the apparent conflict of authority on the question whether such a petition was competent. Counsel for the petitioner contends that, inasmuch as the Collector has, under S. 18, Land Acquisition Act, to decide several matters in relation to the application presented to him, he acts judicially as a Court and, as the matters to be determined by the Collector affect the civil rights of the party moving him, he is a Civil Court within the meaning of the Civil Procedure Code and consequently, under S. 115 of the Code, any order made by him is open to revision by this Court. In support of his contention, he relies on 30 Bom 341,¹ A I R 1932 Oudh 180,² 67 P R 1916,³ 42 Mad 231,⁴ 39 I C 650,⁵ 12 C W N 241,⁶ 16 C W N 327⁷ and 96 I C 110.⁸ In 30 Bom 341¹ at page 347, Chandavarkar J., observed that the written application contemplated by S. 18 would not but be treated as a plaint in a suit, and consequently the person submitting that application could, under S. 53, Land Acquisition Act, invoke S. 147, Civil P. C., (which now corresponds to O. 14, R. 3) in his aid. On the basis of this observation, counsel argues that, if the application submitted under S. 18 is tantamount to a plaint, the Collector, who disposes of it on the merits, must necessarily be deemed to be a Court within the meaning of the Civil Procedure Code. This however is too

1. In re Rustomji B. Jijibhai, (1906) 30 Bom 341 = 7 Bom L R 981.
2. Ahmad Ali Khan v. Secy. of State, (1932) 19 A I R Oudh 180 = 137 I C 68 = 7 Luck 578 = 9 O W N 234.
3. Secy. of State v. Jivan Bakhsh, (1916) 3 A I R Lah 37=36 I C 213=67 P R 1916=73 P L R 1917.
4. Parameshwara Iyer v. Land Acquisition Collector, (1919) 6 A I R Mad 583 = 49 I C 659 = 42 Mad 231 = 36 M L J 95.
5. Saraswati Pattack v. Land Acquisition Deputy Collector, (1917) 4 A I R Pat 176=39 I C 650 = 2 Pat L J 204.
6. Administrator General of Bengal v. Land Acquisition Collector, (1908) 12 C W N 241.
7. Krishna Das v. Land Acquisition Collector, (1912) 16 C W N 327=13 I C 470 = 16 C L J 165.
8. Miss Burjorjee v. Special Collector of Rangoon, (1926) 13 A I R Rang 135 = 96 I C 110.

far-fetched. In A I R 1932 Oudh 180,³ a Division Bench of the Chief Court of Oudh composed of Wazir Hasan C. J., and Kisch J. remarked :

We entertain little doubt that an order refusing to make a reference to the Court of the District Judge under S. 18, Land Acquisition Act, is a judicial order whatever may be the ground of the order. In this particular case the ground was that the application was barred by time. It appears to us that on a proper construction of S. 18 the final determination of the question as to whether the application is barred by time or not must be made by the Court of the District Judge. The Land Acquisition Officer has no jurisdiction to refuse to make the reference even if, in his opinion, the application is not in time under cl. (a) or cl. (b), sub-s. 2, S. 18, Land Acquisition Act. He should express that opinion and refer the matter to the Court for determination. The Section nowhere provides that, if the application contravenes cl. (a) or cl. (b) the Land Acquisition Officer shall reject the application. These clauses are placed in the Section by way of a proviso to the substantive enactment contained in sub-s. (1), S. 18 of the Act and relate to the form of the application and do not have the effect of taking away the right given by the substantive enactment to an interested person who has not accepted the award of requiring that the matter be referred for determination of the Court. That this is the interpretation which has been placed by the Local Government, the second party interested in these cases, is clear from the note added to R. 436 framed by the Local Government.

The learned Judges accordingly set aside the order of the Land Acquisition Officer and directed him to refer the matter for the determination of the Court. It may be observed that, in arriving at this conclusion the learned Judges relied on 67 P R 1916³ and 39 I C 650⁵ among other judgments and further interpreted the observations made by their Lordships of the Privy Council in 32 Cal 605⁹ to mean that the proceedings culminating in an award in Part 2, Land Acquisition Act, were administrative and that the proceedings under Part 3 of the Act, which begins with S. 18, were judicial. In 67 P R 1916,³ Sir Donald Johnstone C. J. in a case in which it was contended that the Court had no jurisdiction to go beyond the reference made by the Collector remarked :

It has been ruled more than once that a Collector making a reference or refusing to make a reference, is acting judicially, and therefore his proceedings are subject to revision by the High Court.

In 42 Mad 231,⁴ Ayling and Krishnan JJ. came to a similar conclusion relying mainly on 12 C W N 241⁶ and 16 C W N 327.⁷ They too expressed an opinion that there

was distinction between Part 2 and Part 3 of the Act and that, in rejecting an application under S. 18, a Collector acted judicially and was thus subject to the revisional jurisdiction of the High Court. In this connexion they relied on 32 Cal 605⁹ in which according to them this distinction had been emphasized by their Lordships of the Privy Council. In 39 I C 650,⁵ a Division Bench of the Patna High Court also followed 12 C W N 241⁶ and 16 C W N 327,⁷ which had formed the basis of the decision in the case referred to above. In 12 C W N 241,⁶ Henderson and Mitra JJ. observed :

It is admitted that up to and including the time of making his award the Collector was in no sense a judicial officer and that the proceedings before him were not judicial proceedings, 32 Cal 605,⁹ and however irregular his proceedings were, we cannot interfere with his award made under S. 11 of the Act. But when an application is made to the Collector requiring him to refer the matter to the Civil Court, the Collector may have to determine and, it seems to us, determine judicially whether the person making the application was represented or not when the award was made, or whether a notice had been served upon the applicant under S. 12 (2) and what period of limitation applies and whether the application is under the circumstances made within time. . . . In our opinion the Collector in rejecting the application was a Court and acting judicially and his order is subject to revision by this Court. To hold otherwise would be to give finality to an award under S. 11 even in cases in which the Collector acts irregularly and contrary to law and then refuses on insufficient grounds to make a reference under Part 3 of the Act. The party aggrieved may be left without remedy which is implied by a judicial trial before the Judge.

In 16 C W N 327,⁷ Caspersz and Chatterjee JJ. followed with approval the judgment cited above remarking :

It would obviously be unjust that the Deputy Collector should refuse to obey the provisions of the Act and to provide no remedy for the correction of his mistaken action. Where the law gives a right to a party to a certain procedure, it must also be deemed to give a remedy for the rectification of any irregularities committed in that connexion.

The learned Judges accordingly assumed jurisdiction in the matter and set aside the proceedings of the Collector and directed him to proceed in accordance with law. In 96 I C 110⁸ a Single Bench of the Rangoon High Court entertained an application under S. 45, Specific Relief Act, against the order of the Land Acquisition Collector refusing to make a reference and directed the Collector to refer the petitioner's application under S. 18 to the District Court.

If these were the only authorities applicable to the case, the question would have

9. *Ezra v. Secy. of State*, (1905) 32 Cal 605 = 32 I A 93 = 1 C L J 227 = 9 C W N 454 = 8 Sar 779 (P O).

been easy of solution but unfortunately the contrary view has been held in almost all the Courts whose judgments have been referred to above and by the other High Courts as well. As against a Single Bench judgment of the Punjab Chief Court referred to above, there is a Division Bench judgment of the same Court reported in 65 P R 1915,¹⁰ which unfortunately was not brought to the notice of the learned Judge in that case. Besides, a Single Bench judgment of this Court reported in A I R 1930 Lah 242¹¹ is also to the same effect. The Division Bench composed of Rattigan and Chevis JJ. did not choose to follow 12 C W N 241⁶ and 16 C W N 327⁷ and relying on a judgment of the Burma Chief Court remarked :

In our opinion, neither the provisions of the Civil Procedure Code nor the provisions of the Punjab Courts Act gives this Court the power to revise orders passed by any officer or tribunal other than a Civil Court subordinate to the Chief Court and we find it impossible to hold that a Collector, who takes action under S. 18 of Act 1 of 1894 is, in any sense, a Civil Court. He is certainly not a 'Court' as that expression is defined in S. 3 of the Act, and we are unable to find any support in the provisions of the Act for the proposition that the Collector in rejecting an application made to him under S. 18 of the Act, is a 'Court' and acts judicially and his order is subject to revision by the High Court. . . . The learned counsel, who appeared on behalf of the various petitioners, were unable to enlighten us as to the kind of Civil Court into which the Collector had developed when dealing with applications under S. 18. Civil Courts as they exist in the Punjab are specified and defined in the Punjab Courts Act and, so far as we can see, the Collector cannot be regarded as any one of those Courts. Mr. Fazal-i-Hussain seeing this difficulty put forward the extraordinary proposition that the Collector was, as it were, the Clerk of the Court to which the reference should be made. It is hardly necessary for us to deal seriously with a suggestion of this kind. We were much pressed with the argument that unless this Court had power to revise orders passed under S. 18 of the Act, great injustice might result in cases where the Collector refused on arbitrary or insufficient grounds to make the reference prayed for. But, even if we are to assume that such orders cannot be revised by the Collector's superior Executive or Revenue Officer, we cannot on the ground of inconvenience or even of the possibility of injustice, arrogate to ourselves a jurisdiction which we do not possess by law.

In A I R 1930 Lah 242¹¹ Jai Lal J. followed this judgment in preference to 67 P R 1916.³ The Madras judgment mentioned above came for consideration before a Full Bench of the same Court in a case

reported in 47 Mad 357¹² and was overruled. Schwabe C. J. conceded that the Collector acted judicially when he acted under Part 3 of the Act but doubted that he was a Court, and came to a definite conclusion that he was not a Court subordinate to the High Court. This decision was concurred in by Phillips and Ramesam JJ., who further observed that it was desirable that the Act should be amended so as to give a remedy to the subject in respect of possible arbitrary acts of Land Acquisition Officers in declining to act under S. 18. Dissenting from the previous Calcutta judgments, Costello Ag. C. J. observed in a case reported in A I R 1937 Cal 705¹³ that the Collector, while acting under S. 18, was not functioning in a judicial capacity at all; he was acting in a purely ministerial or administrative capacity and any order he made in such capacity could by no logomachy or straining of language be said to be an order which was subject to revision by the High Court under the provisions of S. 115, Civil P. C. With these observations Edgley J. agreed and added that a very clear distinction had been drawn between the functions which the Collector was required to exercise under the Act and the duties of the Court and this distinction was emphasized by the language of S. 18. The learned Judge further observed that even if it was admitted that certain orders of the Collector were of a quasi judicial character, this did not mean that the person exercising such functions should necessarily be regarded as a Court within the meaning of the Act. In a recent case, reported in A I R 1938 Cal 250,¹⁴ another Division Bench of the same Court independently of the judgments referred to above came to the same conclusion, disapproving 12 C W N 241⁶ and 16 C W N 327.⁷

Turning now to the Allahabad High Court, we find that a Division Bench of that Court in a case reported in 52 All 96¹⁵ observed that the Court to which a reference had been made by the Collector on an

12. Abdul Sattar v. Special Deputy Collector, Vizagapatam, (1924) 11 A I R Mad 442 = 84 I O 616 = 47 Mad 357 = 46 M L J 209 (F B).

13. Bhagaban Das v. First Land Acquisition Collector, Calcutta, (1937) 24 A I R Cal 705 = 174 I O 284 = I L R (1938) 1 Cal 400 = 41 C W N 1301.

14. Gopinath Shah v. First Land Acquisition Collector, Calcutta, (1938) 25 A I R Cal 250 = 177 I O 866 = 42 C W N 212.

15. Secretary of State v. Bhagwan Prasad, (1929) 16 A I R All 769 = 124 I O 529 = 52 All 96 = 1929 A L J 1186.

10. Rafiuddin v. Secretary of State, (1915) 2 A I R Lah 94 = 31 I O 76 = 65 P R 1915.

11. Mushtaq Ali v. Secretary of State, (1930) 17 A I R Lah 242 = 127 I O 711 = 31 P L R 158.

application under S. 18 had no jurisdiction to go behind the reference in order to scrutinize its irregularity and could not enter into the question whether the application in pursuance of which it was made was within limitation or not. This was in direct opposition to the remarks made in A I R 1932 Oudh 180.² In 54 All 282¹⁶ Mukerji J. sitting alone came to the conclusion that a Collector acting under S. 18 was not a Court subordinate to the High Court within the meaning of S. 115, Civil P. C. The matter came before a Full Bench of the same Court once more and their unanimous decision reported in 54 All 1085¹⁷ was that no revision lay to the High Court under S. 115, Civil P. C., against an order passed by a Collector under S. 18, Land Acquisition Act, and that a Collector acting under S. 18 was merely acting in an administrative capacity. The learned Judges further observed that, even if it were held that the Collector acted judicially, he was not a Court and certainly not a Court subordinate to the High Court. Similar view was expressed by a Division Bench of the Bombay High Court composed of Sir Norman Macleod C. J. and Crump J. in a case reported in 47 Bom 699.¹⁸ The learned Chief Justice towards the end of his judgment observed :

The Collector, provided he does not consider the application as time-barred, is bound to make a reference. But if he fails in the duty imposed upon him by that Section, in my opinion, this Court has no power to direct him to perform it.

Crump J. added :

That there is a hardship is plain. But it is not, in my opinion, a reason for placing upon the words of the Statute an interpretation which they do not reasonably bear. That is a matter for the consideration of the Executive Government or for the Legislature, and one with which we have no concern.

The Rangoon High Court, too, dissented from 12 C W N 241⁶ as well as from 16 C W N 327⁷ and 39 I C 650,⁵ in a case reported in 12 Rang 275,¹⁹ where Sir Arthur Page C. J., who wrote the principal judgment, remarked :

It has been held by the Judicial Committee of the Privy Council that in making an award under S. 11 of the Act, the Collector is acting as a Revenue Officer in an administrative and not in a

judicial capacity ; and it seems to follow that if the Collector is not acting as a Court when making an award under S. 11 of the Act, after inquiring into any objections that might have been raised under the Act, a fortiori the Collector is not acting as a Court when he makes or refuses to make a reference under S. 18 of the Act. Indeed, apart from authority I should have thought it manifest that that was so.

In a recent judgment of the same Court, Mackney J. has expressed a similar opinion in a case reported in A I R 1939 Rang 6.²⁰ Towards the close of his judgment, the learned Judge remarks :

It appears to me that what has to be looked to is not what the Collector does or seems to do, but what he is, and he quite definitely is not a Court within the meaning of the Civil Procedure Code, whatever he does. It appears to me that it is part of his administrative duties to make the references which may be required of him under the Act. Before doing so, it may be that he has to decide certain matters in the same way as a Judge has to decide matters in a suit before him or in an application before him ; but this does not make the action of the Collector a judicial act in the sense of the act of a particular Court ; it still remains an administrative act.

The Nagpur High Court, too, in a judgment reported in A I R 1937 Nag 12²¹ has preferred to follow the view expressed above. From the review of the authorities made above, it is obvious that the bulk of authority is in support of the proposition that the Collector cannot in any circumstances be deemed to be a Court subordinate to the High Court within the meaning of S. 115, Civil P. C., and consequently his order cannot be revised by the High Court. If I may say so with all respect, I am disposed to hold the same view. Before the High Court can exercise its jurisdiction under S. 115, Civil P. C., it is necessary that the order with which it proposes to interfere must be that of a Court subordinate to itself. By S. 3, Civil P. C., for the purposes of the Code, the Courts subordinate to the High Court are the District Court and every Civil Court of a grade inferior to that of a District Court. In order to determine which Courts can be designated as Civil Courts, one has to refer to the Punjab Courts Act. Originally, when the Punjab Courts Act was enacted in 1865 seven grades of Courts were enumerated besides the Courts of Small Causes and all other Courts established under any Act which may afterwards be passed. Those Courts included the Court of the Deputy

16. Kashi Prashad v. Notified Area Mohaba, (1932) 19 A I R All 598=143 I C 111=54 All 282.

17. Bhajan Lal v. Secy. of State, (1932) 19 A I R All 568=141 I C 587=54 All 1085=1932 A L J 769 (F B).

18. Balkrishna Daji v. Collector, "Bombay Suburban," (1923) 10 A I R Bom 290 = 73 I C 354 = 47 Bom 699=25 Bom L R 398.

19. M. H. Mayet v. Land Acquisition Collector, Myingyan, (1934) 21 A I R Rang 118 = 150 I C 1049=12 Rang 275.

20. Mg. Nyun v. Collector of Mandalay, (1939) 26 A I R Rang 6=180 I C 777=1938 R L R 623.

21. S. G. Sapre v. Collector of Sangar, (1937) 24 A I R Nag 12=168 I C 712=I L R (1938) Nag 149.

Commissioner. The law, however has undergone several changes since and the Punjab Courts Act, that is now in force, enumerates the subordinate Civil Courts in S. 18. There it is said :

Besides the Courts of Small Causes and the Courts established under any other enactment for the time being in force, there shall be the following classes of Civil Courts, namely, (1) the Court of the District Judge; (2) the Court of the Additional Judge; and (3) the Court of the Subordinate Judge.

It is evident that the Collector acting under S. 18, Land Acquisition Act, does not fall in any of the classes expressly mentioned therein. The only question that remains to be considered is whether the Collector can be described as a Court established under the Land Acquisition Act, and there is no doubt that he cannot be. In S. 3 of the Act, the expression 'Collector' means the Collector of a district and includes a Deputy Commissioner and any officer specially appointed by the Provincial Government to perform the functions of a Collector under the Act.

In the same Section 'Court' is defined as "a principal Civil Court of original jurisdiction" unless the Provincial Government appoints a special Judicial Officer within any specified local limits to perform the functions of the Court under the Act. Reading the two definitions together, the only conclusion that can possibly be drawn is that the Collector is an officer apart from the Court. His functions under S. 18 may be quasi judicial. His decision not to make a reference may rob a person of valuable rights but on that account alone he cannot be treated as a Court, if he is not a Court otherwise. Even under Part 2 he performs important functions which are to some extent analogous to those he performs under S. 18, but there under the highest authority of the land he is treated as a part of the executive machinery of the Government and not as a Court : 32 Cal 605.⁹ It is true that what he does under Part 2 is open to supervision by the Court if and when properly approached; but whether there is a supervising authority or not to control an officer's action is immaterial in determining whether he acts as a Court or not. As the law stands therefore, a Collector under S. 18 cannot be treated as a Court and a fortiori he is not subordinate to the High Court so as to be controlled under S. 115, Civil P. C. The Courts which have held otherwise have been mainly impressed by the fact that but for the assumption of this extraordinary jurisdiction there will be no remedy available to correct an erring Collector. But in my view it is not for the Courts to fill up

the gaps of legislation and to provide remedies not provided for otherwise. Their function is merely to administer the law as they find it and no attempt should be made by them either to add to the law or to subtract therefrom, however just and reasonable the addition or subtraction may appear to them to be. I would accordingly hold that this petition is not competent. In view of the apparent conflict of authority, however, I would leave the parties to bear their own costs before us.

Dalip Singh J. — The question referred to the Division Bench has been a subject of conflicting authority in the various High Courts. The decision which we are reaching in this case appears to me to lead to such remarkable results that the attention of the Legislature may well be called to it by presenting these results in a connected form in this judgment. The scheme of the Act clearly shows that while the Legislature contemplated that owing to public necessity or convenience it might be desirable to give powers to the Government to acquire the property of private individuals, it also provided that there should be compensation paid to these owners for this forcible acquisition of their property, and further that over and above the value of the property acquired 15 per cent. of that value should be added by way of compensation for the forcible acquisition of their property. The Legislature then did not leave it to the Government or its officers to determine the amount of the compensation to be so paid to the owners but provided a procedure and a method for a judicial determination of the value of the property acquired. Yet if S. 18 has the meaning that we are attaching to it, it follows that the Legislature decided to leave it to the Collector, that is, the representative of the Government, to decide whether that person was entitled to compensation at all or not, in other words, left it to the Collector to decide whether the person had title to the property or not, though it did not leave it to the Collector to decide what should be the amount of the compensation to be paid to the person if he had a title or interest in the property. I may be pardoned for entertaining a doubt as to whether the Legislature really contemplated this, to my mind, remarkable result ; but this is not all. According to S. 18, if it has the meaning now sought to be given to it it is for the Collector to decide whether the right of the person to have the value of his property adjudica-

ted upon by a judicial decision has or has not been forfeited by reason of limitation, has or has not been forfeited by reason of estoppel due to acceptance of the Collector's award, and further whether the petition to have his compensation judicially determined has or has not been properly framed.

In addition to this, there follows another result according to the Allahabad rulings, namely that not only the Collector decides all these points but his decision is final and cannot be interfered with by any Court, that is to say a difficult question of title or a difficult question of estoppel or a difficult question of drafting has to be decided by the Collector without any assistance and as far as I can see without any judicial procedure provided for taking evidence and this result is final and binding on all parties. If the Collector is of opinion that the person claiming has no title to the property, it is obvious that most difficult questions of law and fact might be involved, yet so far as S. 18 is concerned, nothing is provided as to how the Collector is to decide this difficult question of title.

The other points involved might also in particular cases involve difficult questions of law and facts but similarly there is no provision for their judicial decision. It would seem to me to be remarkable that while the amount of the compensation is to be determined by the District Court, an appeal to the High Court and a further appeal to the Privy Council, these other points of limitation, estoppel, title and frame of petition are to be decided solely by the Collector. If the matter were *res integra*, I would not have had any hesitation in deciding that this could not have been the intention of the Legislature. But the matter is not *res integra* and counsel on both sides conceded before us that it is for the Collector to decide all these points. I therefore cannot do more than bow to the weight of authority on the subject.

Next comes the question whether the Collector in so deciding acts judicially. There is no provision in the law to show that in deciding this question the Collector has to act in a judicial manner, that is to say, have regard to the laws of evidence generally and the natural principles of justice. Here again, if the matter had been *res integra*, it might have been possible to hold that in deciding these preliminary points of the petition so to speak the Collector must be presumed to be acting judicially because this was the first step in launching

the matter of the judicial determination of the amount of compensation. But here again the matter is not *res integra* and the weight of authority appears to be that the Collector in this matter does not act judicially. The next point is whether the Collector in deciding this matter acts as a Court. Here again if the matter were *res integra*, I should be inclined to think that a final decision on a civil right arising between the individual and the Government would be a matter ordinarily speaking for the decision of a Court and that therefore the Collector if he has to decide this point was a Court. But here again the weight of authority is the other way and I see that there are reasons for holding to the contrary and I am not prepared to say that all the reasoning of the Courts on this point is wrong.

The next point for decision is whether the Collector is a Court subordinate to the High Court, assuming that he is a Court at all. Here again, I should have been inclined to hold that as a civil right is being judicially decided the Collector would be a Civil Court and that all Civil Courts are subordinate to the High Court and therefore his proceedings are open to revision. But I see force in the reasoning that the Punjab Courts Act enumerates a Civil Court and S. 3, Civil P. C., only makes certain Civil Courts subordinate to the High Court and the weight of authority is that the Collector is not a Civil Court and not subordinate to the High Court. I therefore would agree that no revision lies and would dismiss the petition. The only remedy of the applicant would appear to be to move the Government in the matter. I agree that the parties should bear their own costs.

G.N./R.K.

Petition dismissed.

A. I. R. 1940 Lahore 304

YOUNG C. J. AND DIN MOHAMMAD J.

In the matter of Muslim Bank of India Ltd., Lahore (in liquidation).

Civil Case No. 2 of 1939, Decided on 17th November 1939.

(a) Provincial Insolvency Act (1920), Ss. 33, 34 and 44—Person purchasing shares of company making certain payment on allotment and call—Purchaser adjudged insolvent and unconditionally discharged—Subsequent liquidation of company—Balance of money due upon shares held irrecoverable in liquidation.

A person purchased ten shares of Rs. 100 each in a company in liquidation. The purchaser paid

Rs. 200 on allotment. Later the company before the order for compulsory liquidation, made a call of Rs. 300 on these shares. The purchaser was adjudged insolvent and was unconditionally discharged. In the insolvency the purchaser included these shares in Sch. B. The company was wound up compulsorily and the Official Liquidator of the company placed purchaser's name upon the list of contributories:

Held that the possibility of a call being made by the company, when it was in existence, upon the uncalled balance of the share money due upon the shares was a contingent liability. The debt of Rs. 500, i. e. the balance due on the shares, was provable in the insolvency and therefore the liability therefor disappeared when the order of discharge was made. [P 305 C 2 ; P 306 C 1]

(b) Provincial Insolvency Act (1920), S. 33
— Insolvency Court can alone decide whether debt can be fairly estimated or not.

It is for the Insolvency Court alone to decide whether the debt can be fairly estimated or not and to make an order accordingly. High Court has no jurisdiction to decide whether the debt can be fairly estimated or not. [P 306 C 1]

(c) Provincial Insolvency Act (1920), S. 37
— Order of discharge is not equivalent to annulment of adjudication.

The order of discharge, is not equivalent to annulment of adjudication so as to bring in the provisions of S. 37. The re-vesting of the property in the discharged debtor cannot take place through the operation of S. 37. [P 307 C 2]

A. D. Malik — *for Petitioner.*

Nazir Ahmad and Asad Ullah Khan —
for Respondent.

Young C. J. — The point of law referred to this Bench by the learned Company Judge arises out of the compulsory liquidation of the Muslim Bank of India Limited. One Rahmat Ali of Sialkot purchased ten shares of Rs. 100 each in the company in liquidation. The purchaser paid Rs. 200 on allotment. Later the Bank, before the order for compulsory liquidation, made a call of Rs. 300 on these shares. The petitioner was adjudged insolvent and was unconditionally discharged on 11th February 1936. In the insolvency the petitioner included these shares in Sch. B, but the Official Receiver could not find any bidder for them. The Bank was wound up compulsorily by order of this Court on 7th October 1938. Rahmat Ali's name at the time of the liquidation was still upon the register of the members of the Bank and the Official Liquidator of the Bank placed his name upon the list of contributories. Rahmat Ali applied to this Court for rectification of the register of members praying that his name be struck off therefrom on the ground that as he had been unconditionally discharged as a debtor in 1936, he had, after discharge, no further liability with regard to these shares. The

learned Company Judge referred the application to a Bench. It is agreed by the Official Liquidator that as regards the call made before the compulsory order the liability therefor has been discharged in the insolvency proceedings. The remaining liability for Rs. 500 has to be adjudicated upon. The relevant sections of the Provincial Insolvency Act are as follows:

33 (1) When an order of adjudication has been made under this Act, all persons alleging themselves to be creditors of the insolvent in respect of debts provable under this Act shall tender proof of their respective debts by producing evidence of the amount and particulars thereof, and the Court shall by order, determine the persons who have proved themselves to be creditors of the insolvent in respect of such debts, and the amount of such debts, respectively, and shall frame a schedule of such persons and debts.

Provided that, if, in the opinion of the Court, the value of any debt is incapable of being fairly estimated, the Court may make an order to that effect, and thereupon the debt shall not be included in the schedule.

34 (1) Debts which have been excluded from the schedule on the ground that their value is incapable of being fairly estimated and demands in the nature of unliquidated damages arising otherwise than by reason of a contract or a breach of trust shall not be provable under this Act.

(2) Save as provided by sub-s. (1) all debts and liabilities, present or future, certain or contingent to which the debtor is subject when he is adjudged an insolvent or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication shall be deemed to be the debts provable under this Act.

44 (2) Save as otherwise provided by sub-s. (1) an order of discharge shall release the insolvent from all debts provable under this Act.

The question, therefore, is whether the contingent liability of the petitioner for Rs. 500 to the bank at the time of his insolvency was a debt provable under the Provincial Insolvency Act. According to S. 34 (2),

all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent . . . shall be deemed to be debts provable under this Act.

There was no order by the Insolvency Court in this case excluding in accordance with the proviso to S. 33 (1) this debt from the Schedule. On behalf of the petitioner counsel argues that the words "present or future, certain or contingent" cover the liability of a share-holder who has not, at the date of his insolvency, paid up the full amount of his shares. The words of the Section are certainly wide. According to the Oxford Dictionary 'contingent' means 'liable to happen or not, of uncertain occurrence or incidence.' The possibility of a call being made by the company, when it was in

existence, upon the uncalled balance of the share money due upon the shares is certainly, according to this definition a contingent liability.

Apart from this argument, the proper construction of S. 33 (1) and the proviso thereto and of S. 34 (1) in our opinion makes it clear that the debt of Rs. 500 on the shares was provable in the insolvency and therefore the liability therefor disappeared when the order of discharge was made. The debt was included in the schedule and the only way under the Act of excluding it was by the Insolvency Court making an order that it was "incapable of being fairly estimated." The Court made no such order, and therefore S. 33 (1) does not apply and S. 34 (1)—the debt not being excluded by operation of S. 34 (1)—does apply and the debt was provable and therefore subject to the order of discharge. It is for the Insolvency Court alone to decide whether the debt can be fairly estimated or not and to make an order accordingly. It is too late now for the Official Liquidator of the Company to move in the matter. This Court in our opinion has no jurisdiction to decide whether the debt can be fairly estimated or not.

In (1888) 13 A C 351,¹ their Lordships of the House of Lords considered the effect of a similar provision in the English Bankruptcy Act of 1883, this English Act containing the same provisions as S. 34, Provincial Insolvency Act. In that case the assignee of a lease for a term of years covenanted to indemnify the lessees against damages for breach of their covenants with the lessors to repair and yield up the demised premises in repair at the end of the term. Eight years before the term expired, the assignee filed a petition for liquidation by arrangement under the Bankruptcy Act of 1869 (the provisions of the Bankruptcy Act of 1869 were also similar to those of S. 34, Provincial Insolvency Act) and obtained an order of discharge. After the term expired the lessors having recovered damages against the lessees upon the covenants for repair, the lessees claimed an indemnity from the assignee in respect of his covenant to indemnify. It was held by their Lordships that the claim of the lessees was barred under S. 49, Bankruptcy Act, 1869, by the order of discharge, the effect of S. 31 of that Act being to make the

assignee's future and contingent liability on his covenant to indemnify a debt provable in the liquidation, unless an order of the Court declared it to be a liability incapable of being fairly estimated. Their Lordships, including such eminent Judges as Lord Halsbury, the Earl of Selborne, Lord Herschell and Lord Macnaghten, further came to the conclusion that the liability in that case could not be said to be incapable of being fairly estimated. Lord Macnaghten in his judgment at p. 367 said as follows:

It seems to me that according to the true construction of the Section, unless a judicial declaration has actually been made in the terms of that provision, the liability of the bankrupt under a contract however extreme the difficulty of valuing that liability may be, must be deemed to be a debt provable in bankruptcy, and therefore a debt from which the bankrupt is released by the order of discharge.

The learned Law Lord pointed out the dangers which would occur if any other decision were arrived at. The policy of the Bankruptcy Act being to free the bankrupt from all his liabilities, if a debt such as this could not be proved in the bankruptcy, it would be impossible for any bankrupt to know whether in the future he was a free man or not. Apart from the technical point that there was not an order of the Court excluding this debt from the Schedule, we think that at the date of the bankruptcy of the petitioner it would have been possible to make a reasonable and fair estimate of the petitioner's possible liability under his contract with the company. If, as Lord Macnaghten has pointed out in the authority under discussion, it was possible to make a reasonable estimate of that bankrupt's liability under his covenant to repair at the end of a lease, we see no difficulty in arriving at the same conclusion with regard to the liability of the bankrupt in the case we are considering, under his contract with the company to pay for the shares in the company which had been allotted to him. Any person acquainted with business or company affairs, on having been given the facts as to the position of the Muslim Bank in 1936, could form some reasonable and fair estimate of the possible liability of the bankrupt to the company with regard to his share-holding. S. 34 (2), Provincial Insolvency Act clearly contemplates a certain difficulty in arriving at what is a fair estimate of the value of a debt, by the use of the word "contingent." But because there may be a difficulty in the estimation that does not imply that the value cannot be "fairly estimated."

1. *Hardy v. Fothergill*, (1888) 13 A C 351 = 58 L J Q B 44 = 59 L T 273 = 37 W R 177 = 58 J P 86.

It was argued on the basis of certain English authorities decided before the words "future or contingent" were introduced into the English Act, that a debt of this nature was incapable of being fairly estimated. These authorities, however, are irrelevant in view of the amendment introduced by the later English Act. The only English authority quoted to us after this amendment is that of (1888) 13 A C 351¹ alluded to above. The learned Official Liquidator also referred to certain Indian cases dealing with the problem of fairly estimating the value of a debt for deferred dower. The opinion of the learned Judges in those cases, however, does not bind us, nor were they dealing with the type of debt with which we have to deal. Another point has been raised by the Official Liquidator. He argues that on discharge the adjudication of the insolvent is annulled and that, therefore, under S. 37 (1), Provincial Insolvency Act

the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the Court may by order in writing declare.

He therefore argues that the adjudication being annulled by the discharge and no person having been appointed by the Court, the property in these shares reverted to the insolvent and therefore he is still liable for the uncalled balance. This position is clearly untenable. In the scheme of the Provincial Insolvency Act, annulment of adjudication is dealt with under a separate heading. Ss. 35, 36, 39 and 43 lay down the circumstances in which an adjudication can be annulled, and none of those circumstances includes the discharge of the insolvent.

Section 35 authorises annulment of adjudication where a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent have been paid in full. Under S. 36 if it is proved to the Court by which an order of adjudication has been made that insolvency proceedings are pending in another Court against the same debtor and that the property of the debtor can be more conveniently distributed by such other Court, it has power to annul the adjudication. Under S. 39 adjudication is annulled if compositions and schemes of arrangement are approved by the Court. In matters dealing with the discharge of the insolvent, adjudication can be annulled only

if the debtor does not appear on the day fixed for hearing his application for discharge or on such subsequent day as the Court may direct or if the debtor does not apply for an order of discharge within the period specified by the Court. If no order of annulment of adjudication is made under any of these sections, no adjudication can be said to be annulled. The order of discharge therefore is not equivalent to annulment of adjudication so as to bring in the provisions of S. 37. In the present case, an application for discharge was made and was granted. If the argument of the Liquidator were sound, there would be a patent contradiction in the Act: the debtor would be discharged from all his debts in accordance with the Sections quoted above in the earlier part of this judgment, but he would not be discharged from this debt by operation of S. 37. It is clear that the re-vesting of the property in the discharged debtor cannot take place through the operation of Section 37.

Under S. 44 (1) those debts only are not released which are indicated there and the debt under consideration was not of that kind. The unconditional discharge therefore of the petitioner makes the balance of the money due upon the shares irrecoverable in the liquidation. We accordingly allow this application and order the rectification of the register by removing the petitioner's name. In the peculiar circumstances of the case, there will be no order as to costs.

D.S./R.K.

Application allowed.

A. I. R. 1940 Lahore 307

BHIDE J.

Ram Kanwar — Plaintiff — Appellant.

v.

*Lt. Malik Mahammad Sher Khan —
Defendant — Respondent.*

Second Appeal No. 1301 of 1939, Decided on 15th February 1940, from decree of Addl. Dist. Judge, Shahpur at Mianwali, D/- 26th April 1939.

Ownership — Proof of.

The mere fact that a person has a right of collecting dharat in the market place is not sufficient proof that he is the owner of the whole market-place. [P 808 C 1]

Achhru Ram and Roop Chand —

for Appellant.

Sayyed Mohsin Shah — for Respondent.

Judgment. — The plaintiff sued in this case for a permanent injunction restraining

the defendant from interfering with the plaintiff's opening a door in the western wall of his shop. The defendant resisted the suit on the ground that the site towards the west of the plaintiff's shop was a market place belonging to the defendant and therefore the plaintiff had no right to open a door towards that site. The trial Court found the issues against the plaintiff and dismissed his suit. On appeal the learned District Judge has upheld the decision. The plaintiff has preferred a second appeal.

The learned District Judge has found against the defendant on the issue as regards his alleged ownership of the site towards the west of the plaintiff's shop. He has however upheld the decision of the trial Court on the ground that the defendant had proved that he was exercising his rights of "dharat" in the market place to the west of the plaintiff's shop. The defendant had never relied on his right of collecting dharat in the market place in his written statement and it does not appear how the mere fact that the defendant had a right of collecting dharat in the market place can be held to be sufficient proof that he was the owner of the whole market place. The defendant produced no documentary evidence at all in support of his claim and the oral evidence which has been produced does not seem to me to be sufficient to prove his case. The plaintiff produced a settlement map prepared in the year 1865 from which it appears that the site towards the west was a lane. There is nothing to show in this map that the lane was the private property of the defendant or his predecessor-in-interest. If the defendant's contention was correct it should have been possible for him to produce evidence from the revenue records to support his claim but he has not done so. In the circumstances, on the finding of the learned District Judge himself on the question of the defendant's ownership of the site towards the west of the plaintiff's shop, it seems to me that the plaintiff was entitled to a decree. The learned counsel for the defendant urged that the relief was a discretionary one; but, in the present instance, the plaintiff wanted to open a door in his own house. The learned District Judge has conceded that the plaintiff had a right to do so and the defendant having failed to prove the ground on which he opposed the plaintiff's claim there is no reason why the plaintiff should be refused the decree sought by him. I therefore accept the appeal

and decree the plaintiff's suit with costs throughout.

G.N./R.K.

Appeal accepted.

A. I. R. 1940 Lahore 308

BHIDE J.

Benarsi Das — Plaintiff — Appellant.

v.

*Moti Ram and another—Defendants—
Respondents.*

Second Appeal No. 831 of 1939, Decided on 5th February 1940, from decree of Additional District Judge, Delhi, D/- 27th February 1939.

(a) Transfer of Property Act (1882), S. 78 — Negligence — Mortgagee allowing mortgagor to remain in possession as tenant—No negligence.

Where the mortgagee has allowed the mortgagor to remain in possession of the property and the latter is paying rent, the mortgagee cannot be said to be guilty of negligence within the meaning of Section 78. [P 308 C 2; P 309 C 1]

(b) Practice—Evidence — Party agreeing to evidence being relied on in trial Court — He is estopped from disputing its correctness in appeal.

Where a party clearly agrees to certain evidence being relied on in proceedings before the trial Court he is estopped in appeal from challenging the procedure of the trial Court on the ground that the evidence was wrongly relied upon. [P 309 C 1]

Roop Chand — for Appellant.

Amar Nath Grover — for Respondents.

Judgment. — The plaintiff sued in this case to establish his rights of ownership of a house as against the respondent who was in possession and claimed to be a mortgagee from the original owner Kishenlal. The suit has been dismissed by the Courts below and plaintiff has preferred a second appeal. The Courts below have found that Kishenlal had first mortgaged the house in favour of one Babulal and Babulal had transferred his rights to the respondent Moti. They have further found that the mortgage had not been discharged. These findings of facts have not been challenged in second appeal. The learned counsel for the appellant has merely contended that Babulal was guilty of gross negligence in allowing Kishenlal to remain in possession; but the respondent has explained that Kishenlal was a tenant of Babulal and was paying him rent. It is true that only a lease for one year has been produced, but the tenancy may have been continued by an oral agreement. The very fact that Babulal was able to put Moti respondent in possession is very significant

and it shows that Babulal must have been in actual or constructive possession. In my opinion, no case of negligence within the meaning of S. 78, T. P. Act, has been made out.

It was also urged that certain evidence in the summary proceedings in execution had been wrongly relied upon. But the appellant had clearly agreed to this evidence being relied on and he is now estopped from challenging the procedure of the trial Court on this ground. Lastly, it was urged that the house in dispute represents 1/2 and not 1/3rd share of Kishenlal in the house as it stood when the mortgage of 1/3rd share in favour of Babulal was effected. But this case was never pleaded or put in issue. The learned counsel for the appellant referred to para. 17 of the written statement, but even this does not admit any such facts. In fact the respondent clearly pleaded in the written statement that the house in dispute (No. 524) represents the 1/3rd share of Kishenlal, which was mortgaged in favour of Babulal. The appeal is dismissed with costs.

G.N./R.K.

*Appeal dismissed.***A. I. R. 1940 Lahore 309**

ABDUL RASHID J.

*Muhammad Sulaiman and others —
Plaintiffs — Appellants.*
v.

*Badr-ud-Din and another — Defendants
— Respondents.*

Second Appeal No. 630 of 1939, Decided on 3rd January 1940, from decree of Addl. Dist. Judge, Rohtak, D/- 11th March 1939.

(a) Evidence Act (1872), S. 13 — Judgment in prior litigation decreeing plaintiff's ancestor's claim on ground that suit land formed part of royal grant in their favour—Plaintiff in subsequent suit claiming different land from different persons — Prior judgment is relevant to show that subject-matter in prior litigation was plaintiff's property—But it is inadmissible to prove that property in subsequent suit is part of Royal grant in plaintiff's ancestor's favour.

A judgment in a previous suit may be relevant under S. 13 for establishing a particular transaction, but the findings of fact and reasons upon which the judgment is founded are no part of the transaction and cannot be relevant in a subsequent suit : *A I R 1937 Lah 487 and A I R 1937 P C 89, Rel. on.* [P 310 C 1]

A suit instituted by the plaintiffs' ancestors against some persons who had taken away a part of the land which had been granted to them by the farman-i-shahi, was decreed on the ground that the land in dispute formed part of the Royal

grant. In a subsequent suit against different persons for possession of different land plaintiffs sought to rely on the previous judgment :

Held that the judgment in the previous suit was relevant to show only that the land which formed the subject-matter of prior litigation was the property of the plaintiffs but it was not relevant to show that the land in the subsequent suit formed part of a bigger piece of land which was given by means of a Royal grant to the plaintiffs' ancestors. [P 310 C 1]

(b) Evidence Act (1872), S. 83—Plan relied on by both parties to suit without objection — It is not inadmissible on ground that it is not proved to be accurate in accordance with Section 83.

Where both parties to a suit rely on a plan to the accuracy of which no objection is taken by either of the parties, the plan is not inadmissible on the ground that its accuracy has not been established by evidence in accordance with the provisions of S. 83 : *9 C W N 111, Rel. on.* [P 310 C 2]

Shamair Chand — *for Appellants.*

Muhammad Hussain—*for Respondents.*

Judgment. — The material facts of the case may be briefly stated. The land in dispute, according to the allegations of the plaintiffs, forms part of a large plot of land measuring about 2000 bighas which was granted to the plaintiffs' ancestors by King Muhammad Shah by means of a farman-i-shahi some time in the 18th century. In 1910, the ancestors of the plaintiffs created a wakf-alal-aulad in favour of Imambara Pirzadgan. Since then the institution has been enjoying the income of the property and has been dealing with it. The defendants forcibly took possession of the land in suit in July 1935, and constructed a kotha and walls over it. Accordingly, the plaintiffs brought the present suit for possession against the defendants. The trial Court decreed the plaintiffs' claim on the ground that the land in dispute belonged to the Imambara Pirzadgan and had been in its possession within 12 years of the institution of the suit. On appeal by the defendants, the plaintiffs' suit was dismissed by the learned Additional District Judge. The plaintiffs have, accordingly, preferred a second appeal to this Court.

The learned Additional District Judge has held that it has not been established that the land in suit belongs to the plaintiffs. This is a finding of fact and could not be impeached in second appeal. The principal argument of Mr. Shamair Chand was that the learned District Judge had wrongly excluded a number of documents as being inadmissible in evidence. The learned counsel's contention was that all these

documents were admissible in evidence under S. 13, Evidence Act. In the year 1860, a suit was instituted by the plaintiffs' ancestors against some persons who had taken away a part of the land which had been granted to them by the farman-i-shahi. The plaintiffs' suit was decreed on the ground that the land in dispute formed part of the Royal grant. A copy of the judgment is Ex. P-22. The learned counsel contended that, though the defendants were not parties to this litigation, the judgment was admissible under S. 13, Evidence Act, to show that a certain piece of land was claimed by the plaintiffs in the year 1860 as their property and that they were granted a decree for possession. The difficulty in the way of the plaintiffs-appellants, however is that the land which formed the subject-matter of the litigation in 1860 is not identical with the land now in suit. It was held by a Division Bench of this Court in A I R 1937 Lah 437¹ that a judgment in a previous suit may be relevant under S. 13, Evidence Act, for establishing a particular transaction, but the findings of fact and reasons upon which the judgment is founded are no part of the transaction and cannot be relevant in a subsequent suit. Ex. P-22 is relevant to show that the land which formed the subject-matter of litigation in 1860 was the property of the plaintiffs. It is not relevant to show that the land now in suit forms part of a bigger piece of land which was given by means of a Royal grant to the plaintiffs' ancestors. The same reasoning applies to Ex. P-29, which is a copy of the judgment of Munshi Iqrar Ali, Tehsildar, Sonapat, delivered in the year 1871. In that case also, the plot of land sued upon was not identical with the land in the present case.

It was contended by Mr. Shamair Chand that the plan Ex. P-5 was prepared under the orders of the District Judge in the litigation of 1917, and that that plan had been given to the Commissioner in the present case and the Commissioner had demarcated the land in suit on that plan. It was urged that the plan of 1917 showed the entire plot that had been given to the plaintiffs' ancestors by the Mughal Emperor and that as the plot in suit formed part of the area given to the plaintiffs' ancestors according to the plan of 1917, the plaintiffs were entitled to a decree in the present suit. The plan of 1917 was prepared in a suit which

did not relate to the land now in dispute. That plan and the judgment of the District Judge in the litigation of 1917 cannot therefore be held to be relevant under S. 13. Reference may be made in this connexion to A I R 1931 P C 89.² The learned Additional District Judge held the plan Ex. P-5 to be inadmissible as its accuracy had not been established by evidence in accordance with the provisions of S. 83, Evidence Act. That difficulty however can be overcome by the fact that both parties relied on the plan, Ex. P-5 before the local Commissioner and no objection was taken by the defendants that the plan Ex. P-5 had not been proved to be accurate: *vide* 9 C W N 111³ at p. 113.

The other difficulty however still remains that as the plan Ex. P-5 is a part of the documentary evidence tendered in the litigation of 1917 and that litigation did not deal with the plot of land now in dispute, the plan cannot be said to be relevant under S. 13, Evidence Act. If the judgments, Exs. P-22 and P-29 and the plan, Ex. P-5 be excluded from evidence, the plaintiffs' claim cannot succeed as there would not be sufficient evidence to show that the land now in dispute was a part of the land granted to the ancestors of the plaintiffs by the Mughal Emperor. It appears to me that the plaintiffs' case was badly conducted in the trial Court and that though their claim was probably just, they have failed to establish by independent evidence that the land in dispute is their property. For the reasons given above I dismiss this appeal. Having regard to all the circumstances, however, I order that the parties will bear their own costs throughout.

G.N./R.K.

Appeal dismissed.

2. Gobind Narayan v. Sham Lal, (1931) 18 A I R P C 89 = 131 I O 753 = 58 I A 125 = 58 Cal 1187 (P O).

3. Madhabi Sundari Dassya v. Gaganendra Nath, (1905) 9 C W N 111.

A. I. R. 1940 Lahore 310

DIN MOHAMMAD J.

Mohammad Din and others —

Petitioners.

v.

Mt. Sardar Begum and others —

Respondents.

Civil Misc. Nos. 202 and 359 of 1939, Decided on 26th February 1940, praying permission to file appeal in forma pauperis.

1. Inayat Ullah Khan v. Kanshi Ram, (1937) 24 A I R Lah 437 = 174 I O 722.

Civil P. C. (1908), O. 33, R. 1, Explanation—Value of subject-matter of suit in applicant's possession cannot be ignored in determining whether he is pauper.

In determining whether the applicant should be allowed to appeal as a pauper or not, the value of the subject-matter of the suit in possession of the applicant cannot be ignored: *A I R 1934 All 323* and *A I R 1933 Pat 203, Rel. on.* [P 311 C 1]

R. P. Khosla — *for Petitioners.*

Inder Dev Dua — *for Respondents.*

Order.—This order will dispose of Civil Misc. No. 202 and Civil Miscellaneous No. 359 of 1939. The petitioners, Mohammad Din and others, presented an application for being allowed to appeal as paupers and the District Judge who was directed to make an enquiry into their pauperism has reported that all of them except Ibrahim are paupers. He has however failed to take into consideration the fact that the petitioners were in possession of the subject-matter of the suit and the value thereof was admittedly more than the amount of court-fee they had to pay on appeal. That this fact cannot be ignored in determining whether a person should be allowed to appeal as a pauper or not is evident from the language of the Explanation to O. 33, R. 1, Civil P. C. Further, reference may be made in this connexion to *A I R 1934 All 323*¹ and *A I R 1933 Pat 203*.² I accordingly hold that the petitioners are not paupers and must pay full court-fee on the appeal. Counsel for the petitioners expresses his willingness to pay the proper court-fee, if time is allowed to him in that behalf and I accordingly direct him to make up the deficiency on or before 21st March 1940. In case of default, no further extension will be allowed to the petitioners. Counsel for the respondents has drawn my attention to the fact that in spite of the petitioners not furnishing any security for costs and mesne profits as ordered by me on 10th July 1939, the executing Court has not taken any proceedings against them. This is deplorable. My order was quite explicit on the matter. I now direct the executing Court to start execution proceedings against the petitioners if they fail to furnish security for costs and mesne profits on or before 21st March 1940. The respondents will be entitled to their costs from the petitioners in Civil Miscellaneous No. 202 of 1939.

G.N./R.K.

Order accordingly.

1. *Rajdeo Singh v. Jagdeo Singh*, (1934) 21 A I R All 323=149 I O 1004.

2. *Bhagwat Sahay v. Krishna Sahay*, (1933) 20 A I R Pat 203=144 I O 230.

A. I. R. 1940 Lahore 311

MONROE J.

Babu and another — Defendants —
Appellants.

v.

Dalip Singh and another, Plaintiffs and
others, Defendants — Respondents.

Second Appeal No. 515 of 1939, Decided on 28th February 1940, from decree of Senior Sub-Judge, Hoshiarpur, D/- 23rd December 1938.

(a) Mutation—Value of.

The mutation in favour of a person is not conclusive evidence of the transfer of the land to him.
[P 312 C 1]

(b) Deed—Exchange—Written deed—Transaction cannot be proved unless deed is produced or shown to have been lost — Before notice is taken of the deed its registration must be proved.

Where the exchange between the parties is not an oral but a written transaction, without production of the written instrument or evidence of its loss, the transaction cannot be proved and before any notice is taken of the instrument, it must be shown to have been registered.
[P 312 C 1]

(c) Possessory suit — Onus — Suit for possession on basis of title.

Where the plaintiff is not in possession of the property claimed by him the onus of showing a good title is on him.
[P 312 C 2]

D. N. Aggarwal — *for Appellants.*

D. N. Bhasin — *for Respondents*
(Plaintiffs).

Judgment. — This suit was brought to recover possession of half a site. The trial Judge granted a decree for possession, which was affirmed on appeal. The first two defendants are in actual possession of the whole site. The plaintiffs alleged that the site formerly belonged to Gurdas Singh and Harnam Singh and that by way of exchange Gurdas Singh conveyed his one half-share to the plaintiffs and defendant 4. This transaction took place when Gurdas Singh was apparently no longer in actual possession, namely on 20th March 1937. The first two defendants had taken possession on 21st January 1936 in purported pursuance of a sale deed from one Dina Nath. This deed was produced and proved. The title of the plaintiffs is based on the exchange with Gurdas Singh: when this exchange took place, the plaintiffs knew or ought to have enquired and would have discovered that the transferor was not in possession but that defendants 1 and 2 were. The defendants' case was that Gurdas Singh had by a deed of exchange dated

21st January 1935 transferred his share to Harnam Singh his brother and co-owner, who on the same day transferred the whole to Dina Nath, the immediate predecessor-in-title of the defendants, who acquired the property from him by a registered deed of 21st January 1936. There can be no doubt that this case is a true one, but unfortunately the deed of exchange from Gurdas Singh to Harnam Singh was not registered: and there is no evidence to show that Harnam Singh performed his part of the exchange: both Harnam Singh and Gurdas Singh swore that the exchange had been cancelled, an obvious lie, as is shown by the fact that on the day when the document evidencing it was signed, possession of the property was given to Dina Nath.

Section 49, Registration Act, prevents the deed of exchange from having any effect—the title remained in Gurdas Singh. It is for this reason that a decree has been granted to the plaintiffs. The learned District Judge formed the view that the defendants failed by reason of the technical provisions of the law. I heartily agree and I consider that they have been the victims of the fraud of Gurdas Singh and Harnam Singh. Harnam Singh had actually the audacity to state in his evidence that he sold only his half-share of the site to Dina Nath. The learned Judge has held the plaintiffs' title to be good on the basis of the exchange with Gurdas Singh. But what is sauce for the goose is sauce for the gander. The mutation in favour of the plaintiffs is not conclusive evidence of the transfer of the land. Now the plaintiffs' own statement on solemn affirmation at the trial was:

I took the half-share in dispute in exchange from Gurdas Singh, the exchange deed was written out and mutation also took place: it was about a year ago.

This evidence was overlooked, it appears, in both Courts. The mutation was treated as disposing of any question concerning the plaintiff's title, supported as it was by the evidence of Gurdas Singh and Harnam Singh. The importance of this evidence is, of course, that it shows that the exchange between Gurdas Singh and the plaintiffs was not an oral but a written transaction; without production of the written instrument or evidence of its loss, the transaction cannot be proved and before any notice is taken of the instrument, it must be shown to have been registered. The plain-

tiffs are not in possession and the onus of showing a good title was on them: they have failed to prove title and their suit for possession fails. I allow the appeal and dismiss the suit with costs throughout.

G.N./R.K.

Appeal allowed.

A. I. R. 1940 Lahore 312

MONROE J.

Mt. Rewti and others — Plaintiffs —
Appellants.

v.

Mohan Lal — Defendant —
Respondent.

Second Appeal No. 852 of 1939, Decided on 7th February 1940, from decree of Dist. Judge, Hissar at Gurgaon, D/- 1st May 1939.

(a) Evidence Act (1872), S. 35 — Process-server's report of giving of possession is admissible without his being called as witness.

Where the duty of the process-server is to deliver possession and to record what he had done, this record is the public record of an official act and consequently the process-server's report of the giving of possession is admissible in evidence without his being called as a witness: *A I R 1926 Lah 629, Disting.* [P 313 C 1]

(b) Ownership — Evidence of — Process-server's report of giving of possession to party.

A process-server's report of the giving of possession to a party is the clearest evidence of an act of ownership. [P 313 C 1]

(c) Ownership — Evidence of — Plan to Municipal Committee for building put in and sanctioned.

Where a person puts in plans to the Municipal Committee for building on a property and permission is granted, the act is evidence of a claim to ownership but not of ownership or even of possession of the property. [P 313 C 2]

Partap Singh — *for Appellants.*

Qabul Chand Mital and Madan Lal Kapur
— *for Respondent.*

Judgment. — This suit was brought to recover possession of a plot of land which is shown in the plan Ex. C.1. The trial Judge dismissed the suit on the ground that the plaintiffs had not shown possession within twelve years, though holding that they were in possession in 1915. The learned District Judge held that the plaintiffs had failed to show both title and possession within twelve years. In my opinion, the learned Judge wrongly rejected as inadmissible in evidence the document on which the trial Judge based his finding that the plaintiffs were in possession in 1915 and ignored the most important part of the evidence relating to possession within twelve years. The plaintiffs and the defendant belong to

different branches of the same family and have a common ancestor in Bhola Nath, great-great-grandfather. This relationship is important and insufficient attention has been given to it: it is the background of the whole case and explains the various contacts of the parties and their predecessors.

The plaintiffs' case is that the property is ancestral in their branch of the family: that before 1915 it was let and in that year as a result of legal proceedings it was recovered from a tenant. They relied on the original lease but as it was unregistered, it was properly held to be inadmissible in evidence. This however has no serious effect on the case, because the evidence afforded by the lease would be merely of an act of ownership, of which there is other evidence. For, the plaintiffs recovered possession as the result of a suit against a person who was alleged to be their tenant. The plaint (Ex. P-2) was produced in evidence. A decree was obtained and was executed. The process-server's report of the giving of possession (Ex. P-3) has been produced. This also has been rejected as inadmissible in evidence, on the ground that the process-server was not called as a witness. For the proposition that it was necessary to call him, the learned Judge relied on A I R 1926 Lah 629.¹ The case is not an authority for any such proposition: in it the facts were that a process-server whose duty was to serve notice of an injunction to restrain building inserted in his report a statement that building was in progress: it was no part of his duty to record such a statement or even to observe what was happening and therefore it was clear that his statement was not evidence of the facts contained in it. But here the duty of the process-server was to deliver possession and to record what he had done—this record is the public record of an official act. I hold that the document ought to have been admitted and its effect considered: in the first place, it affords the clearest evidence of an act of ownership: it is also some corroboration of the plaintiffs' statements that the property was owned by them as ancestral property: but its greatest value lies in the fact that one of the witnesses to the giving of possession was "Ganeshi Lal, son of Ram Lal," the father of the defendant, through whom the defendant claims.

I have no doubt that the learned District Judge would, if he had considered the ques-

tion, have held that the signature was not proved, because he rejected the evidence of one of the plaintiffs (Kishori Lal) about another signature as insufficient, in my opinion, for insufficient reasons; the process-server's return was a document placed on the file of the original suit in 1915 where it has since remained and there is not the slightest reason for suspecting that it has been tampered with; there is no occasion to presume a forgery. Kishori Lal as decree-holder was present to take possession and it was natural that he should have had his relation present as a witness. The presence of Ganeshi Lal as a witness to the giving of possession to a member of the other branch, claiming to be an owner must be taken, in my opinion, as an admission of the right then being exercised: he would not have acted as a witness, if he himself had claimed ownership. The evidence disregarded in respect of recent possession is that afforded by two postcards (Exs. P-10 and P-11) written by the defendant himself to one of the plaintiffs Shiv Parshad and to Shiv Dyal, now deceased and represented by his widow Mt. Rewti, both dated 14th June 1929. In these cards the defendant stated that he had persistently tried to recover the rent and would try to recover it as soon as possible. These cards were posted from Riwari where the property is and where the defendant resided. There is no doubt that it is the rent of the property in suit to which reference is made, and from the contents of the postcards the truth of the plaintiffs' evidence that the defendant was trying to collect their rents for them as their agent is clear.

The learned Judge was impressed by the evidence for the defendant, that the defendant put in plans to the Municipal Committee for building on the property in August 1930, and permission was granted, but it appears that at that time the defendant was a member of the Municipal Committee and this action is evidence of a claim to ownership but not of ownership or even of possession, though in view of the postcards, the defendant may have been in actual possession, as agent of the plaintiffs. The defendant has shown that his great-grandfather acquired property in 1872 in this place and the learned Judge has held that this property is part of the property now in dispute. Even if this is so, and the property belonged to the defendants' branch of the family in 1872, the transaction of 1915 shows that before 1905 the property

1. *Fateh Mahomed v. Hakim Khan*, (1926) 13 A I R Lah 629=96 I C 825.

had passed from one branch of the family to the other. It seems to me that the defendant took advantage of the position that he was acting for the plaintiffs in collecting the rents of the property, and getting into possession, then set up his claim. I do not think that it is necessary to send the case back for a consideration of the evidence which has been disregarded. Its effect is so clear that only one conclusion is possible. The plaintiffs' case may be said to rest on two admissions, that of the defendant's father that the plaintiffs were entitled to possession in 1915 and of the defendant himself that he was trying to collect the rents for the plaintiffs in 1929. I allow the appeal. I grant the plaintiffs a decree for possession, with costs in all Courts.

G.N./R.K.

*Appeal allowed.***A. I. R. 1940 Lahore 314**

DIN MOHAMMAD J.

Shangara Singh and others—Plaintiffs
— Appellants.

v.

Imam Din and others—Defendants —
Respondents.

Second Appeal No. 888 of 1939, Decided on 22nd December 1939, from decree of Senior Sub-Judge, Amritsar, D/- 2nd June 1939.

(a) Appeal—Court cannot allow appellant to implead person for first time after expiry of limitation for appeal.

Court is not competent to allow the appellant to implead a person for the first time after the limitation for the appeal has expired: *A I R 1937 Lah 180 and A I R 1938 Lah 35, Rel. on.*

[P 314 C 2]

(b) Limitation Act (1908), S. 5 — Appeal in S. 5 means appeal that is to be instituted for first time and not one which has already been instituted but is amended later on owing to some defect in memorandum of appeal.

Section 5 contemplates an appeal, application for review of judgment or for leave to appeal or any other application to which S. 5 may be made applicable and an appeal there means an appeal that is to be instituted for the first time and not an appeal which has already been instituted but is amended later on account of any defect having been noticed in the memorandum of appeal. Unless therefore this Section is made specially applicable to such cases, S. 5 cannot be invoked by an appellant who has omitted to implead a necessary respondent in the case and the effect of whose omission is the dismissal of the appeal.

[P 315 C 1]

Dr. Nand Lal—for Appellants.

Barkat Ali—for Respondents.

Judgment.—The suit out of which this

appeal has arisen was originally instituted by Hira Singh. During the pendency of the suit he died; and in his place Shangara Singh, Kartar Singh, Bala, Lakha and Chandar were brought on the record as his legal representatives. The suit was for a declaration and permanent injunction. The trial Court decreed the suit on 16th January 1939, and an appeal against that order was preferred on 20th February 1939. In the memorandum of appeal the persons impleaded as respondents were Shangara Singh, Kartar Singh, Bela and Jhanda. On 25th May 1939, when the appeal came for hearing before the Senior Subordinate Judge, counsel for the respondents raised a preliminary objection that the names of Bala, Lakha and Chandar, respondents, did not appear on the record and that consequently the appeal could not proceed. So far as Lakha was concerned, the objection was literally correct, but as regards Bala and Chandar, the objection amounted to this: that their names had been wrongly described as Bela and Jhanda. Thereupon, an application was made by the appellants through their counsel on which the only order passed was that it should be placed on the record and that a separate order had been made. The order that appears to have been made in this connexion appears in the judgment itself disposing of the appeal, which says that as the copy of the judgment which was supplied to the appellants did not mention the name of Lakha and misdescribed the name of Chandar and Bala, the plaintiffs could not be penalized for the mistake of the copying department and that consequently they were entitled to the benefit of S. 5, Limitation Act. Giving them this benefit, the Senior Subordinate Judge entertained the appeal and allowed it.

Dr. Nand Lal, counsel for the appellant, has urged that the Senior Subordinate Judge was not competent to allow the appellant to implead Lakha for the first time after the limitation for the appeal had expired and I agree with him. Reference in this connexion may be made to 18 Lah 136¹ and 18 Lah 746,² in which the judgments were written by myself as a member of the Division Bench. There relying

1. Teja Singh v. Katar Kaur, (1937) 24 A I R Lah 180=172 I C 266=I L R (1937) 18 Lah 136=39 P L R 301.

2. Hayat v. Mutalli, (1938) 25 A I R Lah 35=175 I C 819=I L R (1937) 18 Lah 746=40 P L R 273.

on 6 Rang 29,³ it was held that O. 41, R. 20, Civil P. C., did not come into play to enable the Court to implead as a respondent a person who had been originally left out, inasmuch as he could not be described as a person interested in the appeal within the meaning of that rule. In the second judgment, it was further observed that to such cases S. 5, Limitation Act too did not apply. Counsel for the respondents has urged that this decision, so far as S. 5 is concerned, is open to doubt. This may be so, but sitting as a single Judge I am bound by a Division Bench judgment of this Court.

Even otherwise, I am still of the opinion that to a case like the present the benefit of S. 5 cannot be extended. That Section contemplates an appeal, application for review of judgment or for leave to appeal or any other application to which S. 5 may be made applicable, and an appeal there means an appeal that is to be instituted for the first time and not an appeal which has already been instituted but is amended later on account of any defect having been noticed in the memorandum of appeal. Unless therefore this Section is made specially applicable to such cases, S. 5, Limitation Act, cannot be invoked by an appellant, who has omitted to implead a necessary respondent in the case and the effect of whose omission is the dismissal of the appeal. As remarked by their Lordships of the Privy Council, a very valuable right is secured to such persons and they cannot be deprived of their right merely by the exercise of discretion which apparently is not vested in the Court. I have no hesitation in holding therefore that the Senior Subordinate Judge was not authorized under the law to allow the appellant to implead Lakha as a respondent for the first time, after the expiry of limitation and that, in the circumstances of the case, he was bound to hold that the appeal could not proceed, as the decree in his favour was an indivisible whole. I accordingly allow this appeal, set aside the order of the Senior Subordinate Judge and restore that of the trial Court with costs throughout.

Note.—This judgment has been affirmed by Tek Chand and Bhide JJ., in Letters Patent Appeal No. 87 of 1940 decided on 2nd May 1940.

D.S./R.K.

Appeal allowed.

8. *Ohockalingam Chetty v. Seethai Ache*, (1927)
14 A I R P O 252 = 107 I O 237 = 55 I A 7 = 6
Rang 29 (P.O).

* A. I. R. 1940 Lahore 315

SPECIAL BENCH

DALIP SINGH, BHIDE AND BLACKER JJ.

Hakim Mohammad Hussain

Petitioner

v.

Emperor.

Civil Ref. No. 4 of 1940, Decided on 6th May 1940; case referred by Financial Commissioner, Revenue, Punjab, D/- 5th January 1940.

* (a) Stamp Act (1899), Ss. 35, 40 and 48—Document insufficiently stamped — Person not originally bound to bear stamp duty wishing to have document admitted in evidence in Court—He cannot be compelled to pay duty—Payment is left to his choice.

There is no provision in Ss. 35, 40 and 48 nor in the Act to enable either the Court or the Collector to compel the person who wishes to have an insufficiently stamped document admitted in evidence in Court to pay the duty or penalty when he is not the person who was originally bound to bear the expense of providing the duty. The payment of such duty or penalty is left to his choice under Ss. 35 and 40. He cannot be considered to be a person from whom the stamp duty or penalty is due and consequently the same cannot be recovered from him under S. 48: 30 *All 271*, *Not approved*. [P 317 C 1, 2]

(b) Stamp Act (1899), Ss. 17, 29 and 48 — Duty and penalty are debts due to Crown from person liable to pay same — They can be recovered from his estate in hands of legal representatives.

The duty and the penalty in respect of a document leviable from the person liable to pay the same must be considered to be a debt due from him to the Crown. The mere fact that the document did not come to the notice of the Collector during the lifetime of the person liable does not mean that the liability did not exist. The duty and penalty leviable can be recovered according to general law from such portion of his estate as may be found in the hands of his legal representatives, in the same manner as it could have been recovered from himself during his lifetime under S. 48. [P 318 C 1]

Bashir Ahmad — *for Petitioner.*

Sleem, Advocate-General —

for the Crown.

Bhide J. — This is a reference by the Financial Commissioner (the Chief Controlling Revenue Authority in the Punjab) under S. 57, Stamp Act. The material facts of the case giving rise to the reference may be shortly stated. On 18th January 1912, one Chiragh-ud-Din executed a document settling his property on his sons, daughters and wives in certain proportions and appointing one of his sons named Abdul Majid as manager of the property left to him and three of his brothers, namely Abdul Hamid, Abdul Rashid and Mohammad Saeed. The

document was executed on a stamp paper of annas eight only. After the death of Chiragh-ud-Din the document was produced by Hakim Mohammad Hussain, one of his sons, in a civil suit, but an objection was taken that the document was insufficiently stamped. The learned Sub-Judge trying the suit impounded it and sent it on to the Collector under S. 38 (2), Stamp Act, for necessary action. The Collector, purporting to act under the provisions of S. 40 of that Act, required Mohammad Hussain, who produced the document, to pay stamp duty amounting to Rupees 498.8.0 and a penalty of Rs. 500. Mohammad Hussain applied for revision of the order of the Collector and the Financial Commissioner has referred the following two points for decision of this Court :

1. Whether stamp duty and penalty can be recovered from a person who presents an insufficiently stamped document to a Court when he is not himself the executant.

2. Where such a document has been impounded whether Government can pursue its claim against the estate of the deceased executant.

As regards the first question, it is conceded that there is no distinct provision in S. 40 or anywhere else in the Indian Stamp Act empowering the Collector to demand the proper stamp duty or any deficiency therein, on a document impounded and forwarded to him by a Court under S. 38 (2), from the person who produced it in Court. S. 40, no doubt, empowers the Collector to 'require' the stamp duty or deficiency to be paid; but it is significant it is silent as to the person or persons who can be required to pay the same. The learned counsel for the petitioner Hakim Mohammad Hussain who produced the document in question in Court in the present case had urged that the only person who can be required to pay the stamp duty or deficiency is the person who is legally liable to pay it. In this connexion he has referred to the provisions of Ss. 17 and 29, Stamp Act, and pointed out that the stamp duty has to be paid before or at the time of the execution of the document according to S. 17 and that in the case of a 'deed of settlement,' it is the executant who has to bear the expense of providing the stamp according to S. 29. The learned Advocate-General has on the other hand, argued that as the document is impounded by the Court and forwarded to the Collector under S. 38 (2) owing to the failure on the part of the person who produced it to pay the necessary stamp duty or deficiency in Court, it should be inferred that the Col-

lector has authority to demand its payment from the person who presented the document in Court. He has further pointed out that S. 29 lays down that the stamp duty or deficiency has to be paid by the executant in certain classes of instruments only and that too in the absence of an agreement to the contrary and has urged that it would be very inconvenient if the Collector has to trace the executant in such cases and hold an inquiry if there was or was not any agreement making some other person liable for the payment of the duty. Lastly he has also referred in support of his argument to S. 44, Stamp Act, which provides that when any stamp duty or penalty has been paid under S. 35, S. 37, S. 40 or S. 41 by any person in respect of an instrument, and by agreement or under the provisions of S. 29 or any other enactment in force some other person was bound to bear the expense of providing the proper stamp, the person paying the duty or penalty shall be entitled to recover the same from such other person the amount of the duty or penalty so paid.

The only authority which the learned Advocate-General was able to cite in support of his contentions was 30 All 271,¹ in which it was held that it is the person who wishes a document to be admitted in evidence in Court from whom the Collector can recover the duty and penalty in the first instance. The learned Judges who decided that case seem to have relied merely on the provisions of S. 44, Stamp Act, in support of this conclusion, but with the greatest respect I must say that that Section does not appear to be at all conclusive on the point. It may be observed at the outset that the person who wishes a document to be admitted in evidence in Court may be—and very often is—different from the executant as well as from the person who has the custody of the document and actually produces it in Court. The first question referred by the Financial Commissioner is whether the "stamp duty" can be recovered from the person "who presents an insufficiently stamped document in Court." If a person, who happens to have the document in his custody merely produces it in Court on being required by the Court to do so, there seems to be no reason whatever why he should be made liable to pay the duty or penalty and even the Allahabad ruling cited by the learned Advocate-General does not seem to go to the length of holding that

1. *Secy. of State v. Basharat Ullah*, (1908) 30 All 271=5 A L J 262=1908 A W N 130.

such a person can be 'required' to pay the stamp duty or deficiency. That ruling does hold that a person who wishes to have the document admitted in evidence in Court can be required to pay the requisite duty or penalty in the first instance. But S. 44, Stamp Act, on which reliance has been placed in that ruling does not appear to support such a conclusion. That Section merely enables a person who has paid the duty and penalty under Ss. 35, 37, 40 or 41 to recover the same from the person who was bound to bear the expense of providing it; but it does not throw any light on the question before us, viz. what person or persons can be 'required' to pay the stamp duty or penalty under S. 40.

If the intention of the Legislature was that the necessary duty or penalty should be recovered from the person who wishes to have the document admitted in Court, one would have expected to find some provision to that effect in the Section itself or at least somewhere else in the Act. But no such provision has been made. The reason is I think not far to seek. When a person wishes to have a document admitted in Court for the purpose of his case it may often be to his interest to pay the duty and penalty at once in order to get the document admitted in evidence, as the person who was originally bound to bear the expense of providing the stamp duty may not be traceable at the time or may not be prepared to pay the duty or penalty voluntarily. If he does so to suit his convenience the provisions of S. 44 enable him to recover the same from the person who was originally bound to bear the expense of providing the duty. But there is nothing in S. 35 or S. 40 to enable either the Court or the Collector to compel the person who wishes to have the document admitted in evidence in Court to pay the duty or penalty. The only reasonable inference in the circumstances seems to be that the payment of such duty or penalty is left to his choice under these Sections. There seems, in fact, no good reason why a person, who merely wishes to have a document admitted in evidence, should be compelled to pay the duty or penalty thereon, when he is not the person who was originally bound to bear the expense of providing the duty. If he does not choose to pay the duty and penalty under S. 35 or S. 40, he has to take the consequence of not being able to use the document. But it would be obviously hard and unfair to compel such a person to pay the

duty on the document merely because he attempted to produce it in evidence. The stamp duty may be heavy and he may not be even in a position to pay it, or it may not be worth his while to do so, for the purposes of his case. The Legislature therefore seems to have advisedly left the matter to his choice. It is true that the Collector may not be able to trace easily the executant or the person bound to pay the duty on the document in such cases and there may be some inconvenience as a result in collecting the stamp duty or penalty. But this can scarcely justify penalizing a person who was not responsible for paying the stamp duty at the time of the execution of the document.

The provisions of S. 48, Stamp Act, are also worthy of attention in this respect. According to that Section, all duties, penalties and other sums required to be paid under Ch. 4 of the Act (Ss. 33 to 48) may be recovered by the Collector by distress and sale of the moveable property of the person from whom the same are due or by any other process for the time being in force for the recovery of arrears of land revenue. This seems to be the only provision in the Act for realization of stamp duty and penalty under Ch. 4 by legal process when it is not voluntarily paid, and it is significant that there is no provision in this Section also for realizing the duty and penalty except from the person 'from whom the same are due.' As already pointed out, there is no provision in the Act, making a person who merely presents an insufficiently stamped document for being admitted in evidence liable for payment of the requisite stamp duty or penalty on the document. He cannot therefore be considered to be a person from whom the stamp duty or penalty is due and consequently the same cannot be recovered from him under S. 48. If the stamp duty or penalty has to be recovered compulsorily, it can be legally recovered under S. 48 only from the person from whom the same is due. In order to ascertain the person or persons from whom the duty or penalty is due we must go back to S. 29. According to that Section, it was Chiragh Din, the executant of the deed of settlement who was bound to bear the expense of providing the stamp duty in the present instance. The duty could therefore have been recovered from him under S. 48. It has been urged that S. 29 is not exhaustive, that there are several classes of instruments for which no provision is made in

that Section and the Section would therefore be of no assistance in fixing the liability for payment of duty or penalty in the case of such instruments. This contingency does not however arise in the present instance as a deed of settlement is covered by S. 29 and the point need not therefore be considered for the purposes of this reference. But it may be observed that if it is found that the Stamp Act does not in fact fix the liability for payment of stamp duty on any particular person in the case of any instrument, the consequence will presumably be that the Collector will keep the impounded document in his custody and no person interested in the document will be able to make any use of it until and unless the necessary stamp duty and penalty is paid. For reasons given above, I would answer the first question in the negative.

As regards the second question, the answer would seem to depend upon the provisions of Ss. 17, 29 and 48, Stamp Act. As pointed out already, according to Ss. 17 and 29, it was Chiragh-ud-Din, the executant, who was responsible for payment of the stamp duty at the time of the execution of the deed of settlement. As he did not do so, he would have been held liable for its payment as well as of any penalty that the Collector may have chosen to impose, whenever the document had been brought to his notice. As it happened, the document never came to the notice of any Court or the Collector during the lifetime of Chiragh-ud-Din. All the same as he was the person liable for providing the stamp duty, and also for payment of any penalty which the Collector might consider appropriate in the circumstances of the case, the duty and the penalty leviable from Chiragh-ud-Din must, I think, be considered to be a debt due from him to the Crown. This debt could have been realized from Chiragh-ud-Din any time during his life-time if the document has been brought to the notice of the Collector. The mere fact that the document did not come to his notice during the lifetime of Chiragh-ud-Din does not mean that the liability did not exist. There seems to be no good reason in the circumstances why the duty and penalty leviable from Chiragh-ud-Din should not be recovered according to general law from such portion of his estate as may now be found in the hands of his legal representatives, in the same manner as it could have been recovered from Chiragh-ud-Din himself during his lifetime under S. 48.

I would therefore hold that the Government can pursue its claim against Chiragh-ud-Din against such portion of his estate as may now be in the hands of his legal representatives, and recover it from that estate in the same manner as it could have been recovered from Chiragh-ud-Din himself during his lifetime under S. 48 and would answer the second question accordingly. In view of all the circumstances, I would make no order as to costs of this reference.

Dalip Singh J.—I agree.

Blacker J.—I agree.

G.N./R.K.

Reference answered.

A. I. R. 1940 Lahore 318

YOUNG C. J. AND TEK CHAND J.

Smt. Shiv Devi and others —

Defendants — Appellants.

v.

*Nauharia Ram, Plaintiff, and another,
Defendant — Respondents.*

First Appeal No. 12 of 1939, Decided on 5th December 1939, from decree of Sub-Judge, First Class, Lahore, D/- 29th November 1938.

Succession Act (1925), S. 105—Construction — Word "lapse" — To prevent legacy from lapsing testator must clearly exclude lapse and indicate who is to take in case of legatee dying in his lifetime.

A testator may prevent a legacy from lapsing. But in order to do so he must clearly exclude lapse and must clearly indicate who is to take in case the legatee should die in his lifetime : (1872) 14 Eq 343, *Rel. on.* [P 319 C 2]

Therefore where the testator makes a bequest in favour of his wife and daughters of his property in four equal shares in the absence of any clear exclusion and indication as to who is to take in case a legatee should die in his lifetime, the bequest to the wife on her death during the lifetime of the testator lapses and passes to the son whom the testator had tried to exclude. [P 319 C 2]

J. G. Sethi and M. L. Sethi —

for Appellants.

Khushi Ram Khanna, and Mehr Chand

Mahajan and Hem Raj Mahajan —

for Respondents 2 and 1, respectively.

Young C. J. — This is a first appeal from the decree granted by the learned Subordinate Judge, First Class, at Lahore. Nauharia Ram obtained a decree against Mela Ram. A shop and a house alleged to belong to Mela Ram were attached in execution of the decree. Three sisters of Mela Ram lodged an objection and were successful. Nauharia Ram, decree-holder, therefore brought this suit for a declaration under O. 21, R. 63, Civil P. C., that Mela Ram, defendant, was the owner of the shop and

house and that they were liable to attachment. The defendants pleaded that the shop and house belonged to their father Amar Nath and that he had made a will leaving the property to them. They further pleaded that there was a partition between the defendant Mela Ram and his father and that in the partition the shop and house fell to the share of their father. Various issues were framed and the learned Judge came to the conclusion that the will was valid, that there had been a partition but that on the interpretation of the will only three-fourths of the estate passed to the daughters and one-fourth of the estate which has been left to the wife of the testator but who pre-deceased him lapsed and therefore fell into residue and Mela Ram was the owner of this one-fourth of the estate. In appeal here only one question has been argued and that is the question of the construction of the will. The important portions of the will are as follows :

After my death, my wife Mt. Goman and my daughters, Shib Devi, widow of Dr. Devi Das, Bibi Ramon, wife of Rikhi Ram, and Bibi Kanso, wife of Panna Lal, shall be treated as owners of the entire property I leave. It is stipulated that my aforesaid wife shall during her lifetime herself realize the entire rent or income of the entire property left by me, and spend it as she likes, but that after her death my aforesaid daughters shall bring my property of every description into their use and occupation as owners and possessors in equal shares My wife and daughters shall, like myself, be competent to alienate the property left by me in any way.

It appears to us after a careful consideration of this document and after hearing counsel that the only true construction of the will is that the testator left his estate to his wife and three daughters in equal shares, that is each would possess a quarter of his estate on his death, but that during the lifetime of the wife she would have the usufruct of the whole estate and it would be only after the wife's death that the three daughters would get the full benefit of the estate. The last words quoted clearly show that the testator did actually bequeath to his wife ownership of one-fourth of the estate. The wife having died in the lifetime of the testator, it is clear that this legacy would lapse. S. 105, Succession Act, is as follows :

If the legatee does not survive the testator the legacy cannot take effect but shall lapse and form part of the residue of the testator's property unless it appears by the will that the testator intended that it should go to some other person.

The whole point in this case is the last words of the sentence "unless it appears

by the will that the testator intended that it should go to some other person." The meaning of the term "lapse" has been dealt with in (1872) 14 Eq 343.¹ There the Vice-Chancellor said thus :

It is, I think, quite clear that a testator may prevent a legacy from lapsing, but the authorities show that in order to do that, he must do two things : he must in clear words exclude lapse ; and he must clearly indicate who is to take in case the legatee should die in his lifetime.

It is perfectly clear in the will which we have to construe that there is no clear exclusion. The testator obviously never contemplated the death of either his wife or any of his three daughters in his lifetime. He had contemplated his own death and that was all. Equally, there is no indication as to who was to take in case a legatee should die in his lifetime. It is clear therefore that the bequest to the wife lapses. While it is perfectly clear that the testator did everything he could to exclude his son Mela Ram from his will he has, through events over which he had no control, not been able to exclude Mela Ram to the extent of one-fourth of his estate. The decision of the lower Court in this connexion is, in our opinion, correct on the proper construction of the will, and this appeal is dismissed with costs.

G.N./R.K.

Appeal dismissed.

1. Browne v. Hope, (1872) 14 Eq 343=41 L J Ch 475=27 L T 688=20 W R 667.

A. I. R. 1940 Lahore 319

BLACKER J.

Khair Din — Convict — Appellant

v.

Emperor.

Criminal Appeal No. 1042 of 1939, Decided on 11th January 1940, from order of Magistrate, First Class, Kasur, D/- 21st July 1939.

Penal Code (1860), Ss. 411 and 414 — *A* admitting commission of theft — While pleading guilty before charge *A* stating that he sold property to *B* without disclosing it to be stolen — Joint trial of both and conviction under S. 411 is not justified—Proper course stated.

Where *A* admits the commission of theft and while pleading guilty before charge states that he sold a part of the property to *B* without disclosing that it was stolen, a joint trial of both the accused and conviction under S. 411 cannot be sustained. The proper course for the Magistrate in such circumstances is to separate the cases and convict *A* under S. 414, Penal Code, and to call him as a witness in *B*'s case in order that his exoneration of *B* might be tested by cross-examination and acted upon if found to be trustworthy.

[P 820 C 1]

Judgment.—Khair Din and Dheru were tried jointly by a Magistrate at Kasur and convicted under S. 411/75, I. P. C. Dheru was sentenced to 18 months' rigorous imprisonment and Khair Din to seven years. They both appeal from jail and I will deal with both appeals in this judgment. Dheru's case presents no difficulty. He pleaded guilty and admitted that he had committed the theft. In view of this admission it is however curious that the Magistrate only convicted him under S. 411. As he admitted himself to be the thief and not merely the receiver the conviction should obviously be under S. 414 and I alter it accordingly. The sentence is not excessive especially as the man is a previous convict.

With regard to Khair Din however it is to be noted that Dheru in his statement before the charge admitting his guilt stated that actually one of the prosecution witnesses, Farid Bakhsh, was his accomplice and that although he did sell part of the stolen property to Khair Din he did not tell Khair Din that it was stolen property. The proper course for the Magistrate in such circumstances was to have separated the cases and called Dheru as a witness in Khair Din's case in order that his exoneration of Khair Din might be tested by cross-examination and acted upon if found to be trustworthy. Instead of that the learned Magistrate has entirely ignored it. With regard to Khair Din's appeal, I set aside the conviction and direct that he be retried from the stage at which the charge was framed against him and that Dheru should be called as a Court witness and that the Crown should be permitted to cross-examine him with regard to his statement if it thinks so fit. In order to avoid misunderstanding I suppose I must add that this order cannot be construed as debarring the defence for cross-examining the witness as well.

G.N./R.K. *Order accordingly.*

*** A. I. R. 1940 Lahore 320**

TEK CHAND AND BHIDE JJ.

Sher Singh and another —

Judgment-debtors — Appellants.

v.

Baldev Singh — Decree-holder —

Respondent.

Letters Patent Appeal No. 128 of 1939, Decided on 7th May 1940, from judgment of Dalip Singh J.; *Reported in A I R 1939 Lahore 556.*

* Civil P. C. (1908), S. 60 — For debts of certain person decree passed against his non-agriculturist legal representative—Property in his hands is liable to attachment even if original debtor was agriculturist.

Where for the debts of a person a decree is passed against his legal representative who is non-agriculturist his property derived from original debtor is liable to attachment even if the original debtor was an agriculturist: *A I R 1939 Lah 556, Affirmed; A I R 1936 Lah 895 and A I R 1938 Lah 608, Disting.* [P 320 C 2]

F. C. Mital — *for Appellants.*

Q. C. Mital — *for Respondent.*

Bhide J. — This appeal arises out of execution proceedings relating to a decree passed against Sher Singh and Bhola Singh as the legal representatives of their uncle Mithe. One-half share in a house was attached as the property of Bhola Singh in execution when objection was raised by him that the property was not liable to be sold as Mithe for whose debt the decree was passed was an agriculturist and the house which had been inherited from him was therefore not liable to be sold according to S. 60 (c), Civil P. C. The decree-holder, on the other hand, contended that the house was liable to be sold as Bhola Singh himself was not an agriculturist. The learned Judge in Single Bench has upheld this contention and directed the property to be sold. From this decision Bhola Singh has preferred the present appeal under Cl. 10, Letters Patent. The learned counsel for the appellant has relied in support of his contention chiefly on two rulings of this Court reported in *A I R 1936 Lah 895*¹ and *A I R 1938 Lah 608*.² These rulings are, however, distinguishable as in the present case the decree was passed against Bhola Singh himself and he must therefore be considered to be the "judgment-debtor" for the purpose of S. 60. According to that Section, it seems clear that exemption can be claimed only if the judgment-debtor is an agriculturist. In the present instance it has been found as a fact that Bhola Singh is not an agriculturist. In view of this finding, the decision of the learned Single Judge seems to be correct.

The question whether the position would have been different if the decree had been passed against Mithe, (who was an agriculturist) and was then sought to be executed

1. *Hirda Ram v. Mohammad Din*, (1936) 23 *A I R Lah 895* = 167 *I O 457*.

2. *Gurparshad Dewat Ram v. Kishen Chand*, (1938) 25 *A I R Lah 608* = 177 *I C 835* = 40 *P L R 409*.

against his property in the hands of Bhola Singh (a non-agriculturist) as his legal representative, is not free from difficulty. The rulings cited by the learned counsel for the appellant seem to support this view; but there is a good deal to be said in favour of the contrary view. However, we consider it unnecessary to go into this question for the purposes of this appeal and express no opinion on it. We dismiss the appeal with costs.

D.S./R.K.

*Appeal dismissed.***A. I. R. 1940 Lahore 321****TEK CHAND AND ABDUL RASHID JJ.***Kartar Singh and others — Defendants*
—Appellants.

v.

Sant Singh and others, Plaintiffs and others, Defendants—Respondents.

First Appeal No. 353 of 1938, Decided on 28th February 1940, from decree of Senior Sub-Judge, Ferozepore, D/- 20th July 1938.

(a) Vendor and Purchaser—Major portion of consideration left with vendees who undertook to pay various creditors of vendor—On default vendees held liable to indemnify vendor for loss occasioned by default.

The major portion of the consideration had been left with the vendees who undertook to pay the money left in trust with them to the various creditors of the vendor on securing receipts from them and redeem the land purchased by them. On default by the vendees to pay the creditors as aforesaid :

Held that an implied obligation was cast on the vendees to indemnify the vendor for the loss sustained by their default: (1802) 7 Ves 332; 31 All 583 (P C); A I R 1933 All 386; A I R 1938 All 297 (F B); A I R 1934 Mad 1 and A I R 1939 Pat 194, Rel. on. [P 323 C 2]

(b) Limitation Act (1908), Arts. 83 and 116—Major portion of sale consideration left with vendee for payment to vendor's creditors—Default by vendee—Suit by vendor against vendee for damages for loss caused by default—Suit is governed by Art. 83 read with Art. 116—Time runs from date when vendor is actually damnified.

Where a major portion of the sale consideration is left with the vendee for payment to the various creditors of the vendor and the vendee commits default, a suit by the vendor against the vendee for loss occasioned by the default is in substance a suit for damages for breach of a contract of indemnity and is governed by Art. 83 which must be read with Art. 116 where the sale deed on which the claim is based is a document in writing registered. Time runs from the date on which the vendor is actually damnified: A I R 1933 PC 143; A I R 1933 Lah 109; A I R 1938 All 297 (F B) and A I R 1939 Pat 194, Ref. [P 324 C 2]

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(c) Vendor and Purchaser — Vendee of property subject to mortgage undertaking to pay off mortgagee from amount of purchase money left with him — On vendee's default vendor doing nothing to mitigate damages — Vendor cannot recover full amount of loss sustained.

Where the vendee of the property subject to a mortgage undertakes to pay off the mortgagee from out of the amount of purchase money left with him but commits default and the vendor does nothing to mitigate the damages when he discovers that the vendee had been in default and does not even warn the vendee of the consequences of the delay, nor makes a demand from him for payment of the amount either to the creditor or to himself, he is not entitled to recover from the vendee the full amount of the loss sustained by him. [P 325 C 1]

J. N. Aggarwal and F. C. Mital —

for Appellants.

Achhru Ram and D. N. Aggarwal (for Man Singh, Nand Singh and Chanan Singh), Sardar Iqbal Singh (for Jaswant Singh and Balwant Singh), Shamair Chand and Chandra Gupta for Shamair Chand (for Nathu Ram) and Bhagat Singh (for Bawa Sant Singh)—

for Respondents.

Tek Chand J. — This appeal arises out of a suit for damages for breach of contract instituted by Sant Singh, plaintiff-respondent against five defendants, Kartar Singh, Balwant Singh and Autar Singh, sons of Ranjit Singh and Jaswant Singh and Balwant Singh, sons of Bhagat Singh. The trial Court has granted the plaintiff a decree for Rs. 8640-14-0, with proportionate costs, against the first three defendants, but has dismissed the suit against the last two defendants. Sant Singh, plaintiff and his brother Jagat Singh jointly owned land in two villages, mauza Atari and mauza Dabra. On 29th January 1924, by a registered deed Sant Singh mortgaged his half share of the land in mauza Dabra to one Nathu Ram for Rs. 2000, carrying interest at Rs. 3-2-0 per cent. per mensem. By another registered deed, executed on 29th June 1924, Sant Singh mortgaged his share in the joint holding at mauza Atari to Nathu Ram and Ram Chand for Rs. 2000. This mortgage was with possession but, on the same day, the mortgagor took the mortgaged land on lease from the mortgagee on an annual rental of Rs. 480.

On 21st August 1925, Sant Singh exchanged his half share in the land in mauza Dabra with Jagat Singh's half share in the land at mauza Atari. Thus Sant Singh became the exclusive owner of the land which was originally held by the two brothers jointly in that village. Three days later, on 24th August 1925, Sant Singh sold his

entire land in mauza Atari for Rs. 12,000 to two sets of vendees, in equal shares, namely (1) Kartar Singh, Balwant Singh and Autar Singh (defendants 1 to 3) and (2) Bhagat Singh, father of Jaswant Singh and Balwant Singh (defendants 4 and 5). Out of the sale price Rs. 193-10-0 was received by the vendor for defraying the stamp and registration expenses and he also received Rs. 100 in cash before the Sub-Registrar. The remainder of the consideration, Rs. 11,706-6-0, was left with the vendees for payment of debts due by the vendor to various persons, of which details were given in the deed. Out of this sum, Rs. 5200 was described in the deed as having been left in deposit with the vendees for payment to Ram Chand and Nathu Ram, residents of Muktsar, on account of mortgage money in respect of this and other land.

It appears, that the second set of vendees (defendants 4 and 5), the sons of Bhagat Singh, paid Rs. 6025 to several of the creditors mentioned in the deed, but the first set of vendees (defendants 1 to 3) paid a very small sum to one of the creditors. The principal creditors, Nathu Ram and Ram Chand, mortgagees, to whom the sum of Rs. 5200 was stated to be due in the sale deed were not paid at all. In 1928 these mortgagees, Nathu Ram and Ram Chand, instituted a suit against Sant Singh, plaintiff, and the defendants-vendees for recovery of Rupees 6288-7-6, alleged to be due on foot of the mortgage of the Atari land, which had been effected in their favour by Sant Singh on 29th June 1924. In this suit a preliminary decree for Rs. 6288-7-6 was passed in terms of O. 34, R. 4, Civil P. C., on 12th March 1929. This decree was made final on 22nd April 1930. In execution of this decree, the mortgaged land in Mauza Atari was sold by public auction to the decree-holders for Rs. 5000. The decree-holders took no steps to recover the balance of the decree from the judgment-debtors and therefore this claim has become barred by time and this mortgage or decree is no longer in dispute.

In 1931, Nathu Ram brought an action against Sant Singh for recovery of Rupees 7659-6-0 as due on the mortgage of the Dabra land, which had been effected by Sant Singh in his favour on 29th January 1924. In this suit a preliminary decree for Rs. 7659-6-0, carrying future interest at 25 per cent. per annum, was passed in terms of O. 34, R. 4, on 29th October 1931. This decree was made final on 21st April 1932. In execution of the decree, the mort-

gaged land at Mauza Dabra was sold by public auction to the decree-holder, Nathu Ram, for Rs. 3200 only. Nathu Ram then applied under O. 34, R. 6 for a personal decree for the balance of the decretal amount against Sant Singh and, on 18th November 1932, the Court granted him a personal decree for Rs. 7600. In execution of this (personal) decree, Nathu Ram, attached certain mortgagee rights held by Sant Singh in land belonging to certain third parties, and these mortgagee rights were sold in execution to Nathu Ram himself for Rs. 1400 on 22nd July 1935.

On 19th November 1935, Sant Singh presented a plaint, in forma pauperis, against Kartar Singh, Balwant Singh and Autar Singh, sons of Ranjit Singh, and Jaswant Singh and Balwant Singh, sons of Bhagat Singh (who had died in the meantime) for recovery of Rupees 13,948 as damages for breach of the contract, as embodied in the sale deed of 24th August 1925, whereby they had agreed to pay to Nathu Ram and Ram Chand prior mortgagees Rs. 5200, which had been left in deposit with them out of the consideration, but which had not been paid at all. The defendants denied that the plaintiff was a pauper and a lengthy enquiry ensued. Eventually, the plaintiff made good the amount of court-fee on 21st June 1937, when an amended plaint was filed. In the amended plaint, the claim was reduced to Rs. 12,348 which, he alleged, represented the loss suffered by him by reason of the defendants' failure to pay Nathu Ram, as follows :

- Rs. 3200: Price of the Dabra land which he lost;
- Rs. 1248: Interest thereon at 1 per cent. per mensem from 1st August 1932 to the date of the suit;
- Rs. 7900: Value of the mortgagee rights which were sold in execution of the decree on 17th August 1935.

It was alleged in the plaint that there had been a mutual agreement between the defendants inter se, whereby defendants 1 to 3 had agreed to redeem the land in Dabra and pay Nathu Ram, mortgagee, and defendants 4 and 5 had undertaken to pay the other creditors. Therefore, the decree was claimed against these defendants (1 to 3) only; and it was stated that defendants 4 and 5 had been impleaded as pro forma defendants. The suit was resisted by defendants 1 to 3 on various grounds, of which those material for the purposes of this appeal are: (1) that in the sale deed the vendees had not taken on them any liabi-

lity to redeem the land in Mauza Dabra from Nathu Ram, which had not been sold to them by the sale in question; (2) that, in any case, there was no covenant of indemnity given by them to the vendor; (3) that the suit was barred by time; (4) that the plaintiff had not suffered damages in the sum claimed in the plaint, and (5) that, in any event, the decree should have been passed not only against the appellants, but also against defendants 4 and 5 as well.

The trial Judge found against the contesting defendants on the first three points. He held that the sum of Rs. 5200 left with the vendees, was to be paid to Nathu Ram and Ram Chand in redemption of the lands mortgaged both in mauza Atari and mauza Dabra, that the sale deed contained a covenant of indemnity by the vendees, and that the vendees having failed to pay the amount, were liable to indemnify the plaintiff for the loss caused, which he assessed at Rs. 8640-14-0. He further held that the suit was governed by Art. 83, read with Art. 116, Limitation Act, and was within time. Lastly, he found that there was an agreement between defendants 1 to 3 and the father of defendants 4 and 5, whereby the former had agreed to redeem the land at mauza Atari and Mauza Dabra, and the latter to pay the other creditors. On these findings he passed a decree in favour of the plaintiff against defendants 1 to 3 for Rs. 8640-14-0 with proportionate costs and dismissed the suit against defendants 4 and 5.

On appeal, the learned counsel for the appellants has assailed the findings of the Subordinate Judge on all the five points mentioned above. He has pointed out that the sale in question was in respect of the land in Mauza Atari only, and that in the deed it was not stated that Rs. 5200 had been left with the vendees for payment to Ram Chand and Nathu Ram, prior mortgagees, in redemption of the land in Mauza Atari as well as that in Mauza Dabra. He therefore urged that the appellants were under no liability to redeem the mortgage of the Dabra land from Nathu Ram. This contention is clearly without force. It was stated in the deed that the sum of Rs. 5200 had been left in deposit with the vendees for payment to Ram Chand and Nathu Ram "mortgagees in respect of this land (i. e. the land in Atari) and other land." It is true that the Dabra land was not mentioned in so many words in this clause, but there is no doubt that it was that land

which was referred to as the "other land." The vendor and the two sets of vendees are near relations; they live in the same village, and were well aware of each other's dealings. The persons to whom the sum of Rs. 5200 was to be paid were mentioned by name in the deed, and it has not been shown that any lands belonging to the vendor other than those in Mauza Atari and Mauza Dabra were under mortgage with them. The finding of the Subordinate Judge on this point is therefore correct and must be maintained.

The next contention raised by the learned counsel is that the deed did not contain, expressly or by necessary implication, any undertaking by the vendees, that they would indemnify the vendor for any loss that he might sustain by reason of the failure of the vendees to pay to the prior creditors the amount which had been left with them for the purpose. It is no doubt true that there is no such stipulation expressly mentioned in the deed. But the major portion of the consideration had been left with the vendees and they had undertaken that they

shall pay the money left in trust with them to the persons to whom it is due on securing receipts from them and redeem the land.

It is settled law that when a part of the sale-price is left with the vendees, an implied obligation is cast on them to indemnify the vendor for the loss sustained by their default. This obligation was described by Lord Eldon in the well-known case, (1802) 7 Ves. 332¹ at p. 336 as "an obligation of conscience," and it arises not only when the vendee of the equity of redemption has taken upon himself to discharge the burden on the property sold, but also to pay off other debts due by the vendor. This rule has been applied in numerous cases in India. The leading case on the subject is 31 All 583² in which Lord Macnaughten, while delivering the judgment of their Lordships of the Privy Council, observed that

on the sale of property subject to encumbrances the vendor gets the price of his interest, whatever it may be, whether the price be settled by private bargain or determined by public competition, together with an indemnity against the encumbrances affecting the land. The contract of indemnity may be expresse or implied. If the purchaser covenants with the vendor to pay the encumbrances it is still nothing more than a contract of indemnity.

1. *Waring v. Ward*, (1802) 7 Ves 332=5 R R 180.

2. *Izzadtunnisa Begam v. Kunwar Pertab Singh*, (1909) 81 All 583=3 I C 793=36 I A 203=6 A L J 817 (P O).

In 55 All 490,³ it was held that if a portion of the purchase money is left with a vendee for payment to a creditor of the vendor and no time is fixed for payment, there is an implied agreement on the part of the vendee to pay the amount due to the creditor either forthwith or within a reasonable time; and if the vendee commits a breach of this implied agreement and fails to pay, he is bound in law to indemnify the vendor for any damage sustained by the latter in consequence of the breach. I L R (1938) All 500⁴ was a case very similar to the one before us. There, upon a sale of the property the whole of the consideration money was left by the vendor with the vendee for payment and discharge, to that extent, of a mortgage existing on the property sold as well as on other property belonging to the vendor, but the payment was not made and the mortgagee obtained a decree on his mortgage and sold the mortgaged properties. On a suit by the mortgagee to recover damages caused by the default of the vendees in payment of the money left with them to the mortgagees, it was held by the Full Bench that there was a contract of indemnity, that the defendant-vendees were liable and that the case was governed by Art. 83 read with Art. 116, Limitation Act, the terminus a quo being the date when the vendor was damnified.

Other instances of cases in which, under similar circumstances, an "obligation of conscience" was held to have been impliedly cast on the vendee and on his default the indemnity was enforced against him will be found in 57 Mad 218⁵ and 17 Pat 751.⁶ No cogent reason has been suggested by the learned counsel for the appellants as to why a covenant to indemnify should not be inferred in this case and why it should not be enforced against the appellants who are admittedly in breach, they not having paid anything to Nathu Ram and Ram Chand from 1925, when the sale deed was executed up to the present day. The second contention fails and must be rejected.

3. Unkar Singh v. Kashi Prasad, (1933) 20 A I R All 386=143 I C 821=55 All 490=1933 A L J 787.

4. Tilak Ram v. Surat Singh, (1938) 25 A I R All 297=175 I C 241=I L R (1938) All 500=1938 A L J 455 (F B).

5. Rama Rayanimgar v. Venkatalingam, (1934) 21 A I R Mad 1=149 I C 379=57 Mad 218=66 M L J 4.

6. Mehdatunnissa Begum v. Hatimatunnissa Begum, (1939) 26 A I R Pat 194=181 I C 459=17 Pat 751.

The next point is that of limitation. Mr. Jagan Nath urged that the suit was governed by Art. 61, Limitation Act, and not Art. 83 read with Art. 116 as held by the lower Court. Art. 61 relates to suits "for money payable to the plaintiff for money paid for the defendant" and provides a period of three years for bringing the suit from the date when the money was paid. It is difficult to see how this Article can apply to the present case. Obviously, the claim as laid is for money payable to the plaintiff for money paid for the defendant. It is, in form and in substance, a suit for recovery of damages for breach of a contract of indemnity and as such is governed by Art 83, which must be read with Art. 116, as the sale deed on which the claim is based is a document in writing registered. The period of limitation is therefore extended to six years, running from the date "when the plaintiff is actually damnified." Reference may, in this connexion, be made to 11 Rang 186,⁷ 14 Lah 380,⁸ I L R (1938) All 500⁴ and 17 Pat 751.⁶ Admittedly, the plaintiff in this case was damnified on 1st August 1932, when the Dabra land was sold, and again on 2nd July 1935, when the mortgagee rights held by him in certain other lands were sold. The suit is therefore amply within time, whether it be taken to have been instituted on 19th November 1935, when the plaint was presented in forma pauperis, or on 21st June 1937, when the deficiency in the court-fee was made good.

It will be convenient at this stage to dispose of the last point raised by the appellants' learned counsel that the decree for the amount found due should have been passed, not against defendants 1 to 3 only, but also against the co-vendees, defendants 4 and 5, Balwant Singh and Jaswant Singh, sons of Bhagat Singh. It was stated in the plaint that it had been agreed between the two sets of vendees, that the appellants (defendants 1 to 3) would pay out of their share of the purchase price the mortgage charge of Nathu Ram and Ram Chand on the Atari and Dabra lands. This was admitted by defendants 4 and 5 but it was disputed by defendants 1 to 3. The evidence on the record however leaves no doubt that such an agreement had in fact been made

7. Ram Raghubir Lal v. United Refineries Burma, (1933) 20 A I R P C 143=142 I C 783=60 I A 183=11 Rang 186 (P C).

8. Gulzari Mal v. Maghi Mal, (1933) 20 A I R Lah 109=141 I C 435=14 Lah 380=34 P L R 156.

and that defendants 4 and 5 had carried out their part of it. It is conceded that they have paid Rs. 6025 to the various creditors of the vendors mentioned in the deed, which is more than their half share of the purchase price. Clearly, they were not in default and as has been shown above the persons responsible for the breach are the appellants themselves. The plaintiff himself does not want any decree against these defendants and it has not been shown that they are in any way liable for payment of the loss sustained by the plaintiff by the failure of the appellants to pay their share of the purchase price to Nathu Ram and Ram Chand.

The only remaining question is the amount of damages. The plaintiff's claim was for Rs. 12,348, being the price of the land in Dabra which he had lost as a result of the defendants' breach together with interest thereon, and the face-value of the mortgagee rights held by him in other lands, which were sold in execution of the personal decree which had been obtained by Nathu Ram against him under O. 34, R. 6. The learned Subordinate Judge has not accepted this as the correct measure of damages but has held that the proper criterion was to award to the plaintiff the amount for which Nathu Ram, mortgagee, had obtained a decree for the sale of land in Dabra on foot of the mortgage of 29th January 1924. This amount, including the costs of the mortgage suit, was Rupees 8640-14-0 and for this sum he has granted the plaintiff a decree. In the circumstances of the case, I am unable to accept this as the proper criterion.

It is no doubt true that the appellants had failed to carry out their undertaking to pay Rs. 5200 to Nathu Ram forthwith or within a reasonable time of the execution of the sale deed. It is equally true that they have not paid anything to the mortgagees up to this time. But it has also to be borne in mind that the plaintiff himself did nothing to mitigate the damages when he discovered that the vendees had been in default. He did not even warn the defendants of the consequences of the delay, nor did he make a demand from them for payment of the amount either to the creditors or to themselves. This is therefore not a case in which the plaintiff is entitled to recover from the appellants the full amount of the loss sustained by him. The sum left with the defendants was Rs. 5200 which was to be paid for redemption of the mort-

gages on the land in both villages Atari and Dabra. The land in Atari was sold for Rs. 5000 and the learned Subordinate Judge has calculated that the mortgage charge on the Dabra land on the date of the sale (24th August 1925) was Rs. 2480. This figure has been accepted as correct by both counsel before us. In my opinion, the proper amount of damages payable by the appellants is the sum which they should have paid to Nathu Ram at the time of the sale, i. e. Rs. 2480, together with interest thereon at 6 per cent. per annum from 24th August 1925 to 21st June 1937, which comes to Rs. 1760 approximately, or Rupees 4240 in all.

For the foregoing reasons, I would accept this appeal and, in modification of the decree of the lower Court, grant Sant Singh plaintiff-respondent a decree against Kartar Singh, Balwant Singh and Autar Singh, defendant-appellants, for Rs. 4240 with interest thereon at 6 per cent. from the date of the institution of the suit (21st June 1937) till realization. The plaintiff-respondent shall get proportionate costs in both Courts. The decree of the lower Court dismissing the suit against Jaswant Singh and Balwant Singh (defendants 4 and 5) shall stand and they shall bear their own costs in both Courts.

Abdul Rashid J. — I agree.

G.N./R.K.

Appeal accepted.

A. I. R. 1940 Lahore 325

TEK CHAND AND BHIDE JJ.

*Firm Pahlad Dass Bhagwan Dass—
Judgment-debtor — Appellant.*

v.

Seth Shanti Sagar and others —

Decree-holders — Respondents.

Letters Patent Appeals Nos. 118 and 119 of 1940, Decided on 14th May 1940, against judgment of Skemp J., in Ex. F. A. No. 416 of 1939, D/- 17th April 1940.

(a) Civil P. C. (1908), S. 47— Attachment in execution— Judgment-debtor withdrawing objections to attachment under O. 21, Rr. 66 and 2 in consideration of decree-holder allowing three months for payment and undertaking not to proceed with execution during that period— On Court's suggestion decree-holder making fresh execution petition and Court re-attaching property and dismissing former application without objection from judgment-debtor — After expiry of more than three months decree-holder taking out execution — Judgment-debtor insisting that objections under O. 21, Rr. 66 and 2 be heard on merits on ground that agreement was violated by decree-holder's fresh application—Court held justified in overruling objections.

In execution of his decree the decree-holder attached the property of the judgment-debtor who raised objections to the attachment under O. 21, Rr. 66 and 2. But in pursuance of an agreement the judgment-debtor withdrew his objections and the decree-holder allowed him three months time for payment of the decretal amount undertaking at the same time not to proceed with the execution during the aforesaid period. On the Court's suggestion however the decree-holder made a fresh execution petition, the property of the judgment-debtor was re-attached and the former application consigned to the record room without any objection from the judgment-debtor. More than three months after, the decree-holder took out execution on account of judgment-debtor's default. The judgment-debtor contended that the objections must be decided on merits before execution could proceed on the ground that the fresh execution petition and re-attachment were in violation of the agreement:

Held that though the procedure adopted by the Court was highly objectionable, the judgment-debtor was not prejudiced by the procedure adopted and the Court was justified in the circumstances in overruling the objections. [P 327 C 2]

(b) Civil P. C. (1908), O. 40, R. 1—Decree-holder seeking execution by attachment and sale of property—Judgment-debtor putting obstacles by raising all sorts of objections and delaying execution—Judgment-debtors also appropriating rents and profits and paying little or nothing to decree-holder—Appointment of Receiver held justified in circumstances.

The decree-holders in the execution of their decree by attachment and sale of the judgment-debtor's property asked for the appointment of a Receiver only till the properties could be sold in execution. They wanted to get the properties sold as soon as possible but the judgment-debtors put obstacles in their way by raising all sorts of objections and thus delaying the proceedings. As the judgment-debtors were in the meantime appropriating the rents and profits and paying little or nothing to the decree-holders the decree-holders hoped to get some portion of the rents and profits, at any rate by the appointment of a Receiver:

Held that the appointment of the Receiver was just and convenient in view of all the circumstances of the case: *A I R 1925 P C 176; A I R 1932 Cal 189 and A I R 1937 Lah 433, Expl.*

[P 329 C 1]

(c) Civil P. C. (1908), O. 40, R. 1—Discretion exercised on consideration of facts—It cannot be interfered in appeal unless shown to be improper or illegal.

When discretion is exercised by a Judge in the matter of appointment of a Receiver after considering the facts of the case, the discretion will not be interfered with in appeal, unless it is shown that it was improperly exercised or that the appointment contravenes any principles of law: *A I R 1922 Lah 444, Rel. on.* [P 329 C 1]

Vishnu Datta — for Appellant.

Kartar Singh — for Respondents.

Bhide J. — Letters Patent Appeals Nos. 118 and 119 of 1940 arise out of execution proceedings relating to a decree. One of the appeals is from an order dismissing certain objections to the sale of properties attached in the course of the execution

proceedings, while the other appeal is from the order appointing a receiver of the same properties. The facts of the two appeals being connected, it would be convenient to dispose of them together. The material facts may be shortly stated as follows. A decree was obtained on the basis of an award on 8th April 1932 for a sum of Rs. 80,000. The amount was to be paid with interest at 9 per cent. per annum from 1st August 1934 in monthly instalments of Rs. 3000 and in default of payment of three successive instalments the whole amount was to become payable forthwith. The judgment-debtors did not pay anything till 29th July 1935 when the first application for execution was made. Objections were raised to the attachment of certain properties. The application was eventually dismissed on 11th August 1936. Thereafter a sum of Rs. 5000 was paid by the judgment-debtors on 5th October 1936, and an additional sum of Rs. 3500 later on. On 16th February 1937 a second application for execution was made. Again objections were raised by the judgment-debtors under O. 21, R. 66, as well as under O. 21, R. 2. A considerable time was spent in getting service effected on witnesses cited by the judgment-debtors who were residing in Delhi and Calcutta. Ultimately, on 14th April 1939, the counsel for the judgment-debtors made a statement that he was prepared to withdraw all his objections on condition that the decree-holders gave three months' time and did not, in the meanwhile, proceed with the execution. The decree-holders' counsel agreed to this.

The Subordinate Judge, however, was not prepared to allow the execution case to remain pending as it had already become over two years old. He therefore suggested that a fresh application might be made by the decree-holders and a fresh attachment, of the properties effected. This course was adopted by the decree-holders and after the second application for execution had been made and the properties re-attached, the first application was consigned to the record room on 26th May 1939. The decree-holders did not take any active steps to realize the decree for a period of more than three months, according to the agreement which was arrived at between the parties on 14th April 1939. When the decree-holders wanted to proceed with the execution thereafter, the judgment-debtors raised an objection that the terms of the agreement between the parties had not been complied with as

the first application for execution had been dismissed and a fresh application had been made by the decree-holders and the properties had been attached a second time. The judgment-debtors, therefore, insisted that the objections which they had once more raised to the attachment of the properties under O. 21, R. 66 and O. 21, R. 2, should be decided on the merits. The Court, however, held that the decree-holders had substantially complied with the terms of the agreement and therefore overruled the objections of the judgment-debtors by order dated 12th October 1939. From this order the judgment-debtors preferred an appeal to this Court which was heard by a learned Judge in Single Bench and was dismissed on 17th April 1940. The judgment-debtors have now preferred an appeal under Cl. 10 of the Letters Patent from this order (Letters Patent Appeal No. 118 of 1940).

The decree-holders had also put in an application for the appointment of a receiver in view of the dilatory tactics which had been employed by the judgment-debtors. Since 1932, when the decree was passed, only a sum of Rs. 8500 is said to have been realized by the decree-holders. The judgment-debtors have been realizing the rents of the properties which were sought to be attached and sold in the present execution proceedings. The rents, according to the estimate of the decree-holders, amount to about Rs. 1000 per month (for the attached properties excluding the Palace Cinema), and yet in the course of eight years the judgment-debtors have not paid more than Rs. 8500 to the decree-holders. It is stated further that the properties are under mortgage and if the judgment-debtors are allowed to continue their dilatory tactics, as they have done in the past, the interest would accumulate to such an extent that the decree-holders in this case would probably not be able to realize anything at all after payment of the amount due to the prior mortgagees. In view of these facts, the decree-holders prayed for the appointment of a receiver and the application was granted by the learned Subordinate Judge. From this order also an appeal was preferred to this Court and the appeal was dismissed by the learned Judge in Single Bench along with the appeal referred to above. The judgment-debtors have preferred an appeal under Cl. 10 of the Letters Patent from this order also (Letters Patent Appeal No. 119 of 1940).

I shall first take up the appeal from the order of the learned Subordinate Judge, dated 12th October 1939, dismissing the objections to the attachment of the properties. The learned counsel for the appellants has contended that as the terms of the agreement between the parties were not complied with, the appellants were entitled to have their objections under O. 21, R. 66, and O. 21, R. 2, decided on the merits. This contention of the appellants is purely of a technical character and there seems to be no substance in it. It is true that the original application for execution was allowed to be dismissed and a fresh application for execution was made by the decree-holders. But, as stated already, this was done only at the suggestion of the learned Subordinate Judge, who was anxious to get rid of an old execution case. The substance of the agreement between the parties was that the appellants should be given three months time and no steps should be taken for the sale of the properties for a period of three months. It seems from the statement of the counsel that the properties were to remain under attachment. It cannot be believed that the decree-holders would have allowed the properties to be released from attachment for a period of three months at the risk of the properties being alienated by the judgment-debtors or attached by other creditors. It appears from the record that the judgment-debtors also did not raise any objection at the time to the course suggested by the learned Subordinate Judge and the order for dismissal of the first application was passed on 26th May 1939 in the presence of the counsel for the judgment-debtors without any protest being made by him.

The counsel for the judgment-debtors has not been able to show in what way the judgment-debtors were prejudiced by the procedure adopted. They were to be given three months' time and they got actually much more time (about six months) before the decree-holders took any active steps for execution. The judgment-debtors had, therefore, no grievance in the matter and in my opinion the learned Subordinate Judge was right in refusing to consider their objections on the merits in the circumstances of the case. At the same time, it must be said that the procedure adopted by the learned Subordinate Judge in the present case was not only irregular but highly objectionable. The learned Subordinate Judge seems to have put the parties

to unnecessary trouble and expense merely to get rid of an old case and what is worse, the procedure adopted has given rise to various technical objections and wasted a lot of time of the learned Subordinate Judge himself and also of the Appellate Courts in disposing of these objections.

Coming now to the other appeal, the only question for decision is whether the appointment of the Receiver was justified in view of the circumstances of the case. The power to appoint a Receiver in India rests on the statutory provisions of S. 51 read with those of O. 40, R. 1, Civil P. C. The power can be exercised in the course of a suit—whether based on a mortgage or otherwise—or in execution and in either case the sole criterion is whether such an appointment is 'just and convenient.' The learned Judge has referred to the case-law on the subject and it is not necessary to discuss it for the purposes of this appeal, as counsel for the appellant does not dispute that even in execution of a money-decree a Court has jurisdiction to appoint a Receiver. His only contention is that a Receiver cannot be so appointed unless there is any difficulty arising from the nature of the property in proceeding with the execution in the ordinary manner, e. g. owing to the property not being liable to attachment and sale, etc. In support of this contention he has relied chiefly on 47 All 385,¹ 59 Cal 205² and 18 Lah 486.³ But these rulings do not appear to support the contention of the learned counsel.

In 47 All 385,¹ the property which was sought to be attached and sold in execution of a money decree, was no doubt, not transferable, but their Lordships do not appear to have said anything which could support the learned counsel's contention that a Receiver can be appointed only in cases where the property is not transferable. All that their Lordships say is that the "proper remedy lies, in a 'fitting case' in the appointment of a Receiver for realizing the rents and profits and paying out of the same a sufficient and adequate sum for the maintenance of the judgment-debtor and his family and applying the balance to the

liquidation of the judgment-creditor's debt." The question as to what is a 'fitting case,' must obviously depend upon the circumstances of each case and no hard and fast rule can therefore be laid down. In 59 Cal 205,² also all that the learned Judges laid down was that although S. 51, Civil P. C., provides for the appointment of a Receiver as one of the modes of execution, a decree-holder cannot ask for the appointment of a Receiver as of right in every case, without showing special circumstances justifying such an appointment. The learned Judges observed (*see p. 215*) that the order of appointment in that case had been made by the Subordinate Judge almost as a matter of course and far from satisfying the requirements of the phrase 'just and convenient' occurring in O. 40, R. 1, Civil P. C., which must necessarily mean 'just and convenient' in view of the equities in favour of both the parties.' In that particular case, the learned Judges considered, that there was no reason why the decree should not be satisfied by the ordinary method of attachment and sale and saw no good reason to allow the appointment of a Receiver.

In 18 Lah 486,³ a Division Bench of this Court expressed its agreement with the principles laid down in 59 Cal 205,² but even that ruling does not seem to bear out the learned counsel's contention that under the Indian law a Receiver can only be appointed if there are difficulties arising from the nature of the property against which execution is sought and which prevent the decree-holder from obtaining relief by the ordinary method available for satisfaction of the decree, viz., attachment and sale of the judgment-debtor's property. The two principles which, according to this ruling, should be borne in mind in making an appointment of a Receiver are (1) that the Court should see whether the amount due is likely to be realized within a reasonable time from the profits of the attached property and (2) that such an appointment appears in the circumstances to be the best course for the creditor and the debtor.

As regards the above principles it may be stated at the outset that the decree-holders have asked for the appointment of a Receiver in this case only till the properties can be sold in execution. The decree-holders want to get the properties sold as soon as possible but the judgment-debtors are putting obstacles in their way by rais-

1. *Rajindra Narain Singh v. Sunder Bibi*, (1925) 12 A I R P C 176=87 I C 295=52 I A 262=47 All 385 (P O).

2. *Hemendra Nath v. Prokash Chandra*, (1932) 19 A I R Cal 189=137 I C 98=59 Cal 205=35 C W N 1066.

3. *Sant Singh v. Sain Das*, (1937) 24 A I R Lah 438=175 I C 447=I L R (1937) 18 Lah 486=89 P L R 839.

ing all sorts of objections and thus delaying the proceedings. As the judgment-debtors are in the meantime appropriating the rents and profits and paying little or nothing to the decree-holders, the decree-holders hope to get some portion of the rents and profits at any rate by the appointment of a Receiver. It will thus appear that the appointment of a Receiver in this case not being a substitute for the sale of the judgment-debtor's properties, the first of the above-mentioned principles has no application to the present case. As regards the second principle, the appointment of a Receiver seems to be 'just and convenient' in view of all the circumstances of the case. The learned Subordinate Judge has recapitulated in his order the dilatory tactics which have been employed by the judgment-debtors and the frivolous objections which have been raised by them to the attachment and sale of their properties support the conclusion of the learned Subordinate Judge. The learned Judge in Single Bench has also come to the same conclusion and as laid down in A I R 1922 Lah 444,⁴ when discretion is exercised by a learned Judge in such a matter after considering the facts of the case, the discretion will not be interfered with in appeal, unless it is shown that it was improperly exercised or that the appointment contravenes any principles of law. No such ground has been made out in the present case. The appointment cannot be said to be 'unjust' to the judgment-debtors as the properties will only be managed by the Receiver and the net profits dealt with according to the directions of the Court. The judgment-debtors themselves have necessitated the appointment by the tactics employed by them. The appointment of a Receiver does not in any way stand in the way of the sale of the properties and if the judgment-debtors do not try to hamper the course of execution, the properties would be sold before long and the appointment of the Receiver will terminate automatically.

Before concluding, there are one or two matters mentioned in the course of the arguments which must be referred to. It was urged that the learned Subordinate Judge had made no provision for a part of the rents and profits being paid to the judgment-debtors for the maintenance of themselves and their families. This question has apparently not yet been considered

by the learned Subordinate Judge and it is open to the judgment-debtors to approach the Court with an application for such provision being made. It was next urged that there are certain mortgagees who are entitled to the present possession of the properties and the Receiver is not entitled to take possession as against them according to R. 1 (2) of O. 40, Civil P. C. If this contention is correct, the objection of the mortgagees will have to be decided on its merits by the executing Court. The mortgagees are not parties to these appeals and there are no materials before us to enable us to express any opinion on this point. In view of all the circumstances, there seems to be no force in these appeals and they must accordingly be dismissed with costs. The parties are directed to appear before the executing Court on 3rd June 1940 for further proceedings. The executing Court should now take steps to bring the attached properties to sale according to law as expeditiously as possible.

G.N./R.K.

*Appeals dismissed.***A. I. R. 1940 Lahore 329**

DIN MOHAMMAD J.

*Bharpura — Defendant — Appellant.**Diwan Chand — Plaintiff*

— Respondent.

Second Appeal No. 1637 of 1939, Decided on 26th March 1940, from decree of Senior Sub-Judge, Sargodha, D/- 17th July 1939.

(a) Civil P. C. (1908), S. 100 — Finding of fact — Lower Appellate Court's finding of fact is binding on High Court only when it is honest, is arrived on facts uninfluenced by extraneous considerations, is based on correct appreciation of material on record and is based on evidence and not on surmises and conjectures.

It is true that a finding of fact arrived at by a lower Appellate Court is binding on the High Court, however erroneous it might be. But this dictum presupposes that the finding is honest, that it has been arrived at on the facts of the case uninfluenced by any extraneous considerations, that it is the result of a correct appreciation of the material on the record and that it is based on evidence and not on surmises and conjectures. Any finding of fact which does not satisfy any of the requirements stated above will not be binding on the High Court. Every finding of fact is not sacrosanct and if findings of fact are arrived at on mere surmises and conjectures or on evidence that is inadmissible or otherwise legally insufficient, those findings can be disturbed. [P 331 C 1]

(b) Appellate Court—Finding of fact—Value — Trial Court's opinion should not be lightly brushed aside by Appellate Court—Where that opinion is ignored on unreasonable grounds Appellate Court's finding of fact is of no value.

4. *Amarnath v. Mt. Tehal Kaur*, (1922) 9 A I R Lah 444=67 I C 383.

The opinion recorded by a Judge who sees and hears the witnesses should not be lightly brushed aside by an Appellate Court and if that opinion is ignored on grounds which are altogether unreasonable, no value can be attached to the finding of fact arrived at by the Appellate Court. [P 331 C 2]

(c) **Promissory Note — Suit on — Defendant denying execution and thumb mark not proved to be his — No proof of loan can be allowed aliunde.**

It is well settled that in cases where the original instrument, which forms the basis of the suit, fails, the plaintiff is not allowed to fall back upon the original consideration. A suit cannot evidently succeed on a promissory note the execution of which is denied by the defendant and the thumb mark on which is not proved to be that of the defendant. In such a case a decree cannot be granted on the strength of the other evidence led by the plaintiff to prove consideration. If the promissory note is ruled out of consideration, no proof of loan can be allowed aliunde : *Case law referred.*

[P 331 C 2 ; P 332 C 1]

V. N. Sethi — *for Appellant.*

R. C. Soni — *for Respondent.*

Judgment.—The suit out of which this appeal has arisen was instituted by Dewan Chand against Bharpura, a Bhatti of Sargodha, for recovery of Rs. 579-6-6 on the foot of a promissory note alleged to have been executed by him on 4th January 1936. The plaintiff further alleged that under the provisions of the Regulation of Accounts Act, he had sent six-monthly statements of accounts to the debtor in the form and manner prescribed by that Act. Bharpura categorically denied the execution of the promissory note or the raising of any loan as alleged by the plaintiff and further denied having received any statement of account. He also pleaded that in any circumstances as the promissory note in suit was never presented to him under the provisions of the Negotiable Instruments Act, he could not be held liable for the amount sued for. On the pleadings of the parties, the trial Court framed the following issues :

(1) Whether the defendant executed the pro-note in suit in favour of the plaintiff for consideration ?

(2) Whether the plaintiff has kept an account under the Regulation of Accounts Act and has been sending copies thereof to the defendant ? If so, what is its effect ?

(3) Whether it was necessary to present the pro-note in suit ?

(4) If issue 3 is proved in favour of the defendant, whether the pro-note was in fact presented ? If not what is its effect ?

(5) Relief.

The trial Judge disbelieved the evidence produced by the plaintiff on the question of the execution of the promissory note by the defendant and consequently found issue 1 against the plaintiff. On issue 2, he found that the requirements of the Regula-

tion of Accounts Act had been satisfied. On issues 3 and 4, it was decided that presentment was necessary under S. 64, Negotiable Instruments Act, and that the promissory note was never presented to the defendant. He consequently dismissed the suit with costs. An appeal was preferred by the plaintiff against this decision and the Senior Subordinate Judge, who heard the appeal, remanded the case with a direction that the defendant's thumb impression be sent to Phillaur for comparison. The trial Judge complied with the order of the Appellate Court and, after obtaining an opinion from Phillaur and examining the expert on interrogatories, once more dismissed the suit with costs, inasmuch as the Phillaur expert had definitely stated that the thumb impression appearing on the promissory note in suit was not that of the defendant. The plaintiff again preferred an appeal from that order which was heard by Mr. Indar Kishan, Senior Subordinate Judge. He allowed the appeal observing inter alia :

(1) The Phillaur report becomes weaker in its effect by reason of a divergent opinion expressed by a local expert at the plaintiff's instance which led the lower Court to ignore the opinions of all the experts.

(2) Both these witnesses (produced by the plaintiff) have been disbelieved by the lower Court on the mere ground that certain criminal complaints were made by the defendant against them, but none of them was questioned as to when that happened. Presumably that must have taken place after the execution of the promissory note or the defendant would not have condescended to secure their attestation on the receipt.

(3) It is significant that on the one hand the defendant never moved his little finger in the past by way of protest or repudiation of the connexion of borrower and lender brought home to him by the plaintiff in the form of six-monthly statements sent to him under the Regulation of Accounts Act.

(4) So far as a portion of the defendant's thumb impression on the receipt is concerned, all the experts are unanimous that a few points of similarity are there implying thereby that it is not a case of a wholly false thumb mark.

It is against this order that the defendant has preferred the appeal now before me. Counsel for the appellant contends (a) that the Senior Subordinate Judge has erred in law in decreeing the plaintiff's suit in spite of the fact that the Phillaur expert had expressly stated that the promissory note in suit did not bear the defendant's thumb impression ; (b) that the remark made by the Senior Subordinate Judge that the lower Court had ignored the expert's opinion was altogether wrong ; (c) that no independent evidence would be led to prove the consideration for the promissory note

if the suit was liable to dismissal on the ground that the promissory note in suit did not bear the thumb impression of the defendant; (d) that the Senior Subordinate Judge was wrong in ignoring the opinion of the trial Judge as to the veracity and reliability of the witnesses examined by him; (e) that he has set aside the judgment of the trial Judge merely on the score of surmises and conjectures; and (f) that the decision of the Senior Subordinate Judge on the question of the necessity of presentment was wrong. Counsel for the respondent, on the other hand, insists that this Court has no jurisdiction to disturb the findings of fact arrived at by the Senior Subordinate Judge and relies in this connection on certain pronouncements made by their Lordships of the Privy Council and the other High Courts in India from time to time.

It is true that it has been observed by their Lordships of the Privy Council as well as by the other High Courts in India in several cases that a finding of fact arrived at by a lower Appellate Court is binding on the High Court, however erroneous it might be. But in my view, this dictum presupposes that the finding is honest, that it has been arrived at on the facts of the case uninfluenced by any extraneous considerations, that it is the result of a correct appreciation of material on the record and that it is based on evidence and not on surmises and conjectures. Any finding of fact which does not satisfy any of the requirements stated above will in my view not be binding on this Court. There is ample authority in support of the proposition that every finding of fact is not sacrosanct and that if findings of fact are arrived at on mere surmises and conjectures or on evidence that is inadmissible or otherwise legally insufficient, those findings can be disturbed.

In the present case, the Senior Subordinate Judge was palpably wrong in saying that the trial Judge had himself ignored the Phillaur expert's evidence on the question of the thumb impression. While discussing issue No. 1, the trial Judge has in more places than one referred to the opinion of the Phillaur expert and has based his decision on issue No. 1 against the plaintiff mainly on the score of that evidence. The Senior Subordinate Judge had in these circumstances no justification to misrepresent the reasoning advanced by the trial Judge and to base his judgment on

that misrepresented version of the trial Court's judgment. Further the argument advanced by the Senior Subordinate Judge against the rejection of the evidence by the trial Judge that the witnesses had not been questioned as to when they become hostile to the defendant is ridiculously absurd. Without there being any material on the record, he presumes that those events had taken place after the execution of the promissory note and in support of this presumption he advances an argument which no sensible Judge could have ever advanced. It is to the effect that had the witnesses been the defendant's enemies, to use the Senior Subordinate Judge's words, "he would not have condescended to secure their attestation on the receipt." This was the very fact that was denied by the defendant and to have used this fact against him was a clear travesty of justice.

Moreover, both Mathra Das and Ramditta Mal had been questioned whether the defendant had made an application against them under S. 107, Criminal P. C and both had admitted this fact to be correct. Had this application been made prior to the execution of the promissory note, this fact should either have been introduced by the witnesses themselves or been elicited by the plaintiff in re-examination. In the absence of any of these steps having been taken the Senior Subordinate Judge was not justified at all in presuming that the thing had happened after the execution of the promissory note. Further, as remarked by their Lordships of the Privy Council so often, the opinion recorded by a Judge who sees and hears the witnesses should not be lightly brushed aside by an Appellate Court and if that opinion is ignored on grounds which are altogether unreasonable, no value can be attached to the finding of fact arrived at by the Appellate Court. I have no hesitation therefore in ignoring the findings of fact arrived at by the Senior Subordinate Judge in this case.

It is well settled that in cases where the original instrument which forms the basis of the suit fails the plaintiff is not allowed to fall back upon the original consideration. The leading judgment on this question is the one given by Garth C. J. in 7 Cal 256¹ where he observed as follows:

When the original cause of action is the bill or the note itself and does not exist independently of it, as for instance, when in consideration of *A* depositing money with *B*, *B* contracts by a pro-

1. *Sheikh Akbar v. Sheikh Khan*, (1881) 7 Cal 256=8 C L R 533.

missory note to repay it with interest at six-months date, here there is no cause of action for money lent or otherwise than upon the note itself, because the deposit is made upon the terms contained in the note and no other. In such a case the note is the only contract between the parties and if for want of a proper stamp or some other reason the note is not admissible in evidence the creditor must lose his money.

This judgment was followed in 63 P R 1917.² In 2 Lah 330³ a Division Bench of this Court made similar observations independently of the judgment cited above. In A I R 1927 Lah 89,⁴ Broadway J., who delivered the principal judgment in concurrence with Fforde J., referring to 63 P R 1917² and 2 Lah 330,³ observed :

In these it has been clearly laid down that when the loan has been granted on the security of a negotiable instrument there is no cause of action independent of the negotiable instrument itself and when that negotiable instrument is inadmissible in evidence the suit must fail. It seems to me that these authorities conclude the question.

In A I R 1939 Lah 31,⁵ Addison and Ram Lall JJ. refused to pass a decree on the basis of a promissory note which was inadmissible in evidence in spite of the fact that the defendant had admitted his liability thereon. In 53 All 114,⁶ a Full Bench of the Allahabad High Court of which one of the Judges was the present Chief Justice of this Court referred to almost all the cases mentioned above with approval. To the same effect is 61 Cal 433.⁷ The judgments referred to above do not apply to the present case in terms but the principle deducible therefrom does apply. A suit cannot evidently succeed on a promissory note which does not bear the thumb impression of the defendant. The question is whether in such a case a decree can be granted on the strength of the other evidence led by the plaintiff to prove consideration? The reply to be given to this question must be in the negative on the principle enunciated above. If the promissory note is ruled out of consideration no proof of loan can be allowed aliunde.

Counsel for the respondent relied on 48

2. Bhag Bhari v. Gujar Mal, (1917) 4 A I R Lah 220=38 I C 623=63 P R 1917.
3. Chanda Singh v. Amritsar Banking Co., (1922) 9 A I R Lah 307=66 I C 201=2 Lah 330.
4. Ramjas v. Shahabuddin, (1927) 14 A I R Lah 89=95 I C 704.
5. Sri Chand Sheo Parshad v. Lajjia Ram, (1939) 26 A I R Lah 31=182 I C 330=41 PLR 356.
6. Nazir Khan v. Ram Mohan Lal, (1931) 18 A I R All 183=133 I C 307=53 All 114=1931 A L J 64 (F B).
7. Ranendra Mohan v. Keshab Chandra, (1934) 21 A I R Cal 554=150 I C 982=61 Cal 433=38 O W N 488.

P R 1913,⁸ 16 I C 33⁹ and 4 Lah 198,¹⁰ but in both 48 P R 1913⁸ and 4 Lah 198¹⁰ the negotiable instrument in question was a mere sequel to the earlier transaction and not the basis of the transaction itself and 16 I C 33⁹ was definitely disapproved in 2 Lah 330.³ Even if it were permissible to examine the evidence led by the plaintiff in support of the passing of consideration on the date alleged, I would be prepared to hold in agreement with the trial Judge that the evidence adduced by the plaintiff was unreliable. It is true that the Phillaur expert had stated that the superimposed thumb impression appearing on the receipt was in some respects similar to that of the defendant, but this is not enough to burden the defendant with the liability for the amount especially when the witnesses produced in support of the advancing of money are clearly hostile to the defendant.

Counsel next contends that he may be allowed to amend the plaint and refers in this connexion to 14 Rang 383¹¹ and 71 M L J 250;¹² but neither of those judgments applies to the facts of the present case. In this view of the case it is not necessary to adjudicate upon the other questions discussed before me. But before I close I may point out for the benefit of the Senior Subordinate Judge that the Explanation to sub-s. (2) of S. 3, Punjab Regulation of Accounts Act, clearly enacts that a person to whom a statement of account has been sent under cl. (b) of sub-s. (1) shall not be bound to acknowledge or deny its correctness and his failure to protest shall not, by itself, be deemed to be an admission of correctness of the account. On the grounds stated above, I allow this appeal, set aside the decree of the Senior Subordinate Judge and restore that of the trial Court with costs throughout.

G.N./R.K.

Appeal allowed.

8. Suraj Kumar v. Baldeo Das, (1913) 48 P R 1913=18 I C 701=60 P L R 1913.
9. Baijnath Das v. Salig Ram, (1912) 16 I C 33.
10. Nathu Ram v. Dogar Mal, (1924) 11 AIR Lah 144=75 I C 555=4 Lah 198.
11. Krishna Prasad Singh v. Ma Aye, (1936) 23 A I R Rang 508=165 I C 810=14 Rang 383.
12. Official Assignee of Madras v. Kuppuswami Naidu, (1936) 23 A I R Mad 785=165 I C 301=71 M L J 250 (F B).

A. I. R. 1940 Lahore 333**TEK CHAND AND ABDUL RASHID JJ.***Malik Ghulam Mohammad —**Defendant — Appellant.*
v.*Rajeshwar — Plaintiff — Respondent.*

First Appeal No. 5 of 1939, Decided on 23rd January 1940, from preliminary decree of Sub-Judge, First Class, Lahore, D/- 24th August 1938.

(a) **Transfer of Property Act (1882), S. 76 (b) — Mortgagor taking mortgaged property on lease from mortgagee—Mortgage deed distinctly providing for payment of interest and further providing that rent would be credited towards interest and balance of interest would be recoverable as such—Mortgagor making default in payment of rent and right to recover it becoming time-barred — Principle of S. 76 (b) held would not apply and mortgagee would not be disentitled to recover interest.**

A person after mortgaging his property took the property on lease from the mortgagee. There was a distinct stipulation in the mortgage deed that the principal sum was to bear interest at certain specified rate and it was agreed that though the mortgagor had taken the mortgaged property on rent the income actually received by the mortgagee would be given credit for and that if the full amount was not received the mortgagor would be liable to make good the deficiency in the interest. The mortgagor made default in the payment of rent and the right to recover rent was time-barred:

Held that the principal obligation of the mortgagor was to pay interest and the provision to pay rent was merely supplementary to, and not in substitution for, that obligation. The general rule laid down in clause (b) of S. 76 therefore was not applicable to the facts of the case. Further, the default was primarily of the mortgagor himself. It was he who was to pay rent at the stipulated rate at specified intervals. He could not therefore be allowed to take advantage of his own default and urge that the mortgagee, who did not sue him had lost his primary right to recover interest: *23 All 338 and A I R 1919 Mad 59, Disting.* [P 334 C 2]

(b) **Mortgage—Suit on — Interest for period from date of suit to date of redemption should be at rate fixed in mortgage deed.**

Mortgagee is entitled to claim interest from the date of suit till the date for redemption at the rate fixed in the mortgage deed as till the period for redemption has expired the matter remains in contract, and the interest has to be paid at the rate and with the rests, specified in the contract of mortgage: *A I R 1927 P C 1, Rel. on.* [P 336 C 1]

*Barkat Ali and Bashir Ahmad —**for Appellant.**Mehr Chand Mahajan and Tirath Ram**— for Respondent.*

Tek Chand J. — This is a first appeal from the preliminary decree passed in a mortgage suit, declaring that the amount recoverable on foot of the mortgage in suit was Rs. 3,03,979.7.9, and fixing 24th Fe-

bruary 1939 as the date for redemption. The decree, further, directed that if the aforesaid amount, together with the costs of the suit, was not paid on the date fixed, the mortgaged properties shall be sold and the sale proceeds applied to the satisfaction of the decretal amount, and in case they were found insufficient the decree-holder shall be entitled to apply for a personal decree against the mortgagor for the balance. It was also provided that the mortgage money shall carry interest at 6 per cent. per annum from the date of institution of the suit till realization. From this decree the defendant has appealed, urging that the decretal amount be reduced by Rs. 1,63,979.7.9; and the plaintiff-respondent has filed cross-objections praying that the interest payable from the date of the institution of the suit till the date fixed for redemption should have been fixed at the rate stipulated in the mortgage deed and not at 6 per cent. per annum. He has paid court-fee on Rs. 6300 and therefore his prayer in cross-objections must be taken to be limited to this amount. The mortgage in suit was effected on 16th March 1927. The consideration was Rs. 1,40,000 made up of the following items :

Rs. 25,000 : Left in trust with the mortgagee for payment to the National Bank of India Ltd., Lahore.

Rs. 1,02,000 : Due on five pro-notes, executed by the mortgagor in favour of the mortgagee, on 2nd April 1925.

Rs. 13,000 : Arrears of interest on the aforesaid pro-notes.

—————
Total Rs. 1,40,000.

The interest agreed to be paid on the principal sum secured was twelve annas per cent. per mensem at six-monthly rests; in default compound interest at the same rate was to be charged. The mortgage was with possession, but on the date of the mortgage, the mortgagor took the mortgaged properties on lease from the mortgagee, and executed five rent-deeds in his favour (Exs. P. 2 to P. 6). The stipulations in the mortgage deed relating to the matter were as follows:

(4) Possession of the property mortgaged has been delivered to the mortgagee aforesaid. He shall remain in its possession till redemption. The income actually received by the mortgagee shall be given credit for. For the time being, I have taken the said property mortgaged, on lease and rent from the mortgagee aforesaid by execution of separate deeds of rent and lease in his favour. If the property mortgaged, whole or in part, remains unoccupied or the lease money and the rent are not recovered from sub-lessees and sub-tenants the mortgagee shall not be responsible therefor. I will,

under all circumstances, be liable to make good the deficiency in the interest.

(6) If the mortgagee, aforesaid, is forced to recover the amount whole or in part, due to him, through Court, interest and compound interest at the said rate shall continue to run from the date of the institution of the suit till realization of the entire amount.

The mortgagee, Keshwa Nand, died on 23rd November 1932, leaving a minor son Rajeshwar plaintiff. He instituted the present suit on 27th August 1937, through his mother as next friend, for recovery of Rs. 3,04,226-13-9, which he claimed was the amount due on foot of the mortgage after giving credit to the defendant for payments made by him. The defendant pleaded that the account between the parties was an old one, that the transaction was "unfair" and the interest charged "excessive," within the meaning of the Usurious Loans Act and therefore the entire account between the parties should be re-opened; that the plaintiff could not sue for interest in view of the rent deeds and leases which had been executed in respect of the mortgaged properties; that certain re-payments had been made for which credit had not been given by the plaintiff; and that in any case the suit was barred by limitation. The trial Judge found against the defendant on all these issues, except that he corrected certain minor errors in calculation and granted the plaintiff a decree for Rs. 3,03,979-7-9, as stated above.

The defendant has appealed with respect to the sum of Rs. 1,63,979-7-9 only and on his behalf two points have been argued before us by Mr. Barkat Ali. Firstly, it has been contended that on the date of the mortgage the mortgagor having taken the properties on lease from the mortgagee, all that the latter was entitled to was to recover rent under the rent deeds and not interest under the mortgage deed and as the plaintiff, or his father, had not done so within the period prescribed by law, his claim for rent had become time-barred, and he cannot sue for interest now. In support of this contention, the learned counsel relied upon the principle underlying cl. (b) of S. 76, T. P. Act, which lays down that when during the continuance of the mortgage the mortgagee takes possession of the mortgaged property, he must use his best endeavours to collect the rents and profits thereof. After hearing counsel at length and examining the terms of the mortgage

deed I am of opinion that this contention is devoid of all force. As has been stated above, there was a distinct stipulation in the deed that the principal sum was to bear interest at the certain specified rate, and it was agreed that though the mortgagor had taken the mortgaged properties on rent, the income actually received by the mortgagee would be given credit for and that if the full amount was not received the mortgagor would be liable "to make good the deficiency in the interest."

It will thus be seen, that the principal obligation of the mortgagor was to pay interest and the provision to pay rent was merely supplementary to, and not in substitution for that obligation. The general rule laid down in cl. (b) of S. 76, T. P. Act, therefore is not applicable to the facts of this case. Further the default was primarily of the defendant himself. It was he who was to pay rent at the stipulated rate at specified intervals. Admittedly, he has failed to do so. He cannot therefore be allowed to take advantage of his own default and urge that the mortgagee, who did not sue him, has lost his primary right to recover interest. Mr. Barkat Ali referred us to two rulings, but the facts in both were peculiar and they are clearly distinguishable. In 23 All 338,¹ there was no stipulation in the deed to pay interest. All that was stated was that the mortgagor had taken the mortgaged property on rent and that he would pay it regularly. No rent was actually paid and the mortgagee allowed the claim for recovery thereof to become time barred. Subsequently, he sued for the principal sum secured on the mortgage deed and also for interest at the rate mentioned in the rent deeds. On these facts it was held that he could not do so, there being no agreement to pay interest and the claim to recover rent having long since become barred. In the other case, 41 Mad 1043,² the claim was based on a mortgage by way of conditional sale, in which, also, there was no agreement to pay interest and the mortgagor had been allowed to continue in possession on payment of rent, and the mortgagee, as landlord, had actually obtained a decree for arrears of rent but had failed to execute it within the period prescribed by law. After some years, the mort-

1. *Chimman Lal v. Bahadur Singh*, (1901) 23 All 338=1901 A W N 95.

2. *Mangeshwar Narain Rao v. Shiva Rao*, (1919) 6 A I R Mad 59=49 I C 123=41 Mad 1043=35 M L J 414.

gagor brought a suit for redemption, and in that suit the mortgagee claimed that he was entitled to be paid the principal sum as well as arrears of rent. The learned Judges repelled the claim as to rent, holding that the mortgagee having obtained a decree for rent, his rights with regard to it were regulated thereafter entirely by the terms of that decree. "The claim for rent" they observed,

had been taken out of the operation of the contract between the parties and passed into domain of judgment, and it was not open, afterwards to either party to ignore the decree and fall back on their antecedent rights and obligations.

The facts of the present case are entirely different. Here, the stipulation in the deed to pay interest is clear and explicit, and it was clearly provided that the rent, to the extent actually paid, was to be credited towards interest, and the balance of the interest was recoverable as such. Further, the default in payment of rent was of the defendant himself and he cannot take advantage of his own default to defeat the rights of the plaintiff. It must therefore be held that the plaintiff is not disentitled to claim interest, merely because the mortgaged properties had been let out to the mortgagor and he had executed rent deeds in his favour, but had not paid the amount of rent within three years from the date when it fell due. The second question for consideration is whether the provisions of the Usurious Loans Act, as amended by the (Punjab) Relief of Indebtedness Act 7 of 1934, are applicable. To determine this, we have to see if the rate of interest, payable under the deed, is "excessive," or the transaction is "otherwise unfair." In the amended Act, it is provided that the Court shall deem interest to be "excessive" if on secured loans it exceeds 12 per cent. per annum simple interest, or 9 per cent. per annum compound interest with annual rests. In the present case, as has been stated above, compound interest was payable at 9 per cent. per annum but at six-monthly rests. It must therefore be held to be "excessive" and the defendant is entitled to relief in respect thereof. This was frankly admitted by the learned counsel for the plaintiff-respondent. I hold therefore that compound interest must be charged at yearly and not six monthly rests.

Mr. Barkat Ali conceded that the transaction was not "otherwise unfair;" but he urged that the dealings between the parties must be re-opened from the very beginning. We have examined the materials on the

record bearing on the matter, but do not find anything usurious or unconscionable in these dealings. Out of the consideration for the mortgage in suit, Rs. 25,000 was admittedly paid by the mortgagee in cash to the National Bank of India and the balance was due on prior pro-notes (Exs. P.9 to P.13) dated 2nd April 1925, three of which carried simple interest at 9 per cent. per annum and the other two at 12 per cent. per annum. It appears from the letter written by the defendant to the plaintiff on 22nd April 1923 (Ex. P.16) that these pro-notes had been executed in lieu of certain hundis for Rs. 70,000 which had been drawn by the defendant in favour of the plaintiff on 1st August 1922, and for a sum of Rs. 12,000 which had been paid to him by cheque on the Punjab National Bank Ltd. The earlier hundis have not been placed on the record but the defendant, who was present in person before us, stated that they had been executed for the balance due on earlier promissory notes, on which simple interest at 9 per cent. per annum had been charged. He frankly stated, that from the commencement of his dealings with the plaintiff's father in 1915 till the execution of the mortgage deed in suit, interest agreed to be paid or actually charged never exceeded 12 per cent. per annum (simple), which is much below the maximum limit prescribed in the Act. On these facts, the only relief to which the defendant is entitled is that compound interest on the principal sum secured by the mortgage must be allowed at 9 per cent. per annum at yearly and not six-monthly rests as stated in the deed and claimed by the plaintiff. The amount due on this basis, on 22nd August 1937, has been calculated by the local commissioner appointed by the lower Court, (as per statement B printed at pp. 36-39 of the paper book) as Rupees 2,97,296-2-2. Both counsel have accepted the calculations to be correct. It must therefore be declared that the amount payable on that date was Rs. 2,97,296-2-2 and not Rs. 3,03,979-7-9, as found and decreed by the lower Court.

The cross-objections relate to the amount of interest payable on the principal, Rupees 1,40,000, from the date of suit till the date for redemption fixed by the lower Court (24th February 1939). The lower Court has allowed simple interest at 6 per cent. per annum for this period. This, however, is contrary to the express stipulation in para. 6 of the mortgage deed. But apart from this

stipulation, the plaintiff is legally entitled to claim interest for this period at the fixed rate. As held by their Lordships of the Privy Council in 54 Cal 161,³

till the period for redemption has expired the matter remains in contract, and the interest has to be paid at the rate, and with the rests, specified in the contract of mortgage.

In view of this ruling, Mr. Barkat Ali did not contest the cross-objections. He however urged that as the date fixed for redemption by the lower Court, (24th February 1939), has long since expired another date may now be fixed. Counsel for the respondent raises no objection, and we fix the date for redemption as 23rd July 1940. The result is that the appeal and the cross-objections must be accepted in part and, in lieu of the decree of the lower Court, a preliminary decree passed in terms of O. 34, R. 4, Civil P. C., declaring that the amount due to the plaintiff on the mortgage in suit, calculated up to 27th August 1937, is Rs. 1,40,000 principal plus Rs. 1,57,296.2-2 interest plus Rs. 4202 costs and that if the defendant pays the aforesaid amount on or before 23rd July 1940, with interest on Rs. 1,40,000 from the date of the suit till that date at 9 per cent. per annum with yearly rests the mortgage shall stand redeemed and the plaintiff shall deliver over to the defendant all documents in his possession or power relating to the mortgaged property but that if he fails to do so, simple interest at 6 per cent. per annum shall be payable on the aggregate amount of principal, interest and costs from 23rd July 1940, and the plaintiff shall be entitled to have the mortgaged properties sold and the sale proceeds applied for the satisfaction of the decree. We further order that if such payment is found insufficient the plaintiff shall be at liberty to apply for a decree for the balance being passed against the person and other property of the defendant. As the appeal has substantially failed the appellant shall pay to the respondents the costs of the appeal in this Court. No order as to costs of the cross-objections. The order passed by the lower Court appointing a receiver shall continue.

Abdul Rashid J. — I agree.

D.S./R.K. *Order accordingly.*

3. Jagannath Prasad Singh v. Suraj Mul Jalal, (1927) 14 A I R P O 1=99 I C 686=54 I A 1=54 Cal 161 (P O).

A. I. R. 1940 Lahore 336

DALIP SINGH J.

Mufti Mohammad Yusuf Ali —

Petitioner.

v.

Deputy Commissioner, Hoshiarpur and others — Respondents.

Civil Revn. No. 246 of 1939, Decided on 27th November 1939, for revision of order of Dist. Judge, Hoshiarpur, D/- 22nd December 1938.

(a) Punjab Alienation of Land Act (13 of 1900), S. 21-A—Revision lies from order under S. 21-A.

Revision lies from an order passed on an application under S. 21-A : 12 P R 1911, *Foll.* ; A I R 1937 Lah 637, *Not approved.* [P 336 C 2]

(b) Punjab Alienation of Land Act (13 of 1900), S. 21-A (5)—Court has power under S. 21-A (5) to remand case.

In a case under S. 21-A where the Court considers remand necessary and desirable it is competent to order the same under S. 21-A (5). [P 336 C 2]

(c) Evidence—Onus immaterial.

In a case where the parties have led all the evidence, the question of onus of proof is of no importance. [P 336 C 2]

Achhru Ram — for Petitioner.

M. Sleem, Advocate-General —

for Respondent No. 1.

Order.—A preliminary objection is raised that no revision lies following A I R 1937 Lah 637.¹ I disagree with the ruling and consider that 12 P R 1911² was correctly decided. On the merits it is contended that no remand was possible. I cannot accept this contention. It seems to me that in cases of this kind, remand must be necessary and desirable and the law provides for it in S. 21-A (5). It is contended the onus of the issue was wrongly placed. This is so but the parties had led all the evidence and the question of onus is of no importance. I see no ground for revision (a limited remedy) and dismiss the petition. As regards costs, I am told in a suit brought by petitioner the decision has been given in his favour as to his caste and the matter is now under appeal. In the circumstances I leave the parties to bear their own costs in this Court.

G.N./R.K.

Petition dismissed.

1. Jhangi Ram-Boda Ram v. Collector Dera-ghazi Khan, (1937) 24 A I R Lah 637=169 I C 430.

2. Asa Singh v. Buta, (1911) 12 P R 1911=9 I C 396=6 P L R 1911.

* A. I. R. 1940 Lahore 337

BHIDE J.

Ram Narain Kaul and another —
Decree-holders — Appellants.
 v.

Maharaj Narain Kaul and others —
Judgment-debtors — Respondents.

Execution First Appeal No. 379 of 1939,
 Decided on 4th March 1940, from order of
 Senior Sub-Judge, Delhi, D/- 18th August
 1939.

* (a) Limitation Act (1908), Art. 182 —
 Partition suit — Date of decree for purpose of
 Art. 182 is date on which order for drawing
 up final decree was passed and not when neces-
 sary stamped paper was supplied.

For purposes of limitation under Art. 182 the
 date of the decree in a partition suit must be taken
 to be the date on which the order for drawing up
 the final decree was passed and not the date on
 which the necessary stamped paper for drawing up
 the decree was supplied by the decree-holder : 32
Cal 483, Disting.; A I R 1924 Cal 351, Rel. on.

[P 338 C 1]

* (b) Limitation Act (1908), Art. 182 —
 Step-in-aid — Application in partition suit for
 preparation of formal decree-sheet on stamped
 paper supplied by decree-holder is step-in-aid.

The test for deciding whether a certain applica-
 tion is a step-in-aid is whether the granting of the
 application would aid execution. Hence, the ap-
 plication in a partition suit for preparation of a
 formal decree-sheet on stamped paper supplied by the
 decree-holder should be treated as a step-in-aid of
 execution for purposes of Art. 182 : *A I R 1931*
Lah 81 (F B), Ref.

[P 338 C 2]

* (c) Limitation—Partition suit — Order for
 drawing up final decree passed—Judgment-
 debtor disputing adequacy of stamped paper
 supplied by decree-holder — Decree-holder's
 cause of action for execution should be taken
 as suspended during period taken by final
 decision in dispute relating to adequacy of
 stamped paper.

Where in a partition suit an order for drawing
 up final decree is passed and the judgment-debtor
 has disputed the adequacy of the stamped paper
 supplied by the decree-holder, the period which is
 taken up in getting final decision on the point by
 the High Court, should in any case be deducted as
 the decree-holder could not get a decree drawn up
 owing to the dispute raised by the judgment-debtor
 and his cause of action for execution should there-
 fore be taken as suspended.

[P 339 C 1]

R. C. Soni — *for Appellants.*

Bishen Narain — *for Respondents.*

Judgment. — This is an appeal from an
 order of the Senior Subordinate Judge,
 Delhi, dismissing an application for execu-
 tion as barred by time. The material facts
 are briefly as follows : A preliminary decree
 for possession of certain property by parti-
 tion was passed on 24th December 1925.
 An appeal from the preliminary decree was
 decided on 13th March 1933, and there-

1940 L/43 & 44

after an order for drawing up final decree
 on payment of proper stamp duty was
 passed on 28th June 1935. The decree-
 holders did not, however, pay the stamp
 duty till 22nd May 1937, when notice was
 issued to the judgment-debtors. They ob-
 jected that the stamp duty paid was insuffi-
 cient. The Court upheld the objection and
 asked the decree-holders to pay up addi-
 tional stamp duty amounting to Rs. 724-8-0.
 A petition for revision of this order was
 filed in this Court and eventually it was
 decided on 16th November 1937, that the
 stamp duty originally paid by the decree-
 holders was sufficient. A final decree was
 then drawn up on a stamp paper on 6th
 January 1938. On 30th November 1938,
 the decree-holders applied for execution of
 the final decree but an objection was raised
 that the application was barred by time.
 The contention of the judgment-debtors
 was that time began to run from the date
 on which the order for drawing up the
 final decree was passed, namely, the 28th
 June 1935, and as the application for exe-
 cution was made more than three years
 after that date, the application was time-
 barred. The learned Senior Subordinate
 Judge has upheld this objection and dis-
 missed the application for execution with
 costs. From this decision the decree-holders
 have preferred the present appeal.

The learned counsel for the appellants
 has contended that there was no executable
 decree till the necessary stamp duty was
 paid, and that the period of limitation could
 not therefore run until the duty was paid
 and a decree was drawn up on a stamped
 paper as required by law. He therefore
 contended that limitation began to run only
 from 6th January 1938, when the decree
 was drawn up on a stamped paper and the
 application for execution was therefore
 within time. The learned counsel for the
 appellant has referred to a number of
 authorities but none of them appeared to
 be directly in point except perhaps 32 *Cal*
 483,¹ in which it was held that in a suit
 for partition there is no operative decree
 until the necessary stamp duty is paid and
 a decree is drawn up on a stamp paper ac-
 cording to law and therefore a partition
 suit should be deemed to be pending till
 such a decree is drawn up. But the learned
 Judges were not dealing in that case with
 the execution of such a decree or the period
 of limitation for execution and the ruling

1. *Jotindra Mohan v. Bejoy Chand*, (1905) 32 *Cal*
 483.

was distinguished on this ground by another Bench of the Calcutta High Court in A I R 1924 Cal 351.² The facts of that case seem to be similar to those of the present case and it was held therein that the period of limitation for execution of a decree in a partition suit (as in other suits) runs from the date of the decree and not from the date on which the necessary stamped paper for drawing up the decree is supplied by the decree-holder. According to O. 20, R. 7, Civil P. C., the decree must bear the same date as the date of the judgment and no matter on what date the decree is actually signed, the date of the decree must therefore be the date of judgment : *cf.* 25 Cal 109.³ Even in the case of an ordinary suit some little time is taken up in assessing costs and preparation of decree-sheets. But such time cannot be allowed to be deducted under the law : A I R 1939 Lah 110⁴ and the rulings cited therein.

It seems therefore clear that for purposes of limitation under Art. 182, Limitation Act, the date of the decree must be taken to be the date on which the order for drawing up the final decree was passed in this case, viz. 28th June 1935. The next contention of the learned counsel for the appellant was that although the decree was passed on 28th June 1935 it was not capable of execution until the necessary stamped paper was supplied and hence the period of limitation should be taken to be governed by Art. 181 and not by Art. 182, Limitation Act. In support of this contention, reliance was placed on 65 P R 1897⁵ and 48 I A 17.⁶ But the facts of those cases are distinguishable, as the decrees were incapable of execution, on the dates of the decrees in those cases on account of the very terms of the decrees. It was therefore impossible for the decree-holder to take out execution until the conditions under which execution could be taken out were fulfilled. This was not the situation in the present instance. It was open to the decree-holder to supply the stamped paper at any time and to get the decree drawn up.

Lastly, it was contended, that if it is

considered that an 'executable decree' came into existence by the mere passing of the order for drawing up a final decree on 28th June 1935, then the application for preparation of a formal decree-sheet on stamped paper supplied by the decree-holder which was made on 20th March 1937 should be treated as a step-in-aid of execution for purposes of Art. 182, Limitation Act. No authority directly in point was cited in support of this contention and the point is not free from difficulty. But I am inclined to think that there is force in it. The expression 'step-in-aid' is not defined anywhere, but it was held by a Full Bench of this Court in 12 Lah 153⁷ that an application for permission to bid at a Court sale can be held to be a step-in-aid, if it 'advances or furthers execution.' The test for deciding whether a certain application is a step-in-aid would thus seem to be whether the granting of the application would aid execution. In the present instance it is not disputed that no decree could be drawn up and execution could not be taken until the stamped paper was supplied. The stamped paper was obviously supplied for the purpose of getting a decree drawn up, so as to enable the decree-holder to execute it. I therefore do not see why the application for having a decree drawn up on stamped paper which was made on 20th March 1937 should not be considered to be a step-in-aid for the purposes of Art. 182, Limitation Act. It is true that no application for execution had been made at the time. But none could be made until the stamped paper was supplied and the decree was drawn up. As at present advised, I hold that the application was a step-in-aid. It is conceded that if it is so held the application for execution dated 30th November 1938 was within time.

On the above finding it is unnecessary to decide the further contention of the learned counsel for the appellant, that the respondents disputed the adequacy of the stamped paper supplied by the appellants and the period which was taken up in getting a final decision on the point by the High Court (i. e. from 20th March 1937 to 16th November 1937) should in any case be deducted as the decree-holder could not get a decree drawn up owing to the dispute raised by the respondent and his cause of action for execution should, therefore, be

7. *Ghanaya Lal v. Nathu Ram*, (1931) 18 A I R Lah 81=131 I C 100=12 Lah 153=32 P L R 84 (F B).

2. *Kishori Mohan Pal v. Provash Chandra*, (1924) 11 A I R Cal 351=72 I C 646.

3. *Golam Gaffar v. Goljan Bibi*, (1898) 25 Cal 109.

4. *Rughnath & Co. v. Ramgopal Rohit Ram*, (1939) 26 A I R Lah 110=182 I C 871=I L R (1939) Lah 319=41 P L R 105.

5. *Hanwanta v. Bhagirath*, (1895) 65 P R 1897.

6. *Rameshwar Singh v. Homeshwar Singh*, (1921) 8 A I R P O 31=59 I C 636=48 I A 17=6 Pat L J 192 (P O).

taken as suspended. In support of this argument, the learned counsel relied on 43 Mad 185⁹ and 33 All 264⁹ by way of analogy. Although it is not necessary to decide this point, I may say that there seems to me force in this contention also. It is true that equitable considerations do not affect limitation; but it seems to me that on the principle laid down in the above rulings, it would be justifiable to hold that the cause of action for execution was suspended in this case during the time taken up by the proceedings relating to the dispute about the adequacy of the stamped paper. It is conceded that if this period is excluded, the application for execution would be within time. I accept the appeal and setting aside the order of the learned Senior Subordinate Judge, hold the application for execution to be within time and direct the execution to proceed according to law. In view of all the circumstances, however, I leave the parties to bear their costs.

D.S./R.K.

Appeal allowed.

8. Muthu Korakki Chetty v. Mahamad Madar Ammal, (1920) 7 A I R Mad 1=54 I C 66=43 Mad 185=38 M L J 1 (F B).

9. Ashfaq Husain v. Gawri Sahai, (1911) 33 All 264=9 I C 975=38 I A 37=8 A L J 332 (P C).

A. I. R. 1940 Lahore 339

SKEMP J.

Indar — Accused — Petitioner

v.

Emperor.

Criminal Revn. No. 94 of 1940, Decided on 9th May 1940; case reported by Sess. Judge, Karnal Division, D/- 12th January 1940.

Criminal P. C. (1898), S. 496 — Person released on bail need not give bond — Person giving bail is liable for failure to produce accused when ordered.

Section 496 does not state that a person released on bail must give a bond himself. Nor is there anything requiring such a bond on first principles. The person giving bail enters into a contract with a penalty clause to produce the accused person before a Magistrate when called upon. The person giving bail is the principal. The person for whom bail is given is the subject of the contract. If the person giving bail fails to perform his contract, then the penalty clause may be put into operation against him, although as in other contracts with a penalty clause it is not necessary to exact the penalty in full: *A I R 1921 Lah 79 and 3 I C 470, Ref.*; *A I R 1928 Lah 318, Not appr.* [P 339 C 2; P 340 C 1]

Asadullah Khan for Advocate-General —
for the Crown.

Order.—One Nanha was arrested by the police under S. 109, Criminal P. C., and Indar, petitioner, stood surety for his ap-

pearance in Court in Karnal in a sum of Rs. 200. Nanha failed to appear and the Magistrate ordered that his bail should be forfeited. Indar appealed to the District Magistrate who reduced the amount to be forfeited to Rs. 100. The learned Sessions Judge has recommended revision of this order on the ground that Nanha executed no bond himself and therefore Indar was not bound. This is supported by a decision of a learned Judge of this Court reported in *A I R 1928 Lah 318*.¹ With respect I agree that in that case the bond ought not to have been forfeited. Wadhawa Singh gave bail for the appearance of his nephew who was wanted under S. 110, Criminal P. C. The bond was dated 10th February 1927, but the Magistrate only began proceedings in June and in the meantime Teja Singh had left for China. It was clearly unnecessary to take security from him under S. 110 and therefore there was no need for the bond to be forfeited. In the course of his judgment the learned Judge seeking for reasons laid down that there was no provision whereby a police officer could take a third party's bond for such appearance and that there could be no surety without principal. Hence as in that case no undertaking had been given by the principal Teja Singh, Wadhawa Singh was not liable. I do not agree with the reasons by which the learned Judge supported his order. In this case as in that bail was demanded under S. 496, Criminal P. C. The word "bail" is not defined in the Code but Wharton's Law Lexicon defines "bail"

fr. *bailler* Fr. to hand over, to set at liberty a person arrested or imprisoned, on security being taken for his appearance on a day and at a place certain, which security is called bail, because the party arrested or imprisoned is delivered into the hands of those who bind themselves or become bail for his due appearance when required in order that he may be safely protected from prison, to which they have, if they fear his escape, etc., the legal power to deliver him.

Section 496 does not state that a person so released must give a bond himself. Nor is there anything requiring such a bond on first principles. The person giving bail enters into a contract with a penalty clause to produce the accused person before a Magistrate when called upon. The person giving bail is the principal. The person for whom bail is given is the subject of the contract. If the person giving bail fails to perform his contract then the penalty clause may be put into operation against him, although

1. *Wadhawa Singh v. Emperor*, (1928) 15 A I R Lah 318=109 I C 219=29 Cr L J 491.

as in other contracts with a penalty clause it is not necessary to exact the penalty in full. In 2 Lah 204² Martineau J. enforced a bail bond although the arrest was illegal. In 3 I C 470³ Benson C. J. said:

There is nothing to show that the accused has paid the amount of his own bail bond. Even if he had, I do not see how this would discharge the petitioner who is not a security in regard to the accused's bond, but has himself undertaken to produce the accused, or in default to forfeit a sum of money.

This petition for revision is dismissed.

G.N./R.K. *Petition dismissed.*

2. Chhajju Singh v. Emperor, (1921) 8 A I R Lah 79=63 I C 454=2 Lah 204=85 P L R 1921.

3. Annappa Naick v. Emperor, (1909) 3 I C 470.

A. I. R. 1940 Lahore 340

DIN MOHAMMAD J.

Kartar Singh—Defendant—Appellant.
v.

Court of Wards Estate, Raja Sir Baba Gurbakhsh Singh Bedi through Deputy Commissioner, Rawalpindi, Plaintiff and another, Defendant—

Respondents.

Second Appeal No. 562 of 1939, Decided on 1st December 1939, from decree of Senior Sub-Judge, Rawalpindi, D/- 8th February 1939.

Punjab Pre-emption Act (1 of 1913), S. 15 (c)—Land recorded in revenue papers in name of head of Hindu joint family—Member of family whose name does not appear in revenue record is owner and can pre-empt.

The very constitution of a joint Hindu family connotes that every member has an equal right with the other members and it is immaterial whether his name is recorded or not in the revenue papers. His right is not lost on that ground and this being so, none of the privileges with which the recorded owner is clothed can be denied to the unrecorded member. [P 341 C 2]

Therefore a member of a joint Hindu family which owns land in an estate can for the purposes of the Pre-emption Act be considered an owner of the estate even if his name does not appear in the revenue records but the land stands in the name of the head of the family alone: 7 All 184 (F B); A I R 1914 All 271; A I R 1922 Oudh 115; A I R 1929 Oudh 265 (F B); 35 P R 1908; A I R 1924 Lah 68 and A I R 1936 Lah 404, Rel. on; 106 P R 1918 and A I R 1920 Lah 94, Disting. [P 340 C 2]

Sardar Harnam Singh—*for Appellant.*
Lala Achhru Ram—

for Respondent (Plaintiff).

Judgment.—The facts bearing on the question of law involved in this case are these: Kartar Singh, son of Amar Singh, sold some agricultural land to Kartar Singh, son of Budh Singh. The Court of Wards of the estate of Raja Sir Baba Gurbakhsh Singh Bedi pre-empted that sale. The vendee re-

sisted it on the ground that he was possessed of equal rights with the plaintiff as a member of the joint Hindu family which was one of the owners of the estate. The trial Court agreed with him and dismissed the suit. On appeal, however, the Senior Subordinate Judge came to a different conclusion on the ground that the name of the vendee was not recorded in the revenue papers although the name of his father was. He consequently allowed the appeal and decreed the suit.

The sole question that falls for determination in this case is whether a member of a joint Hindu family which owns land in an estate can for the purposes of the Pre-emption Act be considered an owner of the estate if his name does not appear in the revenue records and the land stands in the name of the head of the family alone. A similar question arose in an Allahabad case reported in 7 All 184.¹ Five Judges of that Court consisting of such eminent Judges as Sir W. C. Petheram C. J. and Mahmood J. held that the members of a joint and undivided Hindu family other than that member who is recorded in the Collector's book as a sharer in the mahal are cosharers for the purposes of pre-emption in the sense of the *wajibularz*. This decision has later been followed in several judgments of the same Court, as well as of the Oudh Chief Court, the Lucknow High Court and our own Court (see among others 36 All 476,² 65 I C 772,³ 4 Luck 370,⁴ 79 I C 448⁵ and A I R 1936 Lah 404.⁶) In 36 All 476,² a Division Bench composed of Sir Henry Richards and Tudball J. remarked:

In 7 All 184¹ a sale was made to certain members of a joint Hindu family some of whom were not recorded as cosharers. A suit for pre-emption was brought by a person claiming to be a cosharer who alleged that the vendees were strangers. A Full Bench held that the vendors (being members of a joint Hindu family, which joint Hindu family was entitled to a share in the village) must be regarded as cosharers, and not as strangers, and the suit of the plaintiff was dismissed. In the present case it is admitted that the family to which the

1. Gandharp Singh v. Sahib Singh, (1884) 7 All 184=1884 A W N 326 (F B).
2. Bhagwati Saran v. Parmeshar Das, (1914) 1 A I R All 271=25 I C 283=36 All 476=12 A L J 798.
3. Ramadhin Singh v. Suraj Pal Singh, (1922) 9 A I R Oudh 115=65 I C 772=25 O C 57.
4. Hewanchal Singh v. Ajudhiya Singh, (1929) 16 A I R Oudh 265=115 I C 433=4 Luck 370=6 O W N 374 (F B).
5. Sanwal Das v. Jaglo Mal, (1924) 11 A I R Lah 68=79 I C 448.
6. Shib Lal v. Srikishen Das, (1936) 23 A I R Lah C 701=38 P L R 1093.

plaintiff belongs, owned a three anna share. Consequently, if we apply the principle laid down in the case referred to above, the plaintiff is a co-sharer and would be entitled to pre-empt the property provided that no one else has a preferential right.

On this ground, the judgment of the Additional District Judge was set aside and he was directed to re-admit the appeal and proceed to hear and determine the same according to law. In 65 I C 772,³ Sayyad Wazir Hasan A. J. C. after quoting 7 All 184¹ remarked that the Full Bench decision had been admitted by the Oudh Judicial Commissioner's Court as enunciating good law. In 4 Luck 370,⁴ a Full Bench of the Oudh Chief Court, of which Wazir Hasan Ag. C. J. was again a member, followed the principle laid down in that judgment with approval. Misra J. who was one of the Judges observed :

In the Allahabad High Court the said view was taken so far back as 1885 in a Full Bench decision reported in 7 All 184.¹ In that case the point decided by the Full Bench was to the effect that the members of a joint undivided Hindu family other than the member who was recorded in the village record as a cosharer in the mahal were to be deemed as cosharers for the purpose of pre-emption. On the strength of these rulings there can be no doubt that Ajodhya Singh, the son of Chattar Singh, who was admittedly a member of the joint undivided family with his father Chattar Singh, must be deemed to be a cosharer for the purpose of pre-emption though his name was not recorded in the khewat.

In 79 I C 448⁵ a Division Bench of this Court composed of Lumsden and Abdur Raoof JJ. referred to 7 All 184¹ with approval. In AIR 1936 Lah 404⁶ Jai Lal J. followed the principle enunciated in 7 All 184.¹ In an earlier case reported in 35 P R 1908,⁷ a Division Bench of the Punjab Chief Court composed of Sir William Clark C. J. and Reid J., without referring to 7 All 184,¹ affirmed the principle enunciated therein in respect of house property. It was held that where the property on the ownership of which the right to pre-empt is based belongs to a joint Hindu family the right of pre-emption vests under cl. 7 of S. 13, Pre-emption Act, in every cosharer in such property.

It is conceded in this case by the respondent that the land on the basis of which the right is claimed by Kartar Singh belongs to the joint Hindu family, but emphasis is laid on the fact that the land stands in the name of Budh Singh alone and that inasmuch as S. 15 (c) (thirdly) contemplates owners of the estate and an unrecorded

owner is not such an owner, Kartar Singh cannot successfully resist the suit for pre-emption. Reliance in this connexion has been placed on 106 P R 1913⁸ and 1 Lah 503.⁹ In the former case it was held that mere owners of houses in the abadi are not owners of the estate and in the latter a malik qabza who owned a small plot of land destined to be a building site was held not to be such an owner. It will be obvious that these authorities are distinguishable on facts. In my view, the very constitution of a joint Hindu family connotes that every member has an equal right with the other members and it is immaterial whether his name is recorded or not in the revenue papers. His right is not lost on that account and this being so none of the privileges with which the recorded owner is clothed can be denied to the unrecorded members.

I accordingly allow this appeal, set aside the decree of the Senior Subordinate Judge and dismiss the plaintiff's suit with costs throughout. If the respondent chooses to file a Letters Patent appeal against this order, I shall be willing to grant the necessary certificate.

G.N./R.K.

Appeal allowed.

8. Narain Singh v. Gopal Singh, (1913) 106 P R 1913=20 I C 2=252 P L R 1913.

9. Jawala Singh v. Tara Singh, (1920) 7 A I R Lah 94=57 I C 159=1 Lah 503.

A. I. R. 1940 Lahore 341

BHIDE J.

Parkash Kaur and others — Plaintiffs
— Petitioners.

v.

Gian Chand—Defendant—Respondent.

Civil Revisions Nos. 266 to 276 of 1939, Decided on 7th December 1939, for revision of decree of Judge, Small Cause Court, Lyallpur, D/. 21st November 1938.

(a) Evidence Act (1872), S. 116 — Rent suit by daughters claiming to be heirs to leasehold rights alleged to be stridhan of their mother — Though tenants cannot dispute title of mother at commencement of lease they can question plaintiff's derivative title—Plaintiff must prove that leasehold rights constituted stridhan of their mother and that they are entitled to inherit.

Where the rent suit is brought by the daughters claiming to be heirs to the leasehold rights alleged to be the stridhan of their mother, though the tenants cannot dispute the title of their mother at the commencement of the lease they can dispute the derivative title of the plaintiffs. It is in such a case incumbent upon the plaintiffs to prove that the leasehold rights in question were the stridhan of their mother and they are entitled to inherit the said rights according to Hindu law.

[P 342 C 2]

7. Ishri Parshad v. Basheshar Nath, (1908) 85 P R 1908=179 P L R 1908.

(b) Landlord and Tenant — Tenant dispossessed by other paramount title—Landlord cannot recover rent without restoring possession—But he is entitled to rent prior to dispossession by reason of S. 116, Evidence Act.

Where a tenant is dispossessed in execution of a decree by a paramount title, the landlord cannot obviously claim any rent without restoring possession since every lease conveys a covenant for quiet enjoyment. But the landlord is entitled to recover rent prior to the dispossession of the tenants by virtue of S. 116, Evidence Act. [P 343 C 2]

Asa Ram Aggarwal—*for Petitioners.*

Ajit Ram Malhotra and Chandar Bhan—*for Respondent.*

Order.—Civil Revisions Nos. 266 to 276 of 1939 arise out of eleven suits for recovery of rent by the same plaintiffs against different tenants. The suits were tried together and dismissed by one judgment by the Small Cause Court at Lyallpur. Plaintiffs have filed petitions for revision of this order under S. 25, Provincial Small Cause Courts Act. The facts of the cases and the pleas raised differed in material particulars and confusion has resulted owing to the suits having been tried together. For the sake of convenience, the material facts with respect to the leases for the purposes of this judgment have been shown in a statement "A" attached to this judgment. The plaintiffs are the minor daughters of one Mt. Raj Kaur, wife of Brahm Dass. It is alleged that the properties leased to the various tenants in the present suits were given by Brahm Das on a twenty years' lease to Mt. Raj Kaur and that the plaintiffs have inherited the leasehold rights from their mother. The main defence in these suits was that Brahm Dass himself had no title to the properties, as a decree had been obtained with respect to these properties by Wasudev and Inder Jit against Murli Dhar, father of Brahm Dass and the tenants had also been ejected in execution of the decree in June 1938. It was further alleged that Brahm Dass himself had sued for a declaration of his title to the properties on the basis of adverse possession, but his suit had been dismissed.

The defendants have unfortunately not placed copies of the judgments in the previous litigation referred to above on the record. Brahm Dass has however been examined as a witness by the plaintiffs themselves and he has admitted that his suit for a declaration of his title by adverse possession as against his father and his cousins had failed. But the plaintiffs' contention is that the question of title cannot be gone

into in the present cases, as the defendants' tenants are estopped from denying the title of the plaintiffs owing to the provisions of S. 116, Evidence Act. The learned counsel for the plaintiffs has strongly relied on AIR 1937 P C 251¹ in support of his arguments. The learned Judge of the Court below has held that the defendants were not estopped because the plaintiffs claim on the basis of a "derivative title." But the learned Judge seemed to have overlooked some facts and misunderstood the law. In two of the suits (Civil Revisions Nos. 273 and 275), the leases were in favour of the plaintiffs themselves and consequently no question of "derivative title" arises in those suits. As regards the other suits, the original leases were no doubt in favour of Mt. Raj Kaur, plaintiffs' mother, who died on 13th September 1937. But here, too, the defendants cannot question the title of Mt. Raj Kaur at the commencement of the lease. They can only dispute that the title had devolved on the plaintiffs according to law. The plaintiffs' case was that the leasehold rights granted to Mt. Raj Kaur by Brahm Dass constituted her "stridhan"; and hence they were entitled to inherit the said rights according to Hindu law. The defendant however disputed plaintiffs' "derivative" title and hence it was incumbent on the plaintiffs to prove that the leasehold rights in question were the "stridhan" of Mt. Raj Kaur and they were entitled to inherit those rights. But there seems to be nothing on the record to prove that the leasehold rights were "stridhan." Even the lease executed by Mt. Raj Kaur has not been placed on the record and it is not explained how Brahm Dass could grant any lease at all, when he has himself admitted in the witness-box that his suit to establish his title to the properties had been dismissed. The learned counsel for the plaintiffs urged that every property of a woman is her 'stridhan', but this contention is unsound, as 'stridhan' has a technical meaning under Hindu law and plaintiffs had therefore to prove that the leasehold rights were 'stridhan' according to that law. I must therefore hold that the plaintiffs have failed to establish in these suits that Mt. Raj Kaur had any leasehold rights in the properties in suit and that these could be looked upon as her 'stridhan' according to Hindu law.

1. Krishna Prosad Lal Singha Deo v. Baraboni Coal Concern Ltd., (1937) 24 A I R P O 251 = 169 IC 556 = 64 I A 311 = I L R (1938) 1 Cal 1 = 31 S L R 625 (P C).

The learned counsel for the plaintiffs next contended that the plaintiffs had already obtained decrees against some of the tenants and hence the question of their 'derivative' title was *res judicata*. But the plaintiffs have produced only one previous judgment against Sukh Dial, (who is defendant in two suits, viz. those giving rise to Civil Revisions Nos. 267 and 274 of 1939). That judgment shows that the plaintiffs sued for recovery of rent amounting to Rs. 27 after the death of their mother and obtained a decree. The question of their title to maintain that suit was put in issue and decided in their favour (see judgment by Lala Girdhar Kishan Bhatnagar in Civil Suit No. 1074/3 on the record). In the circumstances, the matter must, I think, be held to be *res judicata* so far as this defendant is concerned. In the other suits however no copies of previous judgments have been produced and certain admissions of the defendants, which were referred to, do not appear to me to be clear enough to hold the question to be *res judicata*. It is therefore now necessary to discuss further only four of the suits which have given rise to these petitions, viz. (i) Civil Revisions Nos. 273 and 275, in which the plaintiffs themselves were the original lessors and consequently no question of 'derivative' title arises; and (ii) Civil Revisions Nos. 267 and 274 against Sukh Dayal, in which the question of 'derivative' title must be deemed to be *res judicata*, owing to the previous judgment against Sukh Dayal in a similar rent-suit instituted after the death of Mt. Raj Kaur. I shall deal with these two groups of suits separately.

As regards the first two suits in which the plaintiffs themselves were the lessors, the only defence raised before me was that the lessees had been ejected by a paramount title in execution of a decree. The ejection is however said to have taken place in June 1938. The periods for which rent is claimed in these suits were as follows: Civil Revision No. 273, 22nd May 1938 to 21st June 1938, Civil Revision No. 275, 12th June 1938 to 12th July 1938. The allegation that the tenants were dispossessed by Wasudev and Inderjit in execution of a decree, as alleged by them, is supported by a report on the warrant in execution of the decree in favour of Wasudev and Inderjit and was not disputed. According to their allegations the tenants in the above two cases were ejected on 10th June 1938 and 9th June 1938 respectively. In the circum-

stances, it seems to me that the plaintiffs cannot claim any rent for the periods subsequent to the dates of dispossession of the tenants in June 1939. In Civil Revision No. 275, the whole period for which the rent is claimed is subsequent to the dispossession, while in Civil Revision No. 273, only a part of it was subsequent to the dispossession. The learned counsel for the appellants urged that the title of Wasudev and Inderjit cannot be considered to be 'paramount' to that of the plaintiffs as the plaintiffs were not parties to the suit in which the decree was obtained. But as pointed out above, even Brahmdayass, from whom the plaintiffs claim to have ultimately derived their title, had apparently failed to establish his title against Inderjit and Wasudev, according to the evidence of Brahmdayass himself. Consequently, the dispossession in execution of the decree of Wasudev and Inderjit was, in my opinion, by a paramount title. Secondly, every lease conveys a covenant for quiet enjoyment, and when the tenants were dispossessed in execution of decrees, the plaintiffs cannot obviously claim any rent without restoring possession. However, owing to the rule of estoppel in S. 116, Evidence Act, the plaintiffs seem to be entitled to recover rent for the period prior to the dispossession of the defendant Jiwandass in the suit which has given rise to Civil Revision No. 273 of 1939. This period was from 22nd May 1938 to 9th June 1938 and the rent for the period works out to about Rs. 6 only. As regards the remaining two suits against Sukh Dayal, rent is claimed for the periods shown below:

(1) Civil Revision No. 267 : For the month of June 1938. (2) Civil Revision No. 274 : From 1st November 1937 to 31st May 1938. Sukh Dayal was dispossessed in execution of this decree of Wasudev and Inderjit on 9th June 1938. The period for which rent is claimed in Civil Revision No. 274 is prior to the date on which Sukh Dayal was dispossessed. No other defence being available to Sukh Dayal in this case, the plaintiffs seem to be entitled to a decree for the rent claimed, viz. Rs. 63 in this case. In the other suit giving rise to Civil Revision No. 267 rent is claimed for the month of June 1938. As Sukh Dayal was dispossessed on 9th June 1938, the plaintiffs are entitled to recover rent up to that date only. The amount of this rent due in this case works out to about Rs. 2.12.0 only. The plaintiffs claimed some damages in addition to rent; but this claim has not been made out. On the

above findings the plaintiffs seem to be entitled to decrees in three cases only as follows: Civil Revision No. 267 : Rs. 2-12-0. Civil Revision No. 274 : Rs. 63. Civil Revision No. 273 : Rs. 6.

I accept these petitions and grant plaintiffs decrees as above, but in view of all the circumstances make no order as to costs.

The remaining petitions are dismissed with costs. In the end I may refer to one matter which was mentioned in the course of arguments. It was stated that a receiver had been appointed of the properties in dispute in connexion with the decree obtained by Wasudev and Inderjit and that the receiver was really entitled to realize the rent for which plaintiffs have sued in these cases. But the receiver was not a party to the present suits. If he is entitled to recover the rents for which the plaintiffs are being granted decrees, it is for him to take proper legal proceedings to establish his claim against the plaintiffs and to restrain them from realizing these decrees.

G.N./R.K.

Order accordingly.

A. I. R. 1940 Lahore 344

SKEMP J.

Chint Ram — Defendant — Appellant.
v.

Harbhagat Singh, Plaintiff and others,
Defendants — Respondents.

Second Appeal No. 972 of 1939, Decided on 12th January 1940, from decree of Addl. Dist. Judge, Ferozepore, D/- 8th March 1939.

Punjab Pre-emption Act (1 of 1913), S. 15 — Man owning small plot unassessed to revenue, uncultivated and destined to be building site is not one of 'owners of the estate.'

Owners of the estate mean the proprietary body of the village. A man who owns only a small plot unassessed to revenue, uncultivated except to a trifling extent and clearly destined to be a building site, cannot be regarded as one of the 'owners of the estate': *A I R 1920 Lah 94, Rel. on.*

[P 345 C 1]

R. P. Khosla — *for Appellant.*

Jhanda Singh — *for Respondents.*

Judgment. — This second appeal has arisen from a suit for pre-emption. On 26th January 1937, Kaka Ram sold the land in dispute to Chint Ram, appellant, who some months later obtained mutation of names in the revenue records. On 24th January 1938 the respondent, Sardar Harbhagat Singh, sued for pre-emption on the ground that he was an owner in Thula taloka whereas the vendee Chint Ram was

not such an owner. On 7th March 1938 Manak Mal, the father of the appellant, acquired by exchange a piece of land in Thula taloka measuring 7 kanals 13 marlas; and on the same day he gifted this field number to his son. The trial Judge found that the plaintiff had a preferential pre-emptive right and granted him a decree for pre-emption on payment of the price named in the deed. This judgment and decree were maintained on appeal and Chint Ram has come here on second appeal. Issue 1 was: Has the plaintiff a preferential pre-emptive right? On this the trial Judge held that the gift by Manak Mal to his son was a bogus transaction and that even if it were not bogus, the piece of land gifted was not agricultural land and the vendee was not an owner of the patti. The learned Additional District Judge found that the gift to Chint Ram by his father was genuine but that the land in question did not make the appellant the owner of the patti or an owner of the estate. He therefore dismissed the appeal.

Two points were argued before me: (1) Is the land in question, i. e. field No. 3182 gifted to Chint Ram, agricultural land? and (2) Did issue 1 as framed enable the vendee to show the type of land? After some arguments it was admitted that the finding of the Additional District Judge was correct according to the evidence on the record. "Agricultural land" is defined in S. 3 (1), Punjab Pre-emption Act of 1913, as meaning "land" as defined in the Punjab Alienation of Land Act. The definition in S. 2 (3), Punjab Alienation of Land Act is:

The expression "land" means land which is not occupied as the site of any building in a town or village and is occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture.

Now, the learned Additional District Judge has found—and his findings are binding on me—that the land has been *banjar qadim* and has not been cultivated since 1911-12, that it is not assessed to land revenue and that it is adjacent to the village. Mr. Khosla for the appellant referred to the statement of a witness who said that it had been cultivated 15 or 16 years ago, but for reasons which he gave, the Additional District Judge did not believe that witness's statement and his finding is a finding of fact binding on me. The plaintiff's right of pre-emption is based on S. 15, Punjab Pre-emption Act, which places the right of pre-emption: (c) secondly. "in the owners of the patti or other sub-division of

the estate within the limits of which such land or property is situate"; and, thirdly, "in the owners of the estate."

There is a whole series of rulings, some of which are referred to by the Judges below, which lay down that owners of the estate mean the proprietary body of the village. 1 Lah 503,¹ for instance, held that a man who owned only a small plot of 8 marlas, unassessed to revenue, hitherto uncultivated except to a trifling extent and clearly destined to be a building site, could not be regarded as one of the 'owners of the estate.' This coincides fairly closely with the present facts, and Manak Mal stated in Court that he had given the land to his son for a building site. The finding of the learned Additional District Judge is therefore correct on the evidence, but Mr. Khosla's main contention is that the case ought to be remanded in order to enable his client to produce further evidence on the point. He produced in this Court an extract from old revenue records showing that the revenue on this particular field had been remitted in order to maintain a dharamsala. This contention is not supported by the grounds of appeal. The point was no doubt taken before the District Judge by a separate application supported by an affidavit which appears to have been put in just before arguments began. The Additional District Judge held that there was no necessity to remand.

The facts are that the sale was made to Chint Ram, that just before the expiry of limitation the plaintiff lodged his suit and that he had on the face of it a right of pre-emption. To defeat this right the defendant arranged to become an owner in the Thula. This was a manoeuvre for the purposes of the case, no doubt a perfectly legitimate manoeuvre. The exchange and gift took place on 7th March 1938. The defendant's written statement in answer to the plaintiff was lodged on 30th March 1938, and simply states that the defendant was an owner in the Thula. Apparently, the defendant thought that this was sufficient. Issues were framed on 26th April. The issue as framed was wide enough to cover the evidence which the appellant now wishes to produce. He was aware that prima facie the plaintiff's suit must succeed and he took a step to defeat it. It was for him to prove that the step was sufficient by all the necessary evidence. Probably he thought

that it was sufficient to be an owner in the Thula, not an owner of the Thula, and was unaware of the judicial pronouncements of the Chief Court and this Court. In my judgment this appeal must fail and is hereby dismissed with costs.

D.S./R.K.

Appeal dismissed.

A. I. R. 1940 Lahore 345

BHIDE J.

*Firm Narain Dass Gulab Singh through
Kanwar Kishori Saran and others—
Judgment-debtors — Appellants.*

v.

*Patiala Durbar, Decree-holder and
others, Auction-purchasers —*

Respondents.

First Appeals Nos. 184, 245, 217 and Exn. F. A. No. 324 of 1939, Decided on 11th March 1940, from order of District Judge, Ambala, D/- 20th April 1939.

(a) Civil P. C. (1908), S. 68—Notification under, by Punjab Government—Notification No. 365-R (Revenue Department) dated 17th January 1939 applies even to pending execution proceedings in which order for sale has been passed.

The Notification under S. 68, No. 365 R (Revenue Department), dated 17th January 1939, applies even to pending execution proceedings in which an order for sale of such land has been passed, provided, of course the sale had not been actually carried out before the notification: *A I R 1934 Oudh 16, Ref.* [P 346 C 2]

(b) Civil P. C. (1908), S. 68 — Notification under, by Punjab Government — Notification No. 365-R (Revenue Department) dated 17th January 1939 — It is not necessary to transfer execution of decree as a whole to Collector merely because some land falling within purview of notification had been ordered to be sold.

The executing Court does not become functus officio entirely after land covered by the notification is ordered to be sold. Hence, it is not necessary to transfer the execution of the decree as a whole to the Collector merely because some land falling within the purview of the notification had been ordered to be sold. However, as soon as any land falling within the purview of the notification is ordered to be sold, the execution of the decree so far as that land is concerned must be transferred to the Collector. [P 346 C 2 ; P 347 C 1]

(c) Receiver—Ample property of judgment-debtor available for satisfaction of decree — Receiver should not be appointed—Receiver cannot be appointed when execution proceedings are to be transferred to Collector.

The appointment of a receiver to take charge of the judgment-debtors' property is an exceptional remedy and when there is admittedly ample property of the judgment-debtor available for satisfaction of the decree, there is no good reason to appoint a receiver. Besides, when the execution proceedings are to be transferred to the Collector a receiver cannot be appointed: *A I R 1925 Oudh 448, Rel. on.* [P 348 C 1]

¹ *Jawala Singh v. Tara Singh*, (1920) 7 A I R Lah 94=57 I C 159=1 Lah 503.

Charanjiva Lal Aggarwal —

for Appellants.

Tek Chand and Asa Ram Aggarwal —

for Respondents 2 to 5.

Judgment. — First Appeals from Order Nos. 184, 245 and Execution First Appeal No. 324 and First Appeal from Order No. 217 of 1939 are connected appeals arising out of execution proceedings relating to the same decree and can be conveniently disposed of together. The decree was for a sum of over five lacs and only a small portion of the decree is said to have been realized so far owing to the dilatory and obstructive tactics alleged to have been employed by the judgment-debtors. The execution was proceeding at first in the Court of the Senior Subordinate Judge, Ambala, who passed an order for the sale of land belonging to the judgment-debtors in four villages on 24th February 1939 and directed the papers to be sent to the Collector for the sale being carried out as usual : *cf.* S. 141, Punjab Land Revenue Act. He also directed at the same time proclamation and warrants to issue for the sale of several houses belonging to the judgment-debtors. Thereafter, on 8th March 1939, the execution proceedings were transferred by the District Judge to his own Court. Shortly afterwards a notification was published by the Punjab Government under S. 68, Civil P. C., to the effect that the execution of decrees in cases in which 'land' within the definition of the term in the Punjab Tenancy Act is ordered to be sold 'shall be transferred to the Collector': *vide* Notification No. 365-R (Revenue Department) dated 17th January 1939, published in the Punjab Gazette on 17th March 1939). The judgment-debtors then applied to the District Judge for the execution proceedings being transferred to the Collector in pursuance of this notification. The learned Judge, however, held that the whole of the execution proceedings were not liable to be transferred as contended for the judgment-debtors and secondly, that the proper stage for such transfer had in any case not yet arrived as some more land had still to be attached and a consolidated order would be passed for the sale of all the land (*vide* District Judge's order dated 22nd July 1939.) From this decision Execution First Appeal No. 324 of 1939 has been preferred.

By order dated 20th April 1939, the learned District Judge confirmed the sale of seven house properties. From this decision First Appeal from Order No. 184 of

1939 has been preferred and the main contention in this appeal is that the judgment-debtors were not given opportunity to produce evidence in support of their objections to the sales. By order dated 15th August 1939, the learned District Judge rejected objections to the sale of certain other properties and confirmed their sale. From this order First Appeal from Order No. 245 of 1939 has been preferred. Lastly, First Appeal from Order No. 217 of 1939 is against an order passed by the District Judge rejecting an application by the decree-holder for appointment of a receiver for the management of the judgment-debtors' property and for satisfaction of the decree from the income thereof. I take up first Execution First Appeal No. 324 of 1939. The main point urged in this appeal by the learned counsel for the appellant was that as soon as the executing Court ordered any land falling within the purview of the notification under S. 68, Civil P. C., to be sold, the executing Court became "functus officio" and the whole execution proceedings should have been sent to the Collector and that the executing Court had no power to proceed with the execution at all thereafter in any respect. The notification under S. 68, Civil P. C., runs as follows :

In exercise of the powers conferred by S. 68, Civil P. C., the Governor of the Punjab is pleased to declare that throughout the Punjab, in all cases in which a Civil Court has ordered any land as defined in the Punjab Tenancy Act, 1887, or any interest in such land, to be sold, the execution of the decree shall be transferred to the Collector except when the decree is one for the recovery of money specifically charged on the land ordered to be sold.

It is not disputed that land falling within the purview of the notification was ordered to be sold in execution on 24th February 1939. The notification was published after the date of this order, but this would not matter, as the notification would seem to apply even to pending execution proceedings in which an order for sale of such land has been passed, provided of course the sale had not been actually carried out before the notification (*cf.* A I R 1934 Oudh 16¹). The learned counsel for the judgment-debtors was not able to cite any authority in support of his contention that the executing Court becomes functus officio entirely after land covered by the notification is ordered to be sold. According to

1. Amir Haidar v. Babhu Lal, (1934) 21 A I R Oudh 16 = 147 I C 613 = 9 Luck 390 = 10 O W N 1267.

Ss. 69 and 70, Civil P. C., when such land is ordered to be sold and the execution is transferred to the Collector, the Collector has only such powers in execution as are conferred upon him either by Sch. 3, Civil P. C., or by the rules framed by the Provincial Government under S. 70, Civil P. C. But the Collector does not actually become the executing Court and the powers of the executing Court remain unaffected in other respects (*cf.* A I R 1931 All 320;² 31 Bom 207³ at page 217).

According to para. 1 of Sch. 3, Civil P. C., the Collector has only power to deal with the property of the judgment-debtors falling within the scope of the notification in a certain manner. In the case of decree for payment of money not specifically charged on land if the Collector thinks that all the liabilities of the judgment-debtor can be discharged without the sale of the whole of his immovable properties, he has discretion to take action under paras. 2 to 10. But unless he decides to proceed under para. 2, he does not seem to have any general power to execute the decree in the same manner as an executing Court has. By para. 1 his powers seem to be otherwise limited to the property ordered to be sold. No rules appear to have been published as yet by the Provincial Government under S. 70, Civil P. C., and hence the question of any limitation placed on the powers of the executing Court by such rules does not arise in the present case.

The learned District Judge was therefore right in my opinion in holding that it was not necessary to transfer the execution of the decree as a whole to the Collector merely because some land falling within the purview of the notification had been ordered to be sold. However, I do not think he was justified in postponing the transfer of the execution of the land in four villages which was ordered to be sold on 24th February 1939 to the Collector merely because some other land was also to be attached and order for the sale of such land had yet to be passed. In view of the wording of the notification, it seems to me that as soon as any "land" falling within the purview of the notification is ordered to be sold, the execution of the decree, so far as that land is concerned, must be transferred

to the Collector. If the learned Judge wanted to pass a consolidated order for the sale of all the landed properties, no order for the sale of any land should have been passed until all the land had been attached. It must be remembered that on the transfer of the proceedings, the Collector has the discretion to proceed in the manner laid down in paras. 2 to 10 of Sch. 3. If he does so, it would be obviously for the Collector to decide in what manner, the whole of the immovable property of the judgment-debtors shall be dealt with for liquidation of their debts. If he decides to take such action, then according to para. 11 of the Schedule, the Civil Court will have no power to issue any process against any other immovable property of the judgment-debtors. I therefore hold that the execution proceedings relating to the sale of the land covered by the order of 24th February 1939 should have been forthwith transferred to the Collector after the publication of the notification and the executing Court should not have issued process against any other property of the judgment-debtors thereafter without first ascertaining whether the Collector proposed to take action in this case under paras. 2 to 10, Sch. 3, Civil P. C.

I now come to First Appeals from Order Nos. 184 and 245 of 1939. These appeals relate to disposal of objections to certain sales of house properties which had already taken place. There was no question in these proceedings of issuing process against any properties after the transfer of the execution proceedings to the Collector as the sale had taken place before the publication of the notification. I see therefore no force in the contention that the executing Court had no power to confirm these sales. I shall therefore deal with these appeals on merits. As regards the first of these appeals, the only contention of the learned counsel for the judgment-debtors was that the judgment-debtors were not given time to produce evidence in support of their objections. This contention seems to have no force. The Senior Subordinate Judge in whose Court the execution proceedings were pending at first had already fixed a date for evidence in connexion with the objections and had directed the parties to put in process fees, etc. for witnesses within two days. The judgment-debtors admittedly did not comply with this order and no explanation is given as to why they failed to do so, if they really wanted to produce any evidence in support of the objections. Subsequently,

2. *Murahmat Husain v. Oudh Commercial Bank Ltd.*, (1931) 18 A I R All 320=133 I C 609=1931 A L J 166.

3. *Pita Moti v. Ohuni Lal*, (1907) 31 Bom 207=9 Bom L R 15.

the case was transferred to the Court of the District Judge and the counsel for the parties were informed. The counsel for the parties appeared before the District Judge on 6th April and then the case was fixed for 20th April; yet the judgment-debtors or their counsel took no steps to call any witnesses. The other parties summoned their witnesses and produced them on 20th April. The statement of Lala Raghbir Pershad, counsel for the judgment-debtors, on 20th April, that he was under the impression that fresh notices would issue about transfer of the case to the District Court and then an order would be passed for summoning witnesses seems, on the face of it, absurd and unreliable. Most of the objections were such as ought to have been raised before the sale was conducted, according to proviso 2 to O 21, R. 90, Civil P. C., as framed by this Court. The judgment-debtors have been apparently trying to delay the execution proceedings as much as possible and the request for a further adjournment for producing evidence which was made on 20th April 1939 seems to be a part of their game. In view of all the circumstances, I see no reason to interfere with the order passed by the learned District Judge.

The next appeal is First Appeal from Order No. 245 of 1939. The learned District Judge has disposed of all the objections and the learned counsel for the judgment-debtors was unable to advance any argument in this appeal requiring consideration. This appeal seems to have no force and must fail. The last appeal which remains to be disposed of is First Appeal from Order No. 217 of 1939. The decree-holder had applied for the appointment of a Receiver to take charge of the judgment-debtors' property. The learned District Judge has however rightly pointed out that this is an exceptional remedy and when there is admittedly ample property of the judgment-debtors available for satisfaction of the decree, there seems to be no good reason to appoint a Receiver at present. Besides, when the execution proceedings are now to be transferred to the Collector a Receiver cannot be appointed at present: *cf.* A I R 1925 Oudh 448.⁴ This appeal also must therefore be rejected.

In the end, I may mention that the learned counsel for the decree-holder stated

4. Jang Bahadur v. Bank of Upper India Ltd., (1925) 12 A I R Oudh 448=87 I C 21=28 O C 380=2 O W N 73.

before me that if the execution proceedings have to be transferred as a whole to the Collector, he would prefer not to proceed with the execution as against the land. The learned counsel for the judgment-debtors contended that it is not now open to the decree-holder to get the order for the sale of the land cancelled. I do not however consider it necessary to go into this matter for the purposes of these appeals. I have indicated above my view as to the effect of the notification under S. 68 in the circumstances of the case and I think it preferable to leave the decree-holder to adopt such course as he may be advised to take in the matter in the Court below. On the above findings, I dismiss First Appeals from Order Nos. 184 and 245 of 1939 with costs. I also dismiss First Appeal from Order No. 217 of 1939, but in view of all the circumstances leave the parties to bear their costs. As regards Execution First Appeal No. 324, I accept the appeal and direct that the execution of the decree with respect to the land ordered to be sold on 24th February 1939, be transferred to the Collector for being dealt with by him according to law. I make no order as to costs in this appeal also in view of all the circumstances.

D.S./R.K.

Order accordingly.

A. I. R. 1940 Lahore 348

TEK CHAND AND ABDUL RASHID JJ.

Abdul Aziz (minor) through Mehraj Din — Plaintiff — Appellant.

v.

Dharamsey Jetha & Co. and others —

Defendants — Respondents.

First Appeal No. 231 of 1939, Decided on 12th March 1940, from decree of Sub-Judge, First Class, Amritsar, D/- 16th May 1939.

Mahomedan Law — Will — Payment of debts of deceased takes precedence over legacies — Property in hands of legatee can be proceeded against for payment of debt even if other property of deceased is sufficient to pay debt.

Under Mahomedan law the payment of the debts of the deceased takes precedence over the legacies. The decree-holder can proceed against the property in hands of the legatee irrespective of the fact whether the other assets of the deceased are or are not sufficient for the payment of the decretal amount. —

[P 349 O 2]

Sheikh Abdul Aziz and Dhanpat Rai —
for Appellant.

Panna Lal Behl and Dharam Bhushan —
for Respondent 1.

Abdul Rashid J.—On 2nd August 1931 a decree was passed in favour of Messrs. Dharamsey Jetha & Co., Bombay, defen-

dant 1, for a sum of Rs. 3,22,169-5-6 against Khan Sahib Mistri Asmat Ullah. On 22nd March 1933, Khan Sahib Mistri Asmat Ullah made a will in favour of his brother's grandson, namely Abdul Aziz, plaintiff, bequeathing two houses in mouza Nowshehra Pannuan in his favour. Khan Sahib Asmat Ullah died on 20th February 1936. Messrs. Dharamsey Jetha & Co. attached both the houses that had been bequeathed to Abdul Aziz in execution of their decree against Khan Sahib Asmat Ullah. The plaintiff Abdul Aziz preferred objections in the executing Court against the attachment of the two houses. These objections were, however, dismissed. On 9th November 1938, Abdul Aziz instituted the present suit, under O. 21, R. 63, Civil P. C., for a declaration to the effect that he was the owner of the two houses in dispute by virtue of the will, dated 22nd March 1933, and that these houses were not liable to attachment and sale in execution of the decree of Messrs. Dharamsey Jetha & Co., against Khan Sahib Asmat Ullah.

Defendant 1, who is the only contesting defendant, pleaded, inter alia, that the will was not genuine; that the testator was not in possession of a disposing mind at the time of the execution of the will, and that the plaintiff as a legatee was bound to pay the debts of the testator. It was also pleaded that the plaintiff was the legal representative of the judgment-debtor, and that no separate suit could be filed by him in view of the provisions of S. 47, Civil P. C. The trial Court held that the due execution of the will by Khan Sahib Asmat Ullah had been established. It was also held that the testator was in a disposing mind at the time of the execution of the will. The suit of the plaintiff was, however, dismissed on the findings that the legatee could take the legacy only subject to the debts of the testator and that the plaintiff's suit was barred by the provisions of S. 47, Civil P. C. Against this decision Abdul Aziz has preferred an appeal to this Court. It was contended by the learned counsel for the appellant that the testator left a great deal of property and that the decree of defendant 1 could be satisfied out of the other property of the testator, and that the houses in dispute were, therefore, not liable to attachment and sale in execution of the decree. S. 325, Succession Act, lays down that debts of every description must be paid before any legacy. S. 361 is to the effect that a creditor who has not received payment of his

debt may call upon a legatee who has received payment of his legacy to refund, whether the assets of the testator's estate were or were not sufficient at the time of his death to pay both debts and legacies; and whether the payment of the legacy by the executor or administrator was voluntary or not.

In view of these provisions of the Succession Act the question, whether the testator's estate, apart from the two houses in dispute, was or was not sufficient at the time of death to pay all his debts, is immaterial. Under the Mahomedan law the estate of a deceased Mahomedan is to be applied successively in payment of (1) his funeral expenses and death-bed charges, (2) expenses of obtaining probate etc. (3) wages due for service rendered to the deceased within three months preceding his death, (4) other debts of the deceased according to their respective priority if any and (5) legacies not exceeding one-third of what remains after all the above payments have been made. It would be evident that the payment of the debts of the deceased takes precedence over the legacies. The decree-holder can proceed against the houses in dispute irrespective of the fact whether the other assets of the deceased are or are not sufficient for the payment of the decretal amount. I am, therefore, of the opinion that the contention of the learned counsel that the decree-holder should, in the first instance, proceed against the other property of the deceased cannot be given effect to in view of the provisions of the Succession Act as well as the Mahomedan law. No other point was argued before us in this appeal. For the reasons given above I would affirm the decision of the lower Court and dismiss this appeal with costs.

Tek Chand J.—I agree.

D.S./R.K.

Appeal dismissed.

A. I. R. 1940 Lahore 349

BHIDE J.

Hakim Mohammad Jamil Khan —

Defendant — Appellant.

v.

Kewal Ram and others, Plaintiffs and another, Defendant — Respondents.

Second Appeal No. 1698 of 1939, Decided on 1st March 1940, from decree of Senior Sub-Judge, Delhi, D/- 17th May 1939.

Limitation Act (1908), Art. 11-A—Art. 11-A applies only to suit by person dispossessed of property in delivery of possession in execution of decree.

Article 11-A applies only to suits by a person who has been dispossessed of property in the delivery of possession in execution of a decree.

[P 350 C 2]

Where a person had not been dispossessed of any property when the order under O. 21, R. 99, Civil P. C., was passed against him and the application which was presented by him under O. 21, R. 99, Civil P. C., was held to be incompetent, the suit is not covered by the terms of Art. 11-A: *A I R 1922 Cal 229 and A I R 1929 Pat 553, Rel. on.*

[P 350 C 2]

Shamair Chand — *for Appellant.*

Madan Mohan Kapur—*for Respondents (Plaintiffs 7 and 8).*

Judgment. — The material facts of the case giving rise to this appeal are briefly as follows: Hakim Mohammad Jamil Khan obtained a decree for ejectment against Qazi Abdul Haq from a plot of land measuring 2100 square yards on 10th April 1934. In the course of execution he found that respondents 1 to 13 were in possession of the plot. They preferred objections purporting to be under O. 21, R. 99, Civil P. C., but these were dismissed by the learned Subordinate Judge on 29th March 1935 with the remark: "The objection does not lie under O. 21, R. 99. It is therefore disallowed." Subsequently it appears that a fresh warrant for delivery of possession was issued and thereupon the respondents instituted a suit for a declaration to the effect that they were the owners of the land in question. This suit has been decreed by the Courts below and from this decision the present appeal has been preferred.

The sole point of law raised in appeal is that the suit was barred by Art. 11-A, Limitation Act, inasmuch as it was not instituted within one year of the order under O. 21, R. 99 which was passed on 20th March 1935. The learned Senior Subordinate Judge has held that Art. 11-A was not applicable as the order in question was not passed after investigation under R. 99. The learned counsel for the appellant has contended that Art. 11-A would apply even if the application under O. 21, R. 99, Civil P. C., was dismissed without any investigation. In support of this contention he relied on 11 Lah 369¹ and 115 I C 703.² These rulings, however, relate to objections under O. 21, R. 58, Civil P. C. The wording of Art. 10, Limitation Act, which relates to suits arising out of orders under O. 21, R. 63, Civil P. C., is different to that of

1. Nival Kishore v. Khyali Ram, (1929) 16 A I R Lah 865 = 120 I C 679 = 11 Lah 369 = 31 P L R 752.

2. Subedar Singh v. Ramprit Pande, (1929) 16 A I R Pat 116 = 115 I C 703 = 11 P L T 28.

Art. 11-A, Limitation Act, which is relevant for the purposes of the present suit. According to the wording of the latter Article, it would seem to apply only to suits by a person who has been dispossessed of property in the delivery of possession in execution of a decree. In the present instance it is not disputed that the respondents had not been dispossessed of any property when the order under O. 21, R. 99, Civil P. C., referred to above, was passed against them. In fact the application which was presented by them under O. 21, R. 99, Civil P. C., was held to be incompetent. In these circumstances the suit does not seem to be covered by the terms of Art. 11-A, Limitation Act. The learned counsel for the respondents has cited A I R 1922 Cal 229³ and A I R 1929 Pat 553,⁴ which support the decision of the learned Senior Subordinate Judge. I therefore dismiss the appeal with costs.

D.S./R.K.

Appeal dismissed.

3. Nirode Boroni Dassi v. Monindra Narayan Chandra, (1922) 9 A I R Cal 229 = 68 I C 524 = 35 C L J 537 = 26 C W N 853.

4. Satyanarain Mullick v. Jinsi Sah, (1929) 16 A I R Pat 553 = 117 I C 634 = 10 P L T 872.

A. I. R. 1940 Lahore 350

TEK CHAND AND ABDUL RASHID JJ.

Punjab National Bank Ltd. Lahore through Branch Manager, Qila Sheikhupura — Plaintiff — Appellant.

v.

Seth Pars Ram and others —

Defendants — Respondents.

First Appeal No. 77 of 1939, Decided on 12th February 1940, from decree of Senior Sub-Judge, Sheikhupura, D/- 14th December 1938.

(a) Co-owners — Ouster — Mesne Profits — Person in possession is liable to render account of rents and profits of other's share.

Although one co-owner is not accountable to the others for "excessive use and occupation," but if his possession or user of joint property is inconsistent with the title of the others, or it amounts to their exclusion or dispossession, such possession or user clearly becomes unlawful and he is bound to render account of the rents and profits of the share of others: 122 P R 1881 and A I R 1927 Lah 566, *Expl. and Disting.; Case law referred.*

[P 352 C 2; P 354 C 1]

(b) Evidence—Presumption — Party relying on document alleged by him to be in his possession — His failure to produce same raises presumption that it would have gone against him.

Where a party relying on a document admits it to be in his possession and does not produce it, the obvious inference is that the document if produced would have gone against him. [P 354 C 1, 2]

Achhru Ram and Hargopal —

for Appellant.

P. N. Behl and Rattan Lal Chawala —

for Respondents.

Tek Chand J.—The plaintiff, the Punjab National Bank Limited Lahore, instituted a suit against the defendants, six in number, for partition of a factory, situate at Mauza Fatehpur Jhiwar, near Sangla Hill, and for rendition of accounts in respect of mesne profits of the factory. The defendants admitted that the plaintiff Bank was the owner of 17783/54000ths share in the factory and, on 6th April 1938, the lower Court passed a preliminary decree for partition of the plaintiff's share and subsequently appointed a local commissioner to effect the partition by metes and bounds on the spot. It however dismissed the plaintiff's suit so far as the claim relating to the taking of accounts in respect of mesne profits was concerned. The plaintiff Bank has appealed. The facts material for the purposes of this appeal are that the factory in question originally belonged to Girdhari Lal, father of Shiv Charan Lal and Bikramajit (defendants 4 and 5), Pars Ram (defendant 1), Mt. Bhano Bai (defendant 2) and the plaintiff Bank had obtained decrees against Girdhari Lal. In execution of these decrees the factory was sold and was, in the first instance, purchased by Pars Ram and Mt. Bhano Bai (defendants 1 and 2). The Bank also claimed a share in the factory and before the sale was confirmed, by mutual agreement between the various decree-holders, the Bank was admitted as a co-purchaser. Accordingly, the sale was confirmed in favour of all the three decree-holders on 1st August 1934, and sale certificates were granted to them in the following shares :

The plaintiff Bank	17783/54000
Pars Ram (defendant 1)	24145/54000
Mt. Bhano Bai (defendant 2)	12072/54000

These three parties thus became co-owners of the factory in the shares mentioned above. On 2nd October 1934, Pars Ram sold his share in the factory to Ram Chand (defendant 3) for Rs. 15,000. Out of the sale price, Ram Chand was able to pay Rs. 2000 only in cash and for the balance, Rs. 13,000, he mortgaged, with possession, his 24145/54000ths share in the factory to Pars Ram by a deed executed and registered on the same day. A week later, on 9th October 1934, Pars Ram leased this share to Ram Chand for one year. Within a day or two from that date, Ram Chand executed

a lease in favour of Walu Ram, (defendant 6). The plaintiff Bank alleges that this lease was of the whole factory, though Ram Chand's own share was 24145/54000ths only. Walu Ram, in his jawab dawa, admitted that Ram Chand had leased the whole factory to him. Ram Chand however stated that the lease was only of his own share in the factory. In January 1937 Ram Chand resold his share to Shiv Charan Lal and Bikramajit, sons of the original owner, Girdhari Lal.

On 9th December 1937 the present suit was instituted by the Bank for partition of its share in the factory and for "mesne profits after rendition of accounts." In this suit Pars Ram, Mt. Bhano Bai, Ram Chand and Shiv Charan Lal and Bikramajit, sons of Girdhari Lal, and Walu Ram were impleaded as defendants. In the plaint, after reciting the transactions mentioned above, it was stated that Ram Chand had leased out the entire factory, including the share of the plaintiff Bank, to Walu Ram, without consulting or obtaining the consent of the Bank and that all the defendants had been running the factory in collusion with one another in order to deprive the Bank of its share of the rents and profits of the factory which they were unlawfully bringing into their use. The plaintiff Bank, accordingly, claimed profits which had accrued from the factory to the extent of its share from the date of the purchase in its favour till the institution of the suit and also mesne profits from the institution of the suit till decree, together with interest thereon at a reasonable rate. In the last para of the plaint mesne profits were claimed from 10th February 1934, but before us Mr. Achhru Ram admitted that this was a mistake and that the plaintiffs, if held entitled to have an account from any or all of the defendants, could only claim it from the date of its purchase, which was 1st August 1934.

In their respective written statements, the defendants denied their liability to render account to the plaintiff Bank. The learned Judge held that Pars Ram (defendant 1) was not liable as he was a part owner of the factory for one day only he having sold his share to Ram Chand (defendant 3) on 2nd October 1934. As regards Ram Chand, it was held that he was a co-owner and, as such, he could not be legally called upon to render an account of the rents and profits which he might have received of the joint property. Walu Ram

was exonerated on the ground that he was a mere lessee from the co-owner and as such not liable to render accounts to the owners other than the person who had actually leased the property to him. Mt. Bhano Bai was not shown to be in possession of the property at any time during the period in dispute and, therefore, it was held that she was not liable to render accounts. No definite finding was given as to the claim against Bikramajit and Shiv Charan Lal, but it seems, the learned Judge exonerated them on the same grounds as Ram Chand, as in his view of the law one co-owner could not be sued to render accounts to another of the rents and profits of the joint property. In the result, it was held that the suit for rendition of accounts could not be maintained against any of the defendants and this part of the suit was dismissed. We have no doubt that the decision of the learned Judge is erroneous. The plaintiff Bank is suing for possession of its share in the factory by partition and has also alleged that the defendants, as cosharers in the factory, had been in unlawful possession of its share and had wrongfully appropriated the entire rents and profits. If these allegations are correct, the plaintiff is clearly entitled to recover from the person or persons, who have been in unlawful possession of its share of the factory, the rents and profits of that share and this claim can be joined with a suit for possession. It is provided in O. 20, R. 12, Civil P. C., that where a suit is for recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree (a) for possession of property, (b) for the rent or mesne profits, which have accrued on the property during a period prior to the institution of the suit or directing an enquiry as to such rent or mesne profits, and (c) directing an enquiry as to rent or mesne profits from the institution of the suit until delivery of possession to the decree-holder. The term 'mesne profits' of property is defined in S. 2 (12) of the Code as meaning those profits, which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession. If, therefore, the plaintiff succeeds in proving that one or the other of the defendants has been in wrongful possession of its share of the factory, it is clearly entitled to ask in this suit for "an

enquiry as to the rent or mesne profits which have accrued on the property during the period in question" and the most appropriate mode of this enquiry is to call upon the person or persons in possession to render an account of the receipts and expenditure. After such enquiry has been made, the Court shall pass a final decree in accordance with the result of the enquiry, as provided in sub-r. (2) of R. 12 of O. 20.

The learned Judge has assumed that a suit for accounts can lie only if the defendants stand to the plaintiff in the relation of agent, bailee, receiver, trustee or partner, and as a co-owner does not come within any of these categories, he is not liable to render account of the rents and profits of the entire joint property which he has appropriated, to the exclusion of the other co-owner or co-owners. There is no warrant for such an assumption and the learned counsel, who appeared for the respondents before us, frankly admitted that they could not support the proposition in the wide terms in which it had been laid down by the learned Judge. It is true that one co-owner is not accountable to another merely because he has had "excess of enjoyment" of the joint property. But if there has been an "ouster" by one of the other—his "exclusion" or "dispossession"—there is no doubt as to the liability of the person in possession to render account of the rents and profits of the share of the other. Both these propositions are well founded on principle. Every owner of jointly owned property is seized of it *per my et per tout*, he is interested in each and every part of the property, and it is an incidence of their co-ownership that they have a right to occupy and enjoy it. The mere circumstance, therefore that at any given time one of them is in actual possession of more than his pro rata share, would not render him accountable to the others for "excessive use and occupation." If however his possession or user of joint property is inconsistent with the title of the others, or it amounts to their exclusion or dispossession, such possession or user clearly becomes 'unlawful' and he cannot be allowed to retain the rents and profits of the property in excess of his just share. Numerous instances will be found in the reported cases of the application of these principles. In 19 Cal 253,¹ A I R 1914 Cal 209,² A I R 1926

1. Lachmeswar Singh v. Monowar Hossein, (1892) 19 Cal 253 = 19 I A 48 = 6 Sar 133 (P C).

2. Gora Chand v. Keshab Chunder, (1914) 1 A I R Cal 209 = 23 I O 122.

Cal 860³ and 55 Cal 396,⁴ a claim for mesne profits was disallowed as all that was proved against the defendant was that he had "excess of enjoyment" of joint property and he had not committed any act amounting to the ouster or exclusion of the plaintiff. In the well-known case in 18 Cal 10,⁵ their Lordships of the Privy Council allowed the plaintiff compensation for wrongful exclusion by the co-owners, and in 5 Mad 236,⁶ they granted the dispossessed co-sharer a decree for mesne profits for three years preceding the suit. In 16 Cal 397⁷ the parties were found to have been living under "a most distinct agreement that they were entitled, not as an ordinary joint family, but in specific and defined shares" and Lord Hobhouse, in delivering the judgment of the Judicial Committee, held that :

if the enjoyment of those shares is in any way disturbed, the right to sue for profits will arise as well as the right for partition.

Similarly, in 50 Mad 866,⁸ where after severance of status of a joint Hindu family, the parties held the property as tenants-in-common or cosharers the defendant was held bound for all receipts and expenses and entitled to take credit only for such expenses as had been incurred for the benefit or necessity of the estate, and it was ordered that the "net income after deduction of such expenses will have to be divided among the share-holders according to their shares." Another instance in point is 27 All 88⁹ where the excluded co-sharer was held "entitled to an account of the profits of the lands." Lastly reference may be made to 32 Cal 837,¹⁰ where Mookerjee J. after an elaborate discussion of the authorities, summarized the law in the following propositions :

(1) A tenant-in-common cannot be held liable to his co-tenant for damages for use and occupation of the joint property, unless there has been waste or an ouster of his co-tenants.

(2) When a tenant in possession has prevented

his co-tenants from obtaining from the premises such profits as they were capable of yielding, or has taken possession of the whole and used them as his own, and, thereby made a profit, he must account, either for the fair rental value or the profits, or be liable for mesne profits.

(3) Where one tenant-in-common occupies the joint property, without any assertion of hostile or exclusive title on his part, and without claim on the part of his co-tenants to be admitted into possession, he is under no obligation to account, for he has a right to such occupancy.

The learned Subordinate Judge has relied upon two rulings, but neither of them supports the view of the law taken by him. In 122 P R 1881¹¹ a suit had been instituted by a debtor against a creditor for accounts and it was held that, according to the law then in force, such a suit did not lie. In discussing the matter the learned Judges observed that there must be something more than the mere relation of debtor and creditor before one party could be held entitled to sue another for rendition of accounts. The defendant must stand in some other relation to the plaintiff, as, for instance, that of agent, or bailee, or receiver, or trustee, or partner, or mortgagor, as had been laid down in certain provisions of the Contract Act under which persons described above are specifically held liable to render accounts. This list however was not intended to be exhaustive, and the learned Judges themselves clearly stated that "there might be other cases in which the suit might lie." In the other case, relied upon by the learned Judge, A I R 1927 Lah 566,¹² all that was laid down was that in a suit for rendition of accounts before a decree could be passed, the defendant must be proved to be an accounting party. Neither of these rulings is therefore an authority for the conclusion reached by the learned Judge.

In England, the right of a co-owner to have an account from another co-owner "for receiving more than comes to his just share or proportion" has been recognized from the reign of Queen Anne and has since been well established as a part of the common law. The rule relating to this matter is very clearly and succinctly expressed by Freeman in his Treatise on Co-Tenancy and Partition (2nd Edn., Para. 273 at p. 360) in the following terms :

Where one tenant-in-common actually receives the rents, issues and profits, then he may be compelled to account for such profits actually received. If one of the co-tenants makes a lease of the entire premises as if he was the sole owner, the other co-tenants are entitled to their pro rata share of the

11. Gurditta v. Azam, (1881) 122 P R 1881.

12. Sri Ram v. Ram Kishen Das, (1927) 14 A I R Lah 566=103 I C 114.

3. Majid Mia v. Munshi Mia, (1926) 13 A I R Cal 860 = 94 I C 255.

4. Chandra Kishore v. Bliseswar Pal, (1928) 15 A I R Cal 216 = 109 I C 747 = 32 C W N 291 = 55 Cal 396.

5. Watson & Co. v. Ram Chand Dutt, (1891) 18 Cal 10 = 17 I A 110 = 5 Sar 535 (P O).

6. Appa Rao v. Court of Wards, (1882) 5 Mad 236 = 9 I A 125 = 4 Sar 345 (P O).

7. Shankar Buksh v. Hardeo Baksh, (1889) 16 Cal 397 = 16 I A 71 = 5 Sar 299 (P O).

8. Sriranga Thathachariar v. Srinivasa Thathachariar, (1927) 14 A I R Mad 801 = 104 I C 472 = 50 Mad 866 = 53 M L J 189.

9. Jagar Nath Singh v. Jai Nath Singh, (1904) 27 All 88 = 1 A L J 488 = 1904 A W N 194.

10. Mohesh Narain v. Naubut Pathak, (1905) 32 Cal 837 = 1 C L J 437.

rents. And, so it is said, if a co-tenant retains more than his share of the profits, he is compellable to account not only for the original profits but also for such further profits as may have accrued to him from this use of the original profits. Upon a leasing of his moiety by one of the co-tenants, his lessee becomes liable to account to the co-tenants of the lessor.

In the Punjab this right has received statutory recognition so far as agricultural land is concerned in S. 77 (k), Punjab Tenancy Act of 1887, which provides for a suit by a cosharer against another cosharer "for accounts of the rents and profits of the joint holding which might be received by the latter." There is no doubt therefore that this part of the claim is clearly maintainable and the plaintiff Bank is entitled to have an account from such of the defendants as are proved to have taken exclusive possession of the whole of the factory during the period in dispute and appropriated the entire rents and profits in a manner inconsistent with the plaintiff's title. The learned counsel for the plaintiff-appellant frankly admitted before us that so far as Mt. Bhano Bai (defendant 2) is concerned there is no evidence on the record to show that she was ever in possession of any part of the factory or that she received any share of the rents and profits of the factory during the period covered by the suit. He therefore stated that he did not press the appeal against her. Mt. Bhano Bai is, accordingly exonerated from liability to render account to the plaintiff.

With regard to the other defendants, counsel had very little to say in answer to the plaintiff's claim. It is clear from the statements of these defendants themselves that from the date of the purchase till January 1937 either Pars Ram (defendant 1) or Ram Chand (defendant 3) or his lessee Walu Ram (defendant 6) were in possession of the entire factory and that in January 1937 Shiv Charan Lal and Bikramajit (defendants 4 and 5) took possession. It was alleged by the plaintiff and admitted by Walu Ram that as early as October 1934 Pars Ram leased the entire factory to Walu Ram, including the share of the plaintiff Bank as well as that of Mt. Bhano Bai (defendant 2). Admittedly this was not done with the consent or knowledge of the plaintiff; indeed it was done in defiance of the plaintiff's title as a cosharer. It is also in evidence that a pool had been arranged by the various factory owners in Sangla in 1934-35 and the whole share of this factory was received from the Pool Association

by Walu Ram. Ram Chand in his jawabdawa alleged that he had leased his own share only to Walu Ram and not the entire factory as alleged by him and stated that a lease deed was actually written at the time and was in his possession at Shikarpur. He however failed to place this document on the record in the Court below and his counsel before us stated his inability to produce it even now. The obvious inference is that this document, if produced, would have gone against Ram Chand's contention in the jawabdawa that he had leased his own share in the factory and not the entire factory to Walu Ram. The lease was originally for a period of one year only, but it is admitted that it was subsequently extended for another two years. These defendants clearly excluded the plaintiff from its share of the factory and in denial of its rights took possession of the entire factory and have been appropriating the entire rents and profits. They are therefore liable to render accounts to the plaintiff. The decision of the lower Court on this point, so far as these defendants are concerned, is clearly erroneous and must be reversed.

For the reasons given above I would accept this appeal and pass a preliminary decree declaring that Pars Ram (defendant 1), Ram Chand (defendant 3), Shiv Charan Lal (defendant 4), Bikramajit (defendant 5) and Walu Ram (defendant 6) are liable to render accounts to the plaintiff Bank for its share of the rents and profits from 1st August 1934 till the institution of the suit and thereafter till the date when the receiver appointed by the lower Court took possession of the property. The appellant Bank will get its costs in this Court from defendants 1, 3, 4, 5 and 6. The appeal is dismissed against Mt. Bhano Bai (defendant 2) with costs. Counsel have been directed to cause their clients to appear before the Senior Subordinate Judge, Sheikhpura on 11th March 1940, when a date for further proceedings will be fixed.

Abdul Rashid J. — I agree.

G.N./R.K.

Order accordingly.

A. I. R. 1940 Lahore 354

SKEMP J.

Mirza Jaffar Beg—Accused—Petitioner
v.

Emperor.

Criminal Misc. Appls. Nos. 313 and 325 of 1939, Decided on 17th November 1939, for transfer of case from Addl. Dist. Magistrate, Lahore.

(a) Criminal P. C. (1898), S. 526 — Case already transferred — Very strong grounds are required to transfer it a second time.

When a case has already been transferred, very strong grounds are required to transfer it a second time. If accused or his counsel are so unfortunate as to have a reasonable apprehension that the second Magistrate will not give them justice and want to get their case transferred to a third Magistrate, it may well be supposed that the accused or his counsel are to blame in part. [P 355 C 1,2]

(b) Criminal P. C. (1898), S. 526 — Scope.

Refusal to call a particular person as a defence witness held no reason for transferring the case. [P 356 C 1]

(c) Criminal Trial — Defence witnesses — Order is to be chosen by defence.

The Magistrate as far as possible should allow the accused to select the order in which the defence witnesses are to appear. [P 356 C 1]

R. L. Anand and Dr. Tassaduq Hussain —
for Petitioner.

Mohammad Monir, Asst. to Advocate-
General — for the Crown.

Order. — This order will dispose of miscellaneous applications Nos. 313 and 325 of 1939 which concern closely connected cases. In fact, originally one application only was made and the second was put in at my suggestion. There are two complaints against Mirza Jaffar Beg, a former Sub-Inspector of Police serving in the Gujranwala District who has now been dismissed, of giving and fabricating false evidence in cases about the recovery of stolen cattle. The complaints were originally instituted in the Gujranwala District but were taken up by Lala Sant Ram, special Magistrate at Lahore, who has powers as a Magistrate throughout the Province. One complaint under S. 193, I. P. C., was partly heard by Lala Sant Ram and a charge framed when it was transferred by the Honourable Chief Justice because of differences between the trying Magistrate and Lala Ram Lal Anand, the leading counsel for the accused. The new Magistrate selected by the District Magistrate in accordance with the orders of the Honourable the Chief Justice was Rai Sahib Amar Nath. The present applications are to transfer the cases from his Court and indeed from the District of Lahore. Now, I would lay down as a maxim that when a case has already been transferred, very strong grounds are required to transfer it a second time. If accused or his counsel are so unfortunate as to have a reasonable apprehension that the second Magistrate will not give them justice and want to get their case transferred to a third Magistrate,

it may well be supposed that the accused or his counsel are to blame in part.

Of the grounds now alleged for transfer the first is that, at the beginning of the trial, the Special Magistrate Lala Sant Ram had consultations with Rai Sahib Amar Nath in the latter's retiring room: this is of no importance. The second main ground is that Sardar Sahib Bhag Singh, Prosecuting Deputy Superintendent of Police, has been intimately associated with the preliminary inquiry and with the departmental inquiry which has been held in this case, that he is strongly prejudiced against the accused, that he is exercising undesirable influence and that he ought not to be allowed to conduct the prosecution. Without expressing any opinion on these allegations I think that as Sardar Bhag Singh has been so intimately connected with at least one of these cases, the prosecution should be in the hands of a Public Prosecutor who may be instructed by Sardar Bhag Singh; and this order disposes of a good many of the grounds of the application. The next allegation is that the Magistrate read the judgment of Sardar Sewa Singh, Additional Sessions Judge, in appeal from the complaint under Ss. 193/471, I. P. C., against the petitioner and expressed his opinion that it was a thorough judgment written ably after a complete and accurate scrutiny of records. This is a remarkable thing for a Magistrate to say verbally in Court. The Magistrate's explanation is that he looked at the judgment of the Additional Sessions Judge and remarked that it was a very lengthy document, and that he had had no occasion to read it. In arguments, Lala Ram Lal Anand cited Dr. Tassaduq Hussain, the counsel for the petitioner in the lower Court, as supporting this statement. At the request of the Crown the statement of Dr. Tassaduq Hussain was taken on oath and he said:

I do not remember the exact words used by him but as far as I recollect he said that it was a lengthy judgment and a well-written judgment.

This is a great deal nearer the Magistrate's explanation than his client's allegations. I take it that the Magistrate's explanation is correct. The next point is that the petitioner asked that certain records and police files should be summoned. The petition continues that, on 26th September 1939, the Court said that the application had been rejected. There is however no final order. I think there is

some misunderstanding on this point. There is an order on the record dated 20th September 1939, as follows:

I have heard arguments. It is alleged that this very ground was taken up in an application for transfer and was not admitted by the High Court. Send for the High Court file.

Indeed, no final order exists. In the circumstances, I will give my opinion on the matter. There is no objection to the petitioner seeing the original records of the criminal trials against Udham Singh. As for the police zeminis the last word does not rest with me but I cannot see why the petitioner should not see the zeminis in the case against Udham Singh, many of which may have been written by himself. There is also a departmental inquiry. Every department likes to keep the record of a departmental inquiry private but I cannot see, nor does Mr. Mohammad Monir, or Sardar Bhag Singh, why the petitioner should not be supplied with copies of statements made in the departmental inquiry by witnesses who are to be examined at the present trial. This is all that the petitioner now asks for. He does not ask for the copies of the findings or the opinions in the departmental inquiry which I think should be kept secret.

The next ground for transfer is that the Additional District Magistrate has refused to summon Sahibzada Mirza Aitizaz-ud-Din, Superintendent of Police, as a defence witness. The petitioner wished to summon a large number of defence witnesses, including the Inspector-General of Police, the Deputy Inspector-General of Police, the Sessions Judge, the District Magistrate and the Superintendent of Police. The learned trial Magistrate allowed the Sessions Judge but not the others. The others are now given up except Sahibzada Mirza Aitizaz-ud-Din. The allegation is that the petitioner conducted the raids under the orders of Sahibzada Mirza Aitizaz-ud-Din and I think he ought to be called but refusal in the circumstances is no reason for transferring the case. However, I direct that the witness be called and also two other witnesses named Abdul Haq and Maqbul Rabani. Finally I direct that the Magistrate as far as possible allows the petitioner to select the order in which the defence witnesses are to appear. This is subject to the proviso that important official witnesses like the Sessions Judge and the Superintendent of Police must be consulted and their convenience taken into account. It is

also desired by the accused that the trial should be held in Lahore rather than in Gujranwala. Neither I nor the Crown counsel can see why this should not be done. Accordingly the trial is to be held in Lahore except as to the evidence of the Sessions Judge and Sahibzada Aitizaz-ud-Din who is now Superintendent of Police, Jhelum, i. e. nearer Gujranwala than Lahore. The statements of these two witnesses can be taken at Gujranwala or Jhelum as the learned Magistrate thinks fit after consulting them and his own convenience. With these remarks these two petitions for transfer are dismissed.

D.S./R.K.

Petitions dismissed.

A. I. R. 1940 Lahore 356

SKEMP J.

Sheo Ram — Defendant — Appellant.

v.

Ram Chand and others — Plaintiffs — Respondents.

Second Appeal No. 1186 of 1939, Decided on 11th January 1940, from decree of the Dist. Judge, Jullundur, D/- 19th August 1939.

(a) **Land Tenure—Saunjhi tenure—Jullunder city — Principle that saunjhidar can be removed only by proprietary body does not apply.**

The principle applicable to the case of saunjhidar in village namely that he can be removed only by the proprietary body, does not apply to the case where the saunjhidar is of Jullunder city within Municipal limits: *13 I C 32 and A I R 1929 Lah 77, Disting.* [P 357 C 2]

(b) **Civil P. C. (1908), S. 92 — Sanction obtained by several persons — One of them dying before institution of suit—Suit by rest is regular.**

Where sanction under S. 92 is obtained by several persons and one of them dies before the institution of suit, the suit instituted by the rest is valid: *A I R 1921 P C 123 and A I R 1938 P C 184, Foll.* [P 358 C 1]

(c) **Civil P. C. (1908), S. 92—Person succeeding to religious institution as son and chela of his father held could not be described as trustee de son tort.**

A sapyasi appointed by the people to look after a temple died and after his death his son took possession of the property as chela of his father. He was however appointed neither by the bhek nor by the representatives of the people:

Held that the person who had succeeded to the temple as son and chela of his father could not be described as trustee de son tort. [P 358 C 1]

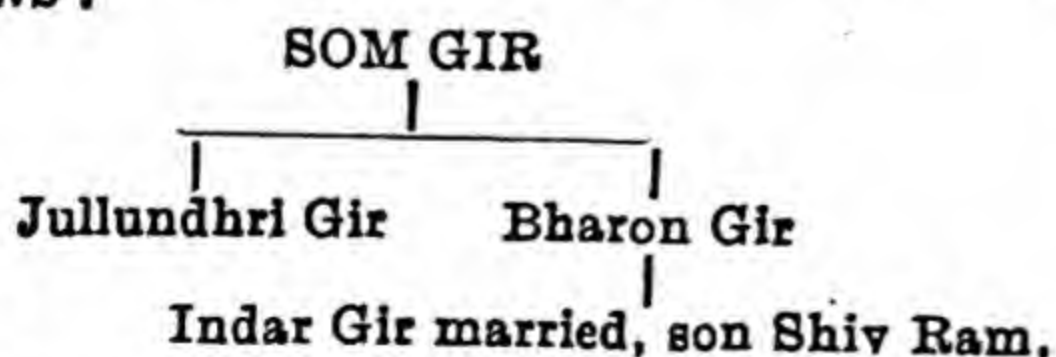
M. C. Sud — for Appellant.

Chandar Gupta and Achhru Ram — for Respondents.

Judgment. — This second appeal concerns an institution of Jullundur City which comprises a tank called Brahm

Kund with three temples on its banks and agricultural land in the possession of the sadhu in charge. Twenty Hindus, who are residents of Jullundur City, obtained the sanction of the Collector under S. 92, Civil P. C., to bring a suit for the removal of Shiv Ram alias Premgir, the sanyasi in charge of the institution. One of them died before the suit was brought and the remaining 19 lodged the present suit. They set forth in the plaint that the land attached to the institution, in area 51 kanals 16 marlas, had been given to the institution as saunjhi by the proprietors. The people of the city therefore through their representatives, had been appointing a sadhu or sanyasi to look after the temples; the offerings and income of the land were used for the maintenance of the institution and of sadhus. The last regularly appointed person was Indargir who died three years before the suit, whereupon the defendant Shiv Ram took possession. Shiv Ram claimed to be the chela of the deceased who had been appointed by the bhek, but in point of fact he had no rights, being appointed neither by the bhek nor by the representatives of the people of Jullundur. The defendant had been selling trees and had neglected the temples. He was of bad character and in consequence of his bad character worshippers had ceased to come.

The defendant contended that the suit did not lie, that the land was shamilat deh, the defendant being its saunjhidar that the plaintiffs had no right to eject him; that he was the son and chela of the late saunjhidar Indargir and had a right to succeed and was in rightful possession. The trial Judge framed fifteen issues all of which he found against the defendant whose ejection and removal he ordered. The learned District Judge concurred and dismissed the appeal. The defendant has come here in second appeal. The gurparnala (pedigree table) of the sanyasis of this institution is as follows :



Admittedly, none of the predecessors of Indargir were married and Shiv Ram is his son and alleged chela. It was found by the Courts below that Shiv Ram is a man of bad character. Mr. Mehr Chand Sud for the appellant urged that this was founded

in part on hearsay evidence and wished to go into the evidence. This I could not allow, pointing out that this was a finding of fact and that, if there were any evidence not hearsay it was a finding of fact based on evidence with which I could not interfere. Mr. Mehr Chand could not contend that there was no direct evidence as to the appellant's bad character and indeed the evidence set forth in the two judgments below seems to me overwhelming that Shiv Ram is a man of bad character who has allowed the temples of which he is in charge to fall into neglect. The main point taken before me, as before the learned District Judge, is that the appellant is a saunjhidar that he could therefore be removed only by the proprietary body and that the plaintiffs according to their own showing represented the Hindus at Jullundur who had no locus standi to sue. Mr. Mehr Chand Sud quoted various rulings as to the nature of a saunjhi tenure, such as 13 I C 32¹ and A I R 1929 Lah 77.² All these rulings however relate to a saunjhi or saunjhidar in villages. The present instance is of Jullundur City within Municipal limits. Admittedly there are a very large number of proprietors in Jullundur who represent all tribes, communities and castes and the majority of whom are Muslims. It would be extremely difficult for the proprietors of Jullundur to combine so as to bring a suit to remove any person who was a saunjhidar in the usual sense.

Mr. Achru Ram for the respondents contends that in reality the property belongs to the institution and that this is proved by the admitted fact that the descent was from Guru to chela, *see* 101 P R 1905,³ and 146 I C 257,⁴ and also by the fact that in the settlement of 1914-15 Indargir was recorded as saunjhidar for the entire holding including 23 kanals, 9 marlas as talab. Mr. Mehr Chand Sud cites a recent Privy Council ruling reported in A I R 1938 P C 195⁵ in which it was held that property which had descended from Guru to chela was

1. Muhammad Badar Khan v. Chiragh Shah, (1912) 16 P L R 1912=13 I C 32.
2. Sundar v. Ram Chand, (1929) 16 A I R Lah 77=109 I C 658.
3. Mt. Har Devi v. Charn Das, (1905) 101 P R 1905=106 P W R 1905=12 P L R 1906.
4. Saran Das v. Shromani Gurdwara Parbandhak Committee Amritsar, (1939) 20 A I R Lah 252=146 I C 257.
5. Parmanand v. Nihal Chand, (1938) 25 A I R P C 195=175 I C 459=65 I A 252=I L R (1938) Lah 458=32 S L R 821 (P C).

not the property of the institution. There were special circumstances in that case; a mahant, in the year 1875, had described the property in dispute as private property in his will and there was ample documentary evidence to show alienations of various properties by the mahants in exercise of their rights of ownership. These circumstances do not exist in the present case. I agree with the learned District Judge that in this case the saunjhi rights, whatever they were, must be regarded as belonging to the institution and not to the individual in charge. Mr. Mehr Chand Sud contended that the suit was not regularly brought because one of the twenty persons to whom sanction had been given died before the suit was lodged. After reference to two Privy Council rulings, 48 I A 12⁶ and I L R (1938) Lah 383,⁷ I hold that the suit was regular. In 48 I A 12⁶ their Lordships said:

There was also a point that the person who originally raised the suit and got the sanction having died the suit could not go on, but there does not seem any force in that point either, it being a suit which is not prosecuted by individuals for their own interests, but as representatives of the general public.

In I L R (1938) Lah 383⁷ it was held that where sanction had been granted under S. 93 to three persons and only two instituted the suit, the third not doing so because of his absence in another province, the suit was validly instituted. Following these rulings, I hold that the death of one out of twenty persons who had obtained sanction does not invalidate the suit. The most serious objection perhaps, is that the defendant is not a trustee and that S. 92, therefore does not apply. S. 92, Civil P. C., runs:

In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature

There is, of course, no express trust. The learned District Judge found that the defendant was a trustee *de son tort*, i. e., a person who has not been rightfully appointed a trustee and purports to manage the trust property. I do not think that this description applies to a person who has succeeded to religious property as son and chela of his father. Mr. Achhru Ram called him a *de facto* trustee and I find that there are two important cases in which Division Benches of the Madras and the Bombay High Courts have

referred to a man in a similar position as a constructive trustee. They are 84 I C 808⁸ where the Bombay High Court held that a mahant or mutwalli would ordinarily seem to be a constructive trustee under S. 92, Civil P. C., for his fiduciary position would be that of a manager or custodian of property held for public purposes of a charitable or religious nature, and 50 Mad 567⁹ where it is laid down that

where the properties in question belong to a mutt the head of the mutt is answerable for maladministration as a trustee in a general sense, though he may not be an express trustee in the English sense. S. 92, Civil P. C., is applicable to such a case, and a suit can be instituted for removal of the head of the mutt and for a scheme, after obtaining the sanction prescribed by the Section.

It is certain that, if the suit had been instituted against the defendant without obtaining sanction under S. 92, strong objection would have been taken that the suit did not lie. Mr. Mehr Chand Sud also relied on the terms of the plaint: the plaintiffs alleged that they had a right to appoint the Sadhu in charge, they described him as a trespasser and sought his ejection. The plaintiffs certainly failed to prove their right of appointments and in my opinion the defendant is not a trespasser and the term 'ejection' is unsuitable, but we have to see what has actually been proved and what is the duty of the Court in the circumstances. The plaintiffs have proved that the defendant, the son of the previous sanyasi, is a man of bad character who is neglecting his duties and that the temples are falling into neglect. They have proved that on account of his bad character worshippers, especially women, do not go to the temple. They have proved, in my opinion, that the land attached to the institution is the saunjhi of the institution rather than of the individual in charge. In such circumstances, I think that the plaintiffs are entitled to a decree under S. 92, Civil P. C., for the removal of the defendant and I would dismiss this appeal with costs, only modifying the decree of the Courts below by deleting the words "or ejection."

D.S./R.K.

Appeal dismissed.

8. *Shripat Prasad v. Lakshmidas*, (1924) 11 A I R Bom 193=84 I C 808=25 Bom L R 747.

9. *Nelliappa Achari v. Punnaivanam Achari*, (1927) 14 A I R Mad 614=101 I C 420=50 Mad 567=52 M L J 415.

6. *Anand Rao v. Ram Das Dadu Ram*, (1921) 8 A I R P C 123=62 I C 737=48 I A 12=48 Cal 493=17 N L R 37 (P C).

7. *Ali Begam v. Badrul Islam Ali Khan*, (1938) 25 A I R P C 184=174 I C 870=65 I A 198=I L R (1938) Lah 383=32 S L R 749 (P C).

* * A. I. R. 1940 Lahore 359

FULL BENCH

TEK CHAND, BHIDE AND DIN

MOHAMMAD JJ.

Khair Mohd. Khan and another —
Plaintiffs — Appellants.

Mt. Jannat and others — Defendants —
Respondents.

Second Appeal No. 109 of 1939, Decided on 7th June 1940, from decree of Dist. Judge, Karnal, D/- 30th October 1938.

* * Limitation Act (1908), S. 23 and Art. 120 — "Continuing wrong" — Test for determination — Encroachment by joint owner by building chabutra on common land claiming it as his own is not continuing wrong — Suit for injunction is governed by Art. 120 and not by Section 23.

In considering whether the particular act complained of constitutes a continuing wrong within the meaning of S. 23 for which the cause of action arises *de die in diem*, it is necessary to keep in mind the distinction between an 'injury' and the 'effects of that injury.' Where the injury complained of is complete on a certain date there is no "continuing wrong" even though the damage caused by that injury might continue. In such case the cause of action to the person injured arises once and for all, at the time when the injury is inflicted and the fact that the effects of the injury are felt by the aggrieved person on subsequent occasions intermittently or even continuously does not make the injury a "continuing wrong" so as to give him a fresh cause of action on each such occasion. If however the act is such that the injury itself is continuous, then there is a "continuing wrong" and the case is governed by S. 23. [P 360 C 1]

In the case of a "trespass" there is fresh injury and a fresh cause of action at every moment during the period during which the trespass continues. But where the act complained of amounts to complete ouster of the plaintiff, the injury is complete at the date of the ouster. To such cases S. 23 does not apply. An encroachment made by a joint owner by building a chabutra on land reserved for common purposes, claiming it as his own, does not constitute a continuing wrong within the meaning of S. 23. It is complete ouster and is a wrong complete at the time the construction is put up. Hence a suit for injunction is governed by Art. 120 and not by S. 23: *A I R 1934 Pat 131; 1 C W N 96; 2 I C 410; AIR 1916 Cal 733; AIR 1923 Cal 365 and A I R 1935 Cal 405, Dissent.; Case law reviewed.* [P 363 C 1, 2]

Madan Mohan Kapur — *for Appellants.*

F. C. Mittal — *for Respondents.*

Judgment of the Full Bench

Tek Chand J. — The suit which has given rise to this reference was instituted by Khair Mohammad and Abdul Majid, plaintiffs of Jhajjar, District Rohtak, against Mt. Janat and Mt. Milk-ul-nisa, defendants, for issue of a perpetual injunction directing the defendants to demolish a chabutra (platform) constructed by them on a por-

tion of a courtyard which, it was alleged, was the joint property of the mohalladars and has been reserved for their common user. The plaintiffs complained that the chabutra obstructed the passage of carts and other vehicles from the outer thoroughfare into the courtyard and caused great inconvenience to them and other persons living in the mohalla. They therefore prayed that the defendants be directed to demolish it. The defendants denied that the land on which the chabutra had been constructed belonged to the mohalladars collectively. They alleged that it was their exclusive property and they could use it in any way they liked. In the alternative, they pleaded that even if the land underneath the chabutra were found to be the common property of the mohalladars the suit was barred by limitation as the chabutra had been in existence for more than six years before the institution of the suit.

The trial Judge found against the defendants on both these points and decreed the suit. On appeal the District Judge affirmed the finding that the chabutra had been constructed on a portion of the courtyard which was the common property of the mohalladars. After an examination of the evidence he came to the conclusion that only a part of the chabutra had been constructed in 1925, that the plaintiffs had extended it to its present dimensions about two years before the institution of the suit and that this recent extension obstructed the passage of carts and carriages to the courtyard. He held that the suit was governed by Art. 120, Limitation Act, under which the plaintiff had six years to sue from the date of the construction. He therefore found that the suit was barred by time qua the portion of the chabutra which had been constructed in 1925, but it was within limitation as regards the extension which had been made within six years of the suit. He accordingly modified the decree of the trial Court restricting the injunction to the demolition of that portion of the chabutra which had been constructed recently and dismissing the suit as regards the portion which had been in existence since 1925. On second appeal before the Single Bench the findings of fact arrived at by the District Judge were not questioned but it was contended that the suit had been erroneously held to be barred by limitation with regard to that portion of the chabutra which had been found to have been constructed in 1925. It was urged that the

structure in question was in the nature of an encroachment upon common property and thus constituted a "continuing wrong" and therefore the suit was governed by S. 23, Limitation Act, which lays down that in such cases a fresh period of limitation begins to run at every moment of the time during which the wrong complained of continues. As the rulings bearing on the point appeared to be conflicting the learned Judge referred the case to a Division Bench who in turn have referred it to the Full Bench.

In considering whether the particular Act complained of constitutes a "continuing wrong" within the meaning of S. 23 for which the cause of action arises *de die in diem* it is necessary to keep in mind the distinction between an "injury" and the "effects of that injury." Where the injury complained of is complete on a certain date, there is no "continuing wrong" even though the damage caused by that injury might continue. In such a case the cause of action to the person injured arises, once and for all, at the time when the injury is inflicted, and the fact that the effects of the injury are felt by the aggrieved person on subsequent occasions, intermittently or even continuously, does not make the injury a "continuing wrong" so as to give him a fresh cause of action on each such occasion. If however the act is such that the injury itself is continuous then there is a "continuing wrong" and the case is governed by S. 23. As observed by Mookerjee J., in 31 I C 242,¹ the essence of a continuing wrong is that

the act complained of creates a continuing source of injury and is of such a nature as to render the doer of it responsible for the continuance; in such cases a fresh cause of action arises *de die in diem*. To put the matter in another way, where the wrongful act produces a state of affairs every moment's continuance of which is a new tort, a fresh cause of action for the continuance lies.

The question in each case therefore is whether the "injury," which is the basis of the grievance of the aggrieved party is itself "continuing," or whether the injury was complete when it was committed but the damage flowing from it has continued or is continuing. If the former, the case falls within the purview of S. 23, Limitation Act, and the cause of action arises *de die in diem*; if the latter, the terminus a quo is the date on which the wrongful act was done. For an instance of a "continuing wrong," reference may be

made to 6 Cal 394² where some 40 or 50 years before the suit the plaintiff's ancestors, after making compensation to the defendants, had constructed a pain or artificial watercourse on the defendants' land to take water from a natural stream to the plaintiff's land. Some years before the suit the defendants, without authority, had obstructed the flow of water along the pain by making dams and cuts in the channel and thus drew off continuously, from day to day, water from the plaintiff's channel and diverted it to their own fields. In a suit by the plaintiff for a declaration of his sole right to the pain and an injunction directing the defendants to close the openings and restraining them from draining off the water in future, it was held by their Lordships of the Privy Council that the dams, cuts and other modes of obstructing or diverting the water from the watercourse were in the nature of a "continuing nuisance" as to which the cause of action was renewed *de die in diem* so long as the obstructions causing such interference were allowed to continue and the suit was held to fall within S. 24, Limitation Act 9 of 1871 (which corresponded to S. 23 of the present Act 9 of 1908). Other instances of "continuing wrongs" are continued pollution of a stream, (1894) 1 Ch 293;³ obstruction caused to immemorial egress of rain water from the plaintiff's house through a drain on the defendant's land, 6 Bom 20;⁴ obstruction of discharge of surface water, 41 I C 863,⁵ obstruction of light and air through ancient windows, (1831) 2 B & Ad 97,⁶ 59 Mad 75⁷ and A I R 1936 Lah 334.⁸ In all such cases the "injury" is continuous and therefore limitation runs every moment of the time, during which the injury continues.

The present case however stands on an entirely different footing. Here, so far as the portion of the platform which was constructed in 1925 is concerned, the injury

2. Raj Rup Koer v. Abul Hossein, (1881) 6 Cal 394=7 I A 240=7 C L R 529=4 Sar 199=3 Suther 816 (P C).

3. Hole v. Chord Union, (1894) 1 Ch 293=63 L J Ch 469=7 R 84=70 L T 52.

4. Punja Kuvarji v. Bai Kuvar, (1881) 6 Bom 20.

5. Kaseswar Mukerjee v. Annoda Prosad, (1918) 5 A I R Cal 422=41 I C 863=22 O W N 666.

6. Shadwell v. Hutchinson, (1831) 2 B & Ad 97=4 Car & P 333=9 L J (O S) K B 142.

7. Ponnu Nadar v. Kumaru Reddiar, (1935) 22 A I R Mad 967=161 I C 653=59 Mad 75=69 M L J 739.

8. Moti Ram v. Hans Raj, (1936) 23 A I R Lah 334=162 I C 303.

1. Brojendra Kishore Roy v. Bharat Chandra Roy, (1916) 3 A I R Cal 751=31 I C 242=22 C L J 283=20 C W N 481.

was completed at the time of the construction. The act of the defendants by constructing the chabutra on the common land and thus appropriating it to their exclusive use, amounted to a complete dispossession and ouster of the plaintiffs and the other mohalladars. It was not a "continuing" wrong, but a wrong which was completed at the time the construction was put up; it was not an "injury" which, to use the classical words of Blackstone "had been committed by continuation from one given day to another" (Book III, Ch. 12, p. 211). The cause of action to the aggrieved mohalladars arose once and for all at the date of the ouster. It does not arise afresh every day that the structure exists and to such a case the provisions of S. 23 do not apply. There is a large number of cases decided by the Chief Court and this Court in which this view has been taken, and with which I am in respectful agreement. In 124 P R 1912⁹ the plaintiff, acting on behalf of the village proprietary body, sued for the removal of a structure which had been constructed by the defendant in a specific field in the shamilat which had been reserved as a thoroughfare. It was held that the act complained of was not a continuing wrong and S. 23 did not apply. The case was held governed by Art. 120.

In 151 P L R 1912¹⁰ the suit had been instituted for a perpetual injunction directing the defendants to restore to its original condition certain land, which had been originally reserved for the common use of the proprietors but which had been encroached upon by the defendants. It was held that the case was governed by Art. 120 and as the structures complained of had been constructed more than six years before the institution of the suit, the claim was barred by time. In A I R 1921 Lah 242¹¹ the plaintiffs, claiming to be joint owners of a certain courtyard, had sued for the issue of a mandatory injunction to the defendants to remove certain chappers which they had constructed, and to restore the courtyard to its former condition. It was found that the chappers were constructed more than six years before the suit, which was dismissed as barred under Art. 120. It

was further held that S. 23 had no application, as the moment the chappers were erected the injury complained of, and sought to be removed by the issue of an injunction, was complete. There was no "continuing" injury within the meaning of the statute, even though the effect of the injury continued.

In A I R 1926 Lah 455,¹² a suit for a perpetual injunction for the removal of an encroachment made on common land was held barred under Art. 120, as the suit had been instituted more than six years after the encroachment. Other instances of similar cases will be found in A I R 1932 Lah 220¹³ and 1935 P L R 160.¹⁴ Reference may also be made to the decision of the Calcutta High Court in 49 I C 93,¹⁵ where a rowak had been constructed on common land and it was held that the injury was completed on the erection of the rowak and there was no continuing wrong within the meaning of S. 23. Similarly, in 19 Mad 154¹⁶ a suit by a Municipality to recover, as forming part of a highway, a strip of land adjoining the house of the defendant on which a pial had been erected more than forty-five years before the suit, was dismissed on the ground that there was no evidence that the strip in question had been used by the public as a part of the street for many years. In all these cases the obstruction was of a permanent nature and the injury had been completed when the structure complained of was built and it was held that S. 23 had no application.

There are some cases decided in Calcutta which contain observations supporting the opposite view (1 C W N 96,¹⁷ 2 I C 410,¹⁸ 29 I C 385,¹⁹ A I R 1923 Cal 365²⁰ and A I R 1935 Cal 405²¹). All these decisions purport to be based on 6 Cal 394² above

12. *Kallan Singh v. Fazal Din*, (1926) 13 A I R Lah 455=94 I C 1055.

13. *Wadhawa v. Allah Ditta*, (1932) 19 A I R Lah 220=135 I C 681=33 P L R 180.

14. *Jai Narain v. Municipal Committee, Delhi*, (1935) 87 P L R 160.

15. *Ashutosh Sadukhan v. Corporation of Calcutta*, (1919) 6 A I R Cal 807=49 I C 93=28 C L J 494.

16. *Municipal Commissioners for the City of Madras v. Sarangapani Mudalliar*, (1896) 19 Mad 154.

17. *Sreemati Soojan Bibi v. Shamed Ali*, (1892) 1 C W N 96.

18. *Nerode Kanta v. Bharat Chandra*, (1909) 2 I C 410.

19. *Nazimulla v. Wazidulla*, (1916) 3 A I R Cal 733=29 I C 385=21 C L J 640.

20. *Dwarka Nath v. Rash Behari Guha*, (1923) 10 A I R Cal 365=76 I C 401=27 C W N 936.

21. *Sarat Ohandra v. Nirode Chandra*, (1935) 22 A I R Cal 405=156 I C 390.

9. *Achar Singh v. Badhawa Singh*, (1912) 124 P R 1912=15 I C 285=2 P L R 1913=132 P W R 1912.

10. *Ganda Singh v. Nathu Ram*, (1912) 151 P L R 1912=13 I C 661=77 P W R 1912.

11. *Lal Singh v. Hira Singh*, (1921) 8 A I R Lah 242=60 I C 20.

referred to and in some of them it has been broadly stated that there is no distinction between an obstruction to a water-course and one to a way, and wrongful interference with a right of way constitutes a continuing nuisance (29 I C 385¹⁹). With great deference, it must be said that this proposition is too widely expressed and cannot be accepted as correct in all cases, regardless of the nature and extent of the encroachment or obstruction. There is, for instance, no analogy between the case decided by the Privy Council and a case in which a right of way has been obstructed by the construction of a wall or a building of a more or less permanent character, which has completely blocked the way of the plaintiff. As has been stated above, in 6 Cal 394² the defendants by making dams and cuts in the water channel, which had been constructed by the plaintiff on the defendants' land, were diverting, continuously and day by day the water from the water channel to their own lands. They were thus committing a fresh wrong every time that the water was so diverted. In 29 I C 385,¹⁹ reference was made to two English cases. But the facts of those cases were materially different. Indeed, one of them, (1873) 8 Ch A 650,²² brings out prominently the distinction between obstructions which are permanent and those which are not. There, the way to the yard of the owner of an inn was obstructed by the loading and unloading of heavy waggons, of the defendant who owned the adjoining property. The obstruction was not permanent; it was caused whenever the waggons were loaded and unloaded and each such obstruction gave a fresh cause of action to the plaintiff. In the other English case referred to, (1891) 3 Ch D 411²³ a mandatory injunction to remove the obstruction to a right of way had been refused, the defendant had then become insolvent, and the plaintiff applied to the Insolvency Court for leave to take proceedings for the abatement of the nuisance. Chitty J. granted leave to take such proceedings for this purpose but took care to say (page 416) that "he was not deciding the point in favour of the applicant." It may be noted that no question of limitation appears to have arisen or decided in that case.

Some cases decided by the Patna High Court were cited before us. But the course

of decisions in that Court does not appear to be uniform. In A I R 1934 Pat 34²⁴ the Calcutta cases, mentioned above, were followed and it was held that a suit for declaration that certain pathways were lands on which the plaintiff and the public had a right is governed by S. 23, Limitation Act, and the wrong being a continuing wrong, no question of limitation arose. This case was disapproved in 19 Pat 208,²⁵ where the Calcutta cases were criticized at length, and it was laid down that where the wrong amounts to dispossession of the plaintiff, then although it may be a continuing wrong, the plaintiff cannot recover possession after twelve years, because under S. 28, Limitation Act, he himself has got no right left. With great deference to the learned Judges who decided that case, while agreeing with their criticism of the Calcutta decisions, I find myself unable to accept their ultimate conclusion. If the wrong is really a "continuing wrong" it is difficult to see how the plaintiff's right will be lost by lapse of 12 years from the date when it was first committed. Ex hypothesi, the cause of action to the plaintiff arises *de die in diem*, so long as the obstruction exists, and if this be so, S. 28 will not apply so as to extinguish his title.

The learned counsel for the appellant also referred to the recent decision of their Lordships of the Privy Council in 12 Pat 681²⁶ and to a case decided by the Chief Court reported in 31 P R 1917.²⁷ But both these cases are clearly distinguishable. In the former case, certain structural alterations had been made by the defendants in the character of the charans (footprints) of Jain Saints in certain shrines on the sacred hill of Parashnath in Bihar; and in the latter, a balakhana had been constructed on a mosque and was used for his residence by the defendant. These acts of sacrilege, resulting in interference with the plaintiffs' right of worship, were held to be "continuing wrongs" which afforded them a recurring cause of action to have the offending obstructions removed. The principle of these cases, therefore, does not apply to this case, which stands on an entirely

24. Bhagwan Dutt v. Asharfi Lal, (1934) 21 A I R Pat 34=146 I C 408.

25. Bibhuti Narayan v. Mahadeo Asram Prasad, (1940) 27 A I R Pat 449=19 Pat 208.

26. Hukam Chand v. Maharaj Bahadur Singh, (1933) 20 A I R P C 193=144 I C 346=60 IA 313=12 Pat 681 (P C).

27. Muhammad Ahmad v. Muhammad Fazal, (1917) 4 A I R Lah 160=39 I C 116=31 P R 1917.

22. Thorpe v. Brumfit, (1873) 8 Ch A 650.

23. Lane v. Chapsey, (1891) 3 Ch D 411 = 61 L J Ch 55=65 L T 375=40 W R 87.

different footing. After careful consideration, I see no reason to doubt the correctness of the view taken in this Court in the cases cited above, that where the act complained of amounts to complete ouster of the plaintiff, the injury is complete at the date of the ouster. To such cases S. 23 does not apply, and the plaintiff has six years from the date of obstruction to sue for declaration or injunction and 12 years for possession. I would accordingly hold that the learned District Judge came to a correct conclusion in holding that this case is governed by Art. 120 and that the plaintiffs' claim relating to that portion of the platform which had been constructed in 1925 was time barred. I would accordingly dismiss the appeal, but would leave the parties to bear their own costs throughout.

Bhide J. — The facts of the case have been fully given in the judgment of my learned brother Tek Chand J. Shortly stated, the question for decision is whether an encroachment made by a joint owner by building a chabutra on land reserved for common purposes, claiming it as his own, constituted a 'continuing wrong' within the meaning of S. 23, Limitation Act. Unfortunately, the expression 'continuing wrong' has not been defined in the Limitation Act and its precise meaning is not easy to ascertain. According to the test laid down in 31 I C 242¹ there is a 'continuing wrong' when the wrongful act complained of produces a state of affairs every moment 'a continuance of which is a new tort.' There seems to be good authority for the proposition that in the case of a 'trespass' there is a fresh injury and a fresh cause of action at every moment during the period during which the trespass continues: see Pollock on Torts, Edn. 12, p. 393, Clerk and Lindsell on Torts, Edn. 9, p. 401, also (1839) 10 A & E 503.²⁸ But where there is a complete dispossession and ouster by building a permanent structure in assertion of an adverse title as in this case, can the case be properly treated as one of "trespass" only? The real wrong complained of in this case was the dispossession of the plaintiffs by the defendants in assertion of a hostile title. This took place when the chabutra was built. I am therefore inclined to agree that the injury in this case was completed and the cause of action, whether for the removal of the chabutra or for possession of the land underneath, arose once for all

when the chabutra was built, and the plaintiffs were thereby dispossessed of the land.

The only two rulings of their Lordships of the Privy Council cited before us were 6 Cal 394² and 12 Pat 681,²⁶ but the facts of these are clearly distinguishable as pointed out by my learned brother. It seems difficult to see how the principle of these rulings could be applied to a case of the present description. The rulings of the High Courts on the question seem to be conflicting, but the current of decisions in this Court is in favour of the view that an encroachment of the kind in dispute in the present instance does not constitute a continuing wrong. It may be pointed out that according to the decision in the Full Bench case reported in 14 Lah 267²⁹ (see p. 281) it would be open in such a case to sue for joint possession within 12 years. In the present instance however the plaintiffs have chosen to sue for an injunction only. For this form of relief limitation is governed by Art. 120. I accordingly agree in dismissing the appeal and leaving the parties to bear their own costs as proposed by my learned brother.

Din Mohammad J. — The question whether a certain case is covered or not by the principle enunciated in 6 Cal 394² is not free from difficulty. The nearest approach to a solution of this complicated problem is found in the observations made by Mukerjee J., in this behalf in 31 I C 242.¹ But if I may say with all respect, even the distinction drawn there between an injury which itself continues and an injury whose effect alone continues is too subtle to be of any practical use. It requires a very acute brain to distinguish between the case of a dam that diverts the flow of water and that of a permanent structure which blocks a public way as was the case in 19 Mad 154¹⁸ or encroaches upon the common land and thus interferes with the rights of persons interested therein which is dealt with in some Lahore judgments. In spite of the difficulty involved however some working principle must be evolved from the cases so far decided, which may serve as a guide for the Subordinate Courts in future, and, as at present advised, I am of opinion that the rule enunciated by my learned brother Tek Chand J. is in accord with the bulk of authority in this Court at least. I accordingly agree that the appeal be dismissed.

D.S./R.K.

Appeal dismissed.

28. *Holmes v. Wilson*, (1839) 10 A & E 503 = 50 R R 492.

29. *Mastan Singh v. Santa Singh*, (1933) 20 A I R Lah 705 = 14 Lah 267 = 34 P L R 618 (F B).

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FULL BENCH

TEK CHAND, MONROE AND BHIDE JJ.
Labh Singh — Defendant — Appellant.

v.

Hassu and others — Plaintiffs —
 Respondents.

Letters Patent Appeal No. 84 of 1939,
 Decided on 7th June 1940, from decree of
 Dalip Singh J., Reported in A I R 1939
 Lah 374.

(a) Punjab Tenancy Act (16 of 1887), Sections 59 (3) and 60 — Alienation by widow of occupancy tenancy is void even if made in favour of landlord—Reversioners can get such alienation declared void independently of question of valid necessity : 44 P R 1917 = A I R 1917 Lah 408 = 39 I C 163; 37 P L R 403 = A I R 1936 Lah 70 = 155 I C 836 and A I R 1930 Lah 942 = 130 I C 517, Overruled.

The position of the widow who has succeeded to her husband's occupancy tenancy under S. 59 is not the same as that of a widow who succeeds, under the personal law, to a life interest to his proprietary estate and whose alienations held good for her lifetime whether they have been effected for necessity or not. An alienation by sale or mortgage of an occupancy tenancy by a widow is absolutely forbidden and hence such an alienation is void, whether it is made in favour of the landlord or a stranger. The reversioners of the widow have therefore a right to get such an alienation declared to be void and not binding on them, independently of the question of valid necessity and consideration for the alienation, on which the reversioners can usually challenge an alienation under custom. The mere fact that according to the provisions of S. 60 of the Act, a transfer of occupancy rights by a widow falling within the ambit of S. 59 (3) would be voidable, at the instance of the landlord, would not show that the transaction would remain valid until it is so avoided : 39 P R 1898; 9 I C 339; 18 I C 623; 4 P R 1900, Rev. and 6 P R 1913 Rev., Rel. on; 44 P R 1917 = A I R 1917 Lah 408 = 39 I C 163; 37 P L R 403 = A I R 1936 Lah 70 = 155 I C 836 and A I R 1930 Lah 942 = 130 I C 517, Overruled. [P 365 C 2; P 366 C 1, 2; P 370 C 1]

(b) Punjab Tenancy Act (16 of 1887), S. 60 — Suit to avoid alienation — Limitation runs from date of alienation (*Obiter*).

Section 60 gives the landlord the right to avoid an alienation of a right of occupancy and presumably he can exercise the right as against the alienee as soon as the alienation takes place. The period of limitation would therefore run from the date of the alienation : 135 P R 1888 and 1 P R 1916 Rev., Rel. on. [P 366 C 1]

(c) Punjab Tenancy Act (16 of 1887), Section 59 (3) — Restriction on widow's power of alienation is really in interest of reversioners and not of landlord.

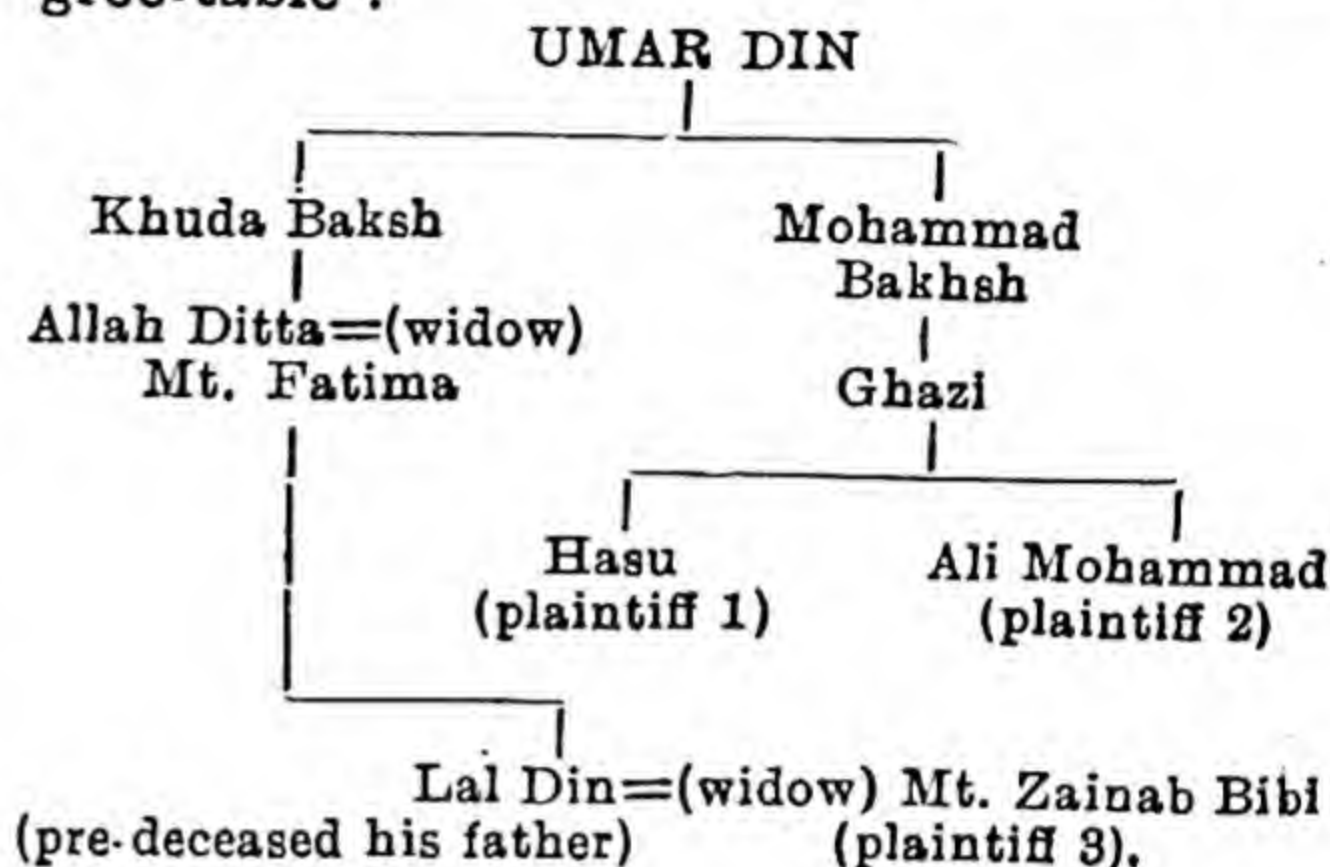
The restriction on widow's power of alienation is an incident of her tenure as an occupancy tenant. This restriction is really in the interests of the reversioners and not of the landlord : 6 P R 1913 (Rev.), Rel. on. [P 367 C 2]

Achhru Ram and Prem Nath Chadha
 — for Appellant.

Barkat Ali — for Respondents.

Judgment of the Full Bench

Bhide J.—The material facts of the case giving rise to this appeal may be shortly stated. An occupancy holding under S. 6, Punjab Tenancy Act, was held in equal shares by four persons viz., Hassu, Ali Mohammad, Mt. Zainab Bibi and Mt. Fatima Bibi, whose relationship to one another will be apparent from the following pedigree-table :



Mt. Fatima sold her one-fourth share in the holding to Sobha Singh, defendant, the landlord, on 30th April 1937. Thereupon the other three co-tenants, viz. Hassu, Ali Mohammad and Mt. Zainab Bibi, instituted the present suit for a declaration that the sale shall not be binding on them, as it was effected without any valid necessity or consideration. The trial Court found that no necessity had been established for the sale but dismissed the suit on the ground that the sale being in favour of the landlord, the occupancy tenancy became extinct to the extent of the share sold and hence the plaintiffs had no locus standi to challenge the alienation according to the principle laid down in 31 P R 1896¹ and followed in subsequent rulings. On appeal the learned Additional District Judge, was of opinion, that the sale in question was tantamount to an abandonment of the tenancy by Mt. Fatima, and the plaintiffs, being her next heirs, were entitled to challenge the sale according to the rule laid down by a Division Bench of the Punjab Chief Court (Chatterji and Anderson JJ.) in 39 P R 1898.² The learned Judge noticed that the view expressed in this ruling to the effect that an alienation by a widow is void under S. 59 (3), Punjab Tenancy Act, was dissented from in a ruling of this Court reported in A I R 1930 Lah 942,³ in which

1. *Didaru v. Banna*, (1896) 31 P R 1896 (F B).

2. *Ishar Singh v. Lal Singh*, (1898) 39 P R 1898.

3. *Thando v. Hashm Ali*, (1930) 17 A I R Lah 942 = 130 I C 517.

it was held, following a later Division Bench ruling of the Punjab Chief Court reported in 44 P R 1917,⁴ that such an alienation is not void but is only voidable at the instance of the landlord. The learned Judge was however somehow of the opinion that the plaintiffs were still entitled to sue to set aside the alienation in favour of the landlord according to the principles laid down in 39 P R 1898.² He accordingly accepted the appeal and decreed the plaintiffs' suit.

The defendant preferred a second appeal to this Court which came up for hearing before Dalip Singh J., who noticed the conflict of judicial decisions on the question whether an alienation of an occupancy tenancy by a widow is to be regarded as void or voidable according to the provisions of S. 59 (3), Punjab Tenancy Act, and expressed his doubt about the correctness of the view taken by Division Benches in 44 P R 1917⁴ and A I R 1936 Lah 70⁵ to the effect that such an alienation is voidable and not void. He did not however consider it necessary to go into this question further as he was of opinion that the joint tenancy in this case being one as against the landlord, an alienation of a fractional interest by one of the co-tenants could not affect the interests of the other co-tenants. In support of his view, the learned Judge relied on the principles laid down in the Full Bench ruling reported in 11 Lah 427⁶ and also on general principles. The learned Judge accordingly affirmed the decision of the Additional District Judge—though on different grounds—and dismissed the appeal. From this decision, a Letters Patent appeal was filed, which came up for hearing before a Division Bench; but that Bench considered that the appeal raised important and difficult questions of law, which should be decided by a Full Bench. The appeal had accordingly, been referred to a Full Bench for decision.

The two points of law on which the decision of this appeal turns are: (i) whether a sale by a widow of an occupancy tenancy is void or only voidable under S. 59 (3), Punjab Tenancy Act; (ii) whether a sale by a co-tenant of his share in a joint holding in favour of his landlord extinguishes his share in the tenancy and therefore the rever-

sioners of the alienor have no locus standi to challenge such an alienation. As regards the first point the provisions of sub-s. (3) of S. 59 are as follows:

When the widow of a deceased tenant succeeds to a right of occupancy, she shall not transfer the right by sale, gift or mortgage or by sub-lease for a term exceeding one year.

In view of the wording of this sub-section, it was held by a Division Bench of the Punjab Chief Court in 39 P R 1898,² as mentioned above, that an alienation by sale or mortgage of an occupancy tenancy by a widow is absolutely forbidden and hence such an alienation is void, whether it is made in favour of the landlord or a stranger. It follows therefore that the reversioners of the widow have a right to get such an alienation declared to be void and, therefore not binding on them, independently of the question of valid necessity and consideration for the alienation, on which the reversioners can usually challenge an alienation under custom. A similar interpretation was placed on the provisions of sub-s. 3 of S. 59, Punjab Tenancy Act, in some later rulings of the Punjab Chief Court as well as of the Financial Commissioners, *see e.g.*, 54 P L R 1911,⁷ 18 I C 623,⁸ 4 P R 1900 (Rev.),⁹ 6 P R 1913 (Rev.),¹⁰ etc., up to the year 1917, when a different interpretation was placed on that sub-section by another Division Bench of the Punjab Chief Court (Shadi Lal and Broadway JJ.). In that case a widow had gifted her occupancy holding and the gift was challenged by the landlord. The learned Judges first repelled the contention that the gift was tantamount to an abandonment of the tenancy and then went to consider the question whether the gift was void or voidable. They referred to S. 60 of the Act, which lays down that any transfer of a right of occupancy in contravention of the foregoing provisions of this chapter shall be voidable at the instance of the landlord, and held that the language of this Section was wide enough to cover the gift in dispute as it was a transfer made in contravention of the provisions of one of the preceding Sections, viz. S. 59, and therefore the gift was only voidable at the instance of the landlord and not absolutely void. The only ruling on the subject, to which the attention of the learned Judges was drawn, was

4. Thakur Singh v. Bihari Lal, (1917) 4 A I R Lah 408=39 I C 163=44 P R 1917.

5. Hargobind v. Gurdasmal, (1936) 23 A I R Lah 70=155 I C 836=37 P L R 403.

6. Moti Lal v. Kartar Singh, (1930) 17 A I R Lah 515=127 I C 1=11 Lah 427=31 P L R 644 (F B).

7. Hayat Baksh v. Gauhar, (1911) 54 P L R 1911=9 I C 339.

8. Allah Ditta v. Hassan, (1913) 50 P L R 1913=18 I C 623.

9. Prem Singh v. Jamit Singh, (1900) 4 P R 1900 Rev.

10. Mt. Khanam Nur v. Hayat Khan, (1913) 6 P R 1913 Rev.=22 I C 660=120 P L R 1914.

apparently 54 P L R 1911.⁷ The learned Judges considered the facts of that case to be distinguishable in certain respects and also pointed out that S. 60, Punjab Tenancy Act, was not considered therein. They were therefore not prepared to endorse the line of argument adopted in that ruling. In the end they held that the gift by the widow was not a void transaction and the landlord was not bound to sue the transferee during her lifetime. The possession of the alienee was therefore held to have become adverse to the landlord only on her death and the suit was held to be within time. With the greatest respect it must be said that the above ruling is difficult to follow. Assuming for the sake of argument that an alienation by a widow is only voidable at the instance of the landlord and not void, it is difficult to see why the possession of the alienee should not become adverse to the landlord till the death of the widow. S. 60 gives the landlord the right to avoid such an alienation and presumably he can exercise the right as against the alienee as soon as the alienation takes place. The period of limitation would therefore run from the date of the alienation: 135 P R 1888¹¹ and 1 P R 1916 (Rev.).¹²

But apart from this fact, I am unable to see how the language of S. 60 can be said to be conclusive on the question whether a transfer by a widow falling within the scope of S. 59 (3) is void or voidable. S. 60 merely says "any transfer made in contravention of the preceding Sections shall be voidable at the instance of the landlord." In other words, it only gives the right to the landlord to intervene, and avoid transactions which are effected in contravention of the preceding Sections. The question whether a transaction falling within the purview of sub-s. 3 of S. 59 is void or voidable, must, I think be decided on the language used in that sub-section. The language used in that sub-section is imperative and forbids absolutely any sale, gift, mortgage or even a lease for more than a year, by the widow. According to the plain meaning of the words used, such an alienation would seem to be null and void and this was the view taken in 39 P R 1898³ and in the subsequent rulings in which that case was followed. The mere fact that according to the provisions of S. 60 of the Act, a transfer of occu-

pancy rights by a widow falling within the ambit of S. 59 (3) would be 'voidable,' at the instance of the landlord, would not show that the transaction would remain valid until it is so avoided. As stated above, S. 60 appears to be intended merely to give a locus standi to the landlord to avoid irregular transfers made in contravention of the preceding Sections. If transfers falling within the scope of S. 59 (3) were not covered by S. 60, there might have been room for doubt as to whether the landlord would have any locus standi to challenge such transfers, even if they were void. For, it might have been argued that the landlords' interests were not affected as long as he was being paid the rent and the conditions of the tenancy were being otherwise fulfilled. It may have therefore been considered advisable to include such transfers also within the scope of S. 60, to make the position clear.

The view expressed in 44 P R 1917⁴ that a transfer falling within the scope of S. 59 (3) can only be regarded as voidable at the instance of the landlord and not void, seems unsustainable on other grounds also. Let us take, for instance, the provisions of S. 56, Punjab Tenancy Act. The Section lays down that an occupancy tenancy under any Section other than S. 5 shall not be attached or sold in execution of a decree. The language of this provision also is imperative and therefore it would appear that an attachment or sale of such occupancy rights in execution would be void. Now, if such rights are sold in execution, I do not see why the reversioners of the tenant whose interests would be obviously affected by the sale, should not have a right to get a declaration that the sale shall not be binding on them. It is also possible for the tenant himself to object to the sale on this ground; e. g., if a sale has been effected without any notice to the tenant and he subsequently applies for its being set aside on the ground that the sale is prohibited by the mandatory provisions of S. 56. It will thus appear that S. 60 does not mean or even imply that other persons, besides the landlord, have no right to challenge an alienation made in contravention of the Sections preceding S. 60. Reversioners have, of course, a right of challenging alienations effected without valid necessity according to custom; but if an alienation is void altogether under any of the provisions of the Punjab Tenancy Act, there seems to be no good reason why they should not be entitled

11. *Ram Chand v. Mahomed Khan*, (1888) 135 P R 1888.

12. *Labhan v. Tulsi*, (1916) 1 P R 1916 Rev.=34 I C 523=3 P W R 1916 Rev.

to get a declaration to that effect in order to protect their rights as held in 39 P R 1898.² 44 P R 1917⁴ has been followed by a learned Judge of this Court (Addison J.) in A I R 1930 Lah 942³ and later on in A I R 1936 Lah 70⁵ by a Division Bench, of which that learned Judge was a member. In the former case the line of reasoning in 44 P R 1917,⁴ was preferred to that in 39 P R 1898² and it was also pointed out that S. 60 was not referred to in the latter ruling. It was further remarked that the Punjab Tenancy Act was intended merely to control the relationships between landlords and tenants and had nothing to do with the powers of alienations possessed by a widow or the control of such alienations by reversioners. In the Division Bench ruling reported in A I R 1936 Lah 70,⁵ it was held that the law as to the challenging of widow's alienations was correctly laid down in A I R 1930 Lah 942,³ but without any further discussion of the subject. I have already referred above to the line of reasoning adopted in 44 P R 1917.⁴ The only other argument which has been brought out in the two rulings of this Court in which that decision has been followed is that the Punjab Tenancy Act is only intended to control the relations between landlords and tenants and has nothing to do with the powers of alienation possessed by a widow or the control of such alienations by reversioners. But although the Punjab Tenancy Act is mainly concerned with regulating the relations between landlords and tenants, there are provisions in it regulating the right of succession to occupancy tenancies which affect the reversioners also.

Sections 53 to 58 are included in the Act under the heading, 'alienation,' while S. 59 comes under a different heading, viz., 'Succession.' The latter Section introduces some important changes in the personal law of occupancy tenants in matters of succession, which affect his heirs and reversioners. For example, according to S. 59 a widow succeeds to a life estate in the entire occupancy holding of her husband until death or remarriage; but she could not have so succeeded under personal law, if he were, e. g., a member of a joint Hindu family, or even if he were governed by Mahomedan law. A daughter finds no place in the order of succession, and a widowed mother has been included in the line of heirs only by a recent amendment introduced by Punjab Act 9 of 1939. All other relations, except

those claiming descent from a common ancestor who occupied the land, are excluded altogether. It is in this S. 59, which regulates succession that it is provided by sub-s. (3) that when a widow succeeds to an occupancy holding on the death of her husband, she has no power to transfer it by sale, mortgage or gift or to lease it for more than a year.

This restriction thus seems to be as an incident of her tenure as an occupancy tenant. As was pointed out by the Financial Commissioner (Mr. Fenton) in 6 P R 1913 (Rev.),¹⁰ this restriction seems to be really in the interests of the reversioners and not of the landlord. For the landlord's interests are sufficiently protected by the restrictions placed on the power of alienation of an occupancy tenant by Ss. 53 to 56 of the Act. According to the provisions of these Sections, the occupancy tenant cannot transfer his rights without giving the landlord the option of purchasing them (S. 53), or without his consent in writing (S. 56). If these provisions are sufficient to protect the interests of the landlord in the case of a male occupancy tenant, there seems to be no reason why they should not be equally sufficient in the case of a female occupancy tenant. It should have been therefore quite unnecessary to introduce any further restrictions on the power of alienation, so far as the landlord is concerned when a widow happens to be an occupancy tenant. It seems reasonable to infer that the restrictions on the powers of alienation of a widow were placed in the interests of the reversioners and not in the interests of the landlords. The occupancy tenants are generally members of agricultural tribes who are governed by custom, and under custom a widow's powers of alienation are very limited. It was probably in consonance with the spirit of customary law that further restrictions on the powers of alienation of a widow were considered advisable and were provided for in sub-s. (3) of S. 59. In 39 P R 1898,² it was remarked that it would seem that the Legislature, in order to avoid the harassing or expensive litigation which constantly arises in respect of transfers by widows, means to give only a strict life interest in occupancy rights inherited by them from their husbands.

Incidentally, there is one point to which attention might be drawn here. By a recent amendment of S. 59, a 'widowed mother' is now included in the line of heirs after the 'widow' (see Punjab Act 9 of 1939). But sub-s. (3) was not amended so as to include

her within its scope. The result is that while the widow of a deceased tenant has no powers of alienation at all by sale, mortgage, etc., a widowed mother not being subject to the provisions of sub-s. (3) would apparently have the same powers as those enjoyed by her under custom or personal law, as the case may be. This position seems anomalous. It seems scarcely likely that the Legislature could have intended to place the widowed mother of a deceased tenant on a better footing in this respect than his widow. For the foregoing reasons, it seems to me that the rule laid down in 39 P R 1898,² that an alienation by a widow falling within the scope of sub-s. 3 of S. 59, Punjab Tenancy Act, is void and not merely voidable, should be affirmed and the decisions which lay down the contrary should be overruled. According to the rule laid down in 39 P R 1898,² the plaintiffs in this case are entitled to get the declaration prayed for by them as Mt. Fatima's sale was void altogether and they can therefore get this relief quite independently of their right to challenge the sale for want of necessity under custom.

The decree of the learned Additional District Judge decreeing plaintiffs' suit was therefore correct and was rightly affirmed by the learned Judge in Single Bench though on different grounds. On the above finding, the appeal fails and consequently it is unnecessary to consider the second point, on which the case was decided by the learned Judge, viz., that the sale by Mt. Fatima does not affect the plaintiffs' rights as the tenancy was joint and the sale of a fractional share by a joint tenant, does not affect the interests of the other co-tenants. I would accordingly dismiss the appeal but leave the parties to bear their costs, in view of the difficult points of law involved.

Tek Chand J.—I agree in the conclusion reached by my learned brother and have very little to add. The right of the widow of a sonless occupancy tenant, to succeed to the tenancy, is conferred on her by statute, which has defined and restricted her powers within narrow limits and has placed certain disabilities on her. These powers are materially different from those of a widow succeeding to the proprietary estate of her husband. The former are regulated by the statute; the latter by the personal law of the deceased husband. Her power to alienate the occupancy rights as her power to succeed to them must there-

fore be sought within the four corners of the statute, and it should be clearly borne in mind that a widow succeeding to occupancy rights does not take the usual "widow's estate," as she does in certain systems of law, so far as proprietary land is concerned. It is the failure to keep this distinction in view, which, if I may say with great respect, is largely responsible for the confusion that has arisen in judicial decisions, dealing with the point under consideration.

In this connexion, it may be mentioned that before 1887 the widow of an occupancy tenant had no right to succeed to the tenancy under any circumstances. The tenancy law in this province was first codified by Act 28 of 1868, and under that Act the widow was not in the line of heirs at all. According to S. 36 of that Act, on the death of an occupancy tenant, his right devolved on (1) his male descendants (if any), and (2) failing such descendants, on his male collateral relatives, provided the common ancestor of the deceased and his said relatives had occupied the land. The Act of 1868 remained in force till 1887, when it was replaced by Act XVI which made several material changes in the law, one of which was to alter the course of succession to occupancy tenancies so as to allow the widow of the last tenant to succeed in certain circumstances. Under sub-s. (1) of S. 59, succession first goes to male lineal descendants of the last tenant; failing them to the widow until she dies, or remarries or abandons the land, or is under the provisions of the Act rejected therefrom; and after her interest has so terminated, the tenancy devolves on his collateral relatives if the common ancestor had occupied the land. But while the widow is given the right to succeed, she is forbidden from alienating the tenancy under any circumstances. Sub-s. (3) of S. 59 contains a peremptory prohibition on her power of alienation. It lays down in emphatic terms that

when the widow of a deceased tenant succeeds to a right of occupancy, she shall not transfer the right by sale, gift or mortgage, or by sub-lease for a term exceeding one year.

This is an imperative provision of the law which absolutely prohibits an alienation by the widow. It makes no distinction between transfers which are for legal necessity and those which are not. Nor does it recognize any difference if the transferee is the landlord and not a stranger. The

prohibition in the sub-section is all embracing, and it is not denied that if S. 59 had stood alone the widow's alienation would be void altogether. It is conceded that in that case it would not be open to the widow in collusion with the landlord, to destroy the right of the collaterals of her husband to succeed to the tenancy on the death of the widow. It is, however, contended that sub-s. (3) of S. 59 is to be read with, and subject to, S. 60, which lays down that any transfer made of a right of occupancy in contravention of the foregoing provisions of this chapter shall be voidable at the option of the landlord.

This Section cannot, in my opinion, be taken to make valid what is prohibited positively and in the clearest terms by sub-s. (3) of S. 59. It is an enabling provision, enacted to make it clear that the landlord has a *locus standi* to intervene and avoid any transfer which has been made in contravention of the provisions of Ss. 52 to 59. A general provision of this kind cannot, in the absence of an express words to the contrary, be taken to abrogate by implication the special provision contained in the earlier Section relating to widow's alienation.

The question as to whether the alienation by a widow in contravention of S. 59 (3) was void and could be objected to by the reversioners of her husband, or was voidable at the instance of the landlord only in view of the provisions of S. 60 of Act 17 of 1887, came up for consideration before the Courts very soon after the Act had come into force, and a reference under S. 617, Civil P. C. of 1882 was made to the Chief Court for an authoritative pronouncement on the subject. The matter was considered by a Division Bench of the Court (Roe and Frizelle JJ.) in 205 P R 1889¹³ and they observed that S. 60 related only to objections by landlords to alienations, and the making of a provision for that purpose did not imply that no one but a landlord could object. They held, accordingly, that the reversioners of the last male occupancy tenant could sue to protect themselves against the injury to their reversionary rights by his widow. The question arose a few years later in a case, in which the alienation by the widow was in favour of the landlord and the reversioners sued to have it declared void: 39 P R 1898.² It was held that a widow's alienation, whether for necessity or not, was void under S. 59 (3), which declared her incompetent to effect

any transfer of the occupancy rights to which she had succeeded, except a lease for a term not exceeding one year. It was pointed out that the Act made no exception in favour of alienation to proprietors, nor could any such inference be drawn from a comparison of the several Sections bearing on the subject of alienations by the tenant. This ruling was followed by several Benches of the Chief Court and its reasoning and conclusions have been adopted by the Financial Commissioners in various cases.

In 44 P R 1917⁴ the question indirectly came up for consideration before another Division Bench of the Chief Court who, however, expressed a different opinion as to the meaning and scope of these Sections. In that case the widow, who had succeeded to the occupancy tenancy of her husband under S. 59, had made a gift of the tenancy to a stranger in 1885. The donee was put in possession of the land at the time of the gift. The widow died in 1912 and about a year after her death the landlord brought a suit for possession against the donee. The latter resisted the suit pleading adverse possession. He urged that the alienation by the widow, being in contravention of the provisions of sub-s. (3) of S. 59, was void and therefore time began to run against the landlord from the date of the alienation and not from the death of the widow. The learned Judges in rejecting this plea expressed the opinion that having regard to the all comprehensive wording of S. 60, the alienation by the widow was not a void transaction but was voidable at the instance of the landlord. From this, they concluded that the landlord was not bound to sue the donee during the lifetime of the widow and his possession, therefore, became adverse to the landlord from her death which had occurred within twelve years of the suit. They, therefore, granted the landlord a decree for possession. With great respect to the high authority of the learned Judges who decided that case, it is difficult to follow their reasoning or to see how the ultimate conclusion flows from it. S. 60 is no doubt wide in its terms, but it does not expressly, or by necessary implication, make valid a transaction which is explicitly forbidden by the terms of sub-s. (1) of S. 59. It merely gives the landlord a *locus standi* to sue to avoid an alienation by a tenant which had been effected in contravention of the provisions of Ss. 53 to 59 of the Act.

Further, assuming that the alienation by the widow was not void but merely voidable

18. *Gaml v. Mt. Khlo*, (1889) 205 P R 1889.

at the instance of the landlord, the terminus a quo for the landlord to sue would not be the date of the death of the widow. The alienation could, in no case, be valid as against the landlord for the lifetime of the widow. Ex hypothesi the landlord could avoid it immediately after it had been effected. Time, therefore, would begin to run against him from the date of the alienation, and the alienee would acquire an indefeasible title at the expiry of twelve years from that date, regardless of whether the widow was alive or dead. If I may say so with great deference, the position of the widow who has succeeded to her husband's occupancy tenancy under S. 59 was erroneously assumed to be the same as that of a widow who succeeds, under the personal law, to a life interest to his proprietary estate and whose alienations held good for her lifetime whether they have been effected for necessity or not. I agree, therefore, with my learned brother in holding that this decision, as well as the rulings which followed it, A I R 1930 Lah 942³ and A I R 1936 Lah 70⁵, did not lay down the law correctly, and that it must be held, following 39 P R 1898,² that an alienation of occupancy rights by a widow is void under S. 59 (3), Punjab Tenancy Act and this nonetheless so even if the alienation is in favour of the landlord.

Before concluding, I think it necessary to point out that the view taken by us in this case does not in any way affect the Full Bench decisions of the Chief Court in 31 P R 1896¹ and 29 P R 1902,¹⁴ where it has been held that an alienation by a male tenant in favour of the landlord, or, with his consent, in favour of a stranger, cannot be challenged by the collateral relatives of the alienor. As pointed out in 39 P R 1898² (at p. 137), S. 59 does not contain any prohibition against the alienation by the male descendants or collateral relatives who have succeeded to an occupancy tenancy; therefore, having regard to the earlier provisions of the Act for the acquisition of the tenants' rights by the landlord, the reversioners of the male tenant have no locus standi to contest an alienation effected in favour, or with the consent, of the landlord. The case of a widow, however, stands on a different footing. Sub-s. (3) of S. 59 distinctly forbids all alienations of whatever sort by her except a sub-lease for a year. I would ac-

cordingly dismiss this appeal and leave the parties to bear their own costs throughout.

Monroe J.—I agree.

D.S /R.K.

Appeal dismissed.

A. I. R. 1940 Lahore 370

FULL BENCH

DALIP SINGH, BHIDE AND BLACKER JJ.

Punjab National Bank Ltd., Ferozepore City — Plaintiff — Appellant.

v.

Firm Ram Karan Ramji Lal and others — Defendants — Respondents.

First Appeal No. 260 of 1938, Decided on 10th May 1940, from preliminary decree of Senior Sub-Judge, Ferozepore, D/: 12th April 1938.

(a) **Transfer of Property Act (1882), S. 82—S. 82 does not restrict decree-holder's right to execute against any particular judgment-debtor** (Per Blacker J., in Order of Reference).

Section 82 merely lays down that all the properties are liable to contribute rateably. This does not restrict the decree-holder's right to execute against any particular judgment-debtor, who can recover any excess himself from the others.

[P 371 C 2]

(b) **Punjab Alienation of Land Act (13 of 1900), S. 16—Equitable mortgage by non-agriculturist in favour of another non-agriculturist — Mortgagor subsequently transferring his ownership of that land to agriculturist — Mortgagee is not deprived of his right to execute his decree by sale.**

As the Punjab Alienation of Land Act was passed for a specific purpose, namely the protection of agriculturists against the gradual loss of their land by alienations to non-agriculturists, effect should not be given to any departure from the ordinary common law, however wide its language may be, which is inconsistent with or goes beyond or is quite unnecessary for that purpose. The words in S. 16 cannot be taken as connoting every and any kind of ownership. The scheme of the Act would suggest that it was the existing rights of agriculturists which were to be protected and not necessarily rights which might subsequently accrue to them. Any land which has come to an agriculturist or been acquired by him, as distinct from any land which has always been his, must therefore be subject to the same charges and encumbrances as it was before it came to him and therefore it can only be said to belong to him within the meaning of S. 16, Punjab Alienation of Land Act, subject to such charges and encumbrances and that even in his hands it is liable to the extent of them but no more. Hence, where a person who is not a member of an agricultural tribe, has mortgaged his land to another person, who is also a non-agriculturist, by an equitable mortgage and later transfers his ownership of that land to a person who is a member of an agricultural tribe, the mortgagee is not deprived by this Section of his ordinary

14. *Khazan Singh v. Khushal Singh*, (1902) 29 P R 1902=83 P L R 1902.

legal right of executing his decree by sale of the property. [P 374 C 1 ; P 375 C 1]

(c) Punjab Alienation of Land Act (13 of 1900), S. 16—S. 16 applies only where liability of land to be sold is not already determined by decree itself (Per *Bhide J.*).

If the decree to be executed has already determined the liability of the property to sale, the executing Court cannot question the validity of the decree or refuse to carry it out. S. 16 was not intended to override this principle and give power to an executing Court to ignore and nullify the effect of the decree passed by a Court of law. S. 16 was meant to apply only to those cases where the liability of the land to be sold is not already determined by the decree itself, and the executing Court has to decide what property should be sold to satisfy the decree. In other words, the Section is analogous to S. 60, Civil P. C., which lays down that certain properties shall not be liable to be attached and sold in execution: *AIR 1933 Lah 397*, and *AIR 1936 Lah 845, Dissent.* [P 375 C 2]

Har Gopal and N. L. Salooja for S. L. Puri — for Appellant.

ORDER OF REFERENCE.

Blacker J. — A firm known as Ram Karan Mal-Ramji Lal at Ferozepore of which the partners were Lala Ramji Lal, father of defendants 1 and 2, and Mt. Sharbati, defendant 3, effected an equitable mortgage with the plaintiff bank of certain property at Ferozepore by the deposit of title deeds, the consideration being an overdraft to the limit of Rs. 60,000. On 21st August 1934, the Bank brought a suit for recovery of Rs. 12,575-11-4 as a charge and by sale of the property charged. Subsequent to the mortgage effected by Lala Ramji Lal on behalf of the firm some of the property charged had passed into other hands and therefore certain other persons were impleaded as defendants, the total number of defendants being 14. The learned lower Court granted the plaintiff bank the decree sought with certain reservations. Of those that are relevant to this appeal one was that in the case of the property which had passed into the hands of defendants 9 and 10, Faqir Chand and Rattan Chand, out of the four shops claimed, i. e., Nos. 58 to 61, one, i. e., No. 61, was exempted. With regard to defendants 11, 12 and 13, Hari Singh, Ishar Singh and Narain Singh, the trial Court decreed that as they were agriculturists the property in their hands could not be sold but could only be proceeded against by way of mustajri, if the share of the money due on it was not realized out of the other mortgaged property. The Court also decided that the plaintiff should proceed first against certain of these properties which had not been transferred and after

that it could proceed against any of the others. From this order it excepted those that had passed into the hands of the members of the agricultural tribes which were placed last.

The plaintiff appealed only against the decision of the lower Court by which the land which had passed into the hands of Hari Singh, Ishar Singh and Narain Singh was ordered not to be sold. There were two cross-objections. One was on behalf of defendants 9 and 10, Faqir Chand and Rattan Chand, who maintained that only shop No. 60 was mortgaged and that the Court's decree for the sale of shops Nos. 58 and 59 should be set aside. The other was on behalf of defendants 5, 6 and 7, Ishar Das, Lachhman Das and Ram Chand, who claimed that the Court should have ordered that the properties in their hands should be sold last. I will deal with the last cross-objection first as it is the simplest. It is sufficient to say that counsel for these defendants was not able to give us any reason why his clients should be favoured and their property proceeded against last. He referred to S. 82, T. P. Act, but that merely lays down that all the properties are liable to contribute rateably. This does not restrict the decree-holder's right to execute against any particular judgment-debtor, who can recover any excess himself from the others. There is no force in this cross-objection which should be dismissed with costs.

I now come to the cross-objection filed by defendants 9 and 10, Faqir Chand and Rattan Chand. Their case is that there is no satisfactory evidence that shops Nos. 58, 59 and 60, the sale of which has been decreed by the trial Court, were identical with shop No. 60 which was sold by one Shahab Din to the defendant mortgagor. The bank relies mainly upon a recital in a document described as form No. 60, one of the documents which created the equitable mortgage in favour of the bank made by Ramji Lal, to the effect that the shop No. 60 which he had bought from Shahab Din had been demolished and that in its place shops Nos. 57 to 60 had been built. The mortgagor appears to have made an unfortunate slip as the numbers of the shops were really not 57, 58, 59 and 60 but 58, 59, 60 and 61. It was on this account that the trial Court did not give the bank a decree in respect of shop No. 61. Counsel for the cross-objectors in this case argues that this form No. 60 is inadmissible in

evidence as an admission by Ramji Lal in his own favour. This is an argument which I am unable to follow, because it is the bank that is suing and not Ramji Lal and it is difficult to see how it could be held that at the time that he executed this document Ramji Lal had any interest in making a false statement to the effect that the original shop No. 60 had been split up into four shops. It is impossible to come to the conclusion that the lower Court had erred in relying upon this document, and it is sufficient to prove the plaintiff's case at least with regard to the three shops in respect of which the lower Court gave a decree. This cross-objection should accordingly be also dismissed with costs.

I then come to the main appeal by the plaintiff bank against the decision of the learned lower Court that the property in the hands of Hari Singh, Ishar Singh and Narain Singh cannot be sold. It would appear that Ramji Lal, who was a non-agriculturist, originally sold this land to defendants 5, 6 and 7, Ishar Das, Lachhman Das and Ram Chand, also non-agriculturists, and they sold them to Hari Singh, Ishar Singh and Narain Singh, all agriculturists. There was no pleading that these last three defendants, Hari Singh, etc., had any notice of the equitable mortgage and no issue was framed on this question. But it would not appear that that would make any material difference to the question which we have to decide. The learned counsel for the appellant bank has argued that as the mortgagor to the bank was a non-agriculturist and had every right to mortgage the property in his hands, its rights which included the right of bringing that property to sale could not be affected by any subsequent alienation of their property. Unfortunately S. 16, Punjab Alienation of Land Act, appears to stand in his way. The relevant portion of that Section runs as follows :

No land belonging to a member of an agricultural tribe shall be sold in execution of any decree or order of any Civil or Revenue Court, whether made before or after the commencement of this Act.

At first sight this would appear to be a complete answer to the appellant's case. The respondents, who unfortunately were not represented although they had been duly served, appear from the record to have purchased openly and honestly the land in suit and in the ordinary sense of the English words one would say that it belongs to them within the meaning of S. 16. Counsel,

however, argues that S. 16 should be very strictly construed as it cuts into the ordinary jurisdiction of the Courts — a proposition in support of which he relies upon 2 Lah 78¹ and 1 Lah 192² which is a Full Bench authority. He maintains that S. 16 should not be applied unless all the component parts of ownership are present. According to him the ownership which was acquired by these particular defendants was not a full ownership because something had been taken out of it, namely the plaintiff's power to sell the land. He has relied upon a judgment of a Single Judge of this Court reported in 131 I C 229³ and he has also cited a Division Bench judgment quoted in 18 Lah 48.⁴ In 131 I C 229,³ in a similar case, it was held that the purchaser of the land had only purchased so much of the interest in the land as remained after the mortgage was satisfied. It was held that this did not amount to full ownership and that therefore S. 16, Punjab Alienation of Land Act, did not apply. This judgment was quoted in the Division Bench case, 18 Lah 48,⁴ but counsel does not seem to be correct in thinking that it was followed. As a matter of fact it was neither followed nor disapproved; it was merely quoted in order to show that it had no application to the circumstances of the particular case which was then before the Bench.

It seems to me difficult to agree with the proposition laid down in 131 I C 229.³ The right of the mortgagee to sell in a simple mortgage of this sort is actually conditional upon the non-discharge of the debt by other means. The ownership of the defendant transferees in this land is certainly dependent on the fulfilment of a condition, namely that they avoid the sale of it by discharging the mortgage debt. It seems nevertheless difficult to hold that this is not an ownership within the intention of S. 16, Punjab Alienation of Land Act, the language of which is not qualified in any way. On the other hand to hold that S. 16 is applicable would entail a result which was probably not contemplated by the Legislature. To hold that once land which

1. Manji v. Girdhari Lal, (1921) 8 A I R Lah 44 = 61 I C 664 = 2 Lah 78 = 71 P L R 1921.

2. Datar Kaur v. Ram Rattan, (1920) 7 AIR Lah 456 = 58 I C 603 = 1 Lah 192 (F B).

3. Surjan v. Tegh Bahadur Singh, (1931) 18 AIR Lah 545 = 131 I C 229.

4. Ohhajju Ram v. Muzaffar Ahmad, (1936) 23 A I R Lah 845 = 165 I C 243 = 38 P L R 1065 = I L R (1937) 18 Lah 48.

is the subject of a mortgage of this sort passes to the hand of an agriculturist it becomes incapable of being sold in execution of a decree would be to put a powerful weapon in the hands of an unscrupulous mortgagor. He could completely defeat the rights of the mortgagee by passing on the mortgaged property on favourable terms to an agriculturist. The result is that while I find it very difficult to agree with the reasons for which S. 16, Punjab Alienation of Land Act, was held to be inapplicable in 131 I C 229³ (referred to in the Division Bench case, 18 Lah 48,⁴) it seems to me that the question is of such very great importance and that a decision to the effect that S. 16, Punjab Alienation of Land Act, must apply to a transaction of this sort would be likely to have such very serious and unforeseen consequences that I think that before this view is held the case should be laid before a larger Bench for decision. I also understand that there are some other cases of the same nature about to come before this Court which would render it desirable to have an authoritative decision on this point. I would therefore refer the case for the orders of the learned Chief Justice with the recommendation that this point be decided by a larger Bench.

Dalip Singh J. — I agree but I wish to add a few words of explanation. The Land Alienation Act was obviously intended for the protection of agriculturists. The question is whether in the circumstances of this case S. 16 of that Act which states that no land belonging to an agriculturist shall be sold in execution of a decree was intended to apply. It may be contended strongly that the present owner of the land is an agriculturist. The fact that the previous owner of the land had mortgaged the land did not mean that the owner ceased to be an owner. He parted with his ownership rights to the present owner who is an agriculturist. The land belongs to him and therefore under the plain words of S. 16, it cannot be sold in execution of a decree. On the other hand, two arguments might be put forward. One is that the land does not belong to an agriculturist because an estate has been carved out of the land previous to its coming into the possession of the agriculturist by an alienation of certain rights in the land being effected by way of mortgage. This seems to be the reasoning adopted in the single Bench ruling quoted in the judgment of my learned brother. The reasoning does

not appeal to me very much because, to take a simple instance, if land is leased an estate is carved out of the land; could it be contended, if a non-agriculturist had leased the land and had subsequently sold the ownership rights or landlord rights which remained in him to an agriculturist, that the land did not belong to an agriculturist and therefore his landlord rights in the land could be sold in execution of a decree? I do not think it could be so contended.

But there is another way of looking at the matter which is this. A mortgage is an alienation of rights in land and by statute the creation of a mortgage attaches a liability to the land mortgaged to be sold if the debt due under the mortgage is not discharged; in other words, a conditional liability attaches to the land to be sold, and this has been described as 'an estate in land.' If a non-agriculturist has by mortgaging the land attached this liability to the land to be sold, does he by parting with his residuary rights in the land do away with this liability which has already attached to the land because the person to whom he parts with the residuary rights is statutorily protected from being deprived of his land by sale in execution of a decree. This result is not protection of the agriculturist but is really avoiding the alienation already made by a non-agriculturist and therefore is not within the scope of S. 16, Land Alienation Act. This question would arise quite apart from whether the transaction as between the non-agriculturist and agriculturist as regards the sale of the former's right was bona fide or not bona fide. It is obvious that the result of any decision one way or the other would have far reaching effects and as the point is of importance and the matter is not very clear I agree that it should be referred to a Full Bench for decision.

Judgment of the Full Bench

Blacker J. — The facts of this case have, I think, already been stated in sufficient detail by me in my judgment as a member of the Division Bench which referred it. They need not be recapitulated here. The question which we have to answer is easy to frame but is not so easy to decide. S. 16, Punjab Alienation of Land Act, runs as follows :

16 (1). No land belonging to a member of an agricultural tribe shall be sold in execution of any decree or order of any Civil or Revenue Court, whether made before or after the commencement of this Act

The question before us is whether in a case where a person who is not a member of an agricultural tribe has mortgaged his land to another person who is also a non-agriculturist by an equitable mortgage and later transfers his ownership of that land to a person who is a member of an agricultural tribe, the mortgagee is deprived by this Section of his ordinary legal right of executing his decree by sale of the property. When this case was before the Division Bench it certainly did seem that the language which the Legislature has employed in drafting the Section is so wide and general that it was difficult to see how the answer could be anything but in the affirmative. On appeal before the Full Bench however the learned counsel for the appellant—it is unfortunate that the respondents were not represented — has contended that the taking of the strict grammatical meaning of the words of a statute is not the sole method of interpretation. He has pointed out that where an Act has been passed for a specific purpose, the Courts have not always to follow literally the language of its provisions where those provisions have clearly gone beyond the scope of the purposes for which the Act was passed particularly when the ordinary common law has been departed from to fulfil such purposes. Counsel relies upon ordinary rule that a prior mortgage prevails against a subsequent purchaser, and has also pointed out quite correctly that in India an equitable mortgage is on all fours with a legal mortgage. His contention is that as the Punjab Alienation of Land Act was passed for a specific purpose, namely the protection of agriculturists against the gradual loss of their land by alienations to non-agriculturists, effect should not be given to any departure from the ordinary common law however wide its language may be which is inconsistent with or goes beyond or is quite unnecessary for that purpose.

The argument of the counsel finds considerable support in "Maxwell on the Interpretation of Statutes." In Edn. 8 of that work, in Ch. 3 on p. 73 there are two very relevant and important paragraphs which may be quoted in full :

Before adopting any proposed construction of a passage susceptible of more than one meaning, it is important to consider the effects of consequences which would result from it, for they often point out the real meaning of the words. There are certain objects which the Legislature is presumed not to intend and a construction which would lead to any of them is therefore to be avoid-

ed. It is not infrequently necessary therefore to limit the effect of the words contained in an enactment (especially general words) and sometimes to depart not only from their primary and literal meaning, but also from the rules of grammatical construction in cases where it seems highly improbable that the words in their wide primary or grammatical meaning actually express the real intention of the Legislature. It is regarded as more reasonable to hold that the Legislature expressed its intention in a slovenly manner, than that a meaning should be given to them which could not have been intended.

One of these presumptions is that the Legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed. It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness, and to give any such effect to general words simply because they have a meaning that would lead thereto when used in either their widest, their usual, or their natural sense, would be to give them a meaning other than that which was actually intended. General words and phrases therefore, however wide and comprehensive they may be in their literal sense, must, usually, be construed as being limited to the actual objects of the Act. The general words of the Act are not to be so construed as to alter the previous policy of the law.

In support of the doctrines laid down by Maxwell there is the House of Lords' decision in (1877) 2 A C 743.⁵ This authority lays down certain principles which are fully in accord with the dicta of Maxwell. It seems therefore that what has to be looked to before answering the question is what was the purpose with which the Punjab Alienation of Land Act was passed. It is pretty clear that the object of the Punjab Alienation of Land Act was as has been stated by counsel and that the intention of the Legislature was only to depart from the ordinary established principles of law in so far as it was necessary to achieve that purpose. It is difficult to see how the purpose of protecting agriculturists from loss of their existing lands is to be achieved by a provision which would permit them to acquire new lands on such terms as would enable them to defeat the bona fide legal rights of persons who had prior charges on such lands. From this point of view therefore it would seem in accordance with the sound principles of interpretation and with authoritative rulings of the English Courts to hold that the Legislature,

5. *The River Wear Commissioners v. William Adamson*, (1877) 2 A C 743=47 L J Q B 193 =37 L T 543=26 W R 217.

through inadvertence or some other reason, has used language so wide and general in its terms as to include that result which it is impossible to believe that it would have intended. The Courts would not be legislating by refusing to apply that language to its full extent but would actually be assisting the Legislature by limiting it to the true objects which the Legislature must be presumed to have had in view.

It seems to me therefore that the words in S. 16 of the Act cannot be taken as connoting every and any kind of ownership. The scheme of the Act would suggest that it was the existing rights of agriculturists which were to be protected and not necessarily rights which might subsequently accrue to them. It seems to me therefore that it must be held that any land which has come to an agriculturist or been acquired by him, as distinct from any land which has always been his, must be subject to the same charges and encumbrances as it was before it came to him and therefore it can only be said to belong to him within the meaning of S. 16, Punjab Alienation of Land Act, subject to such charges and encumbrances and that even in his hands it is liable to the extent of them but no more. My answer therefore to the question which has been put would be in the negative and I would therefore accept the appeal and grant the appellant the decree for which he asks against the respondents. I may add that I have had the privilege of reading the judgment of my learned brother *Bhide J.* and concur in the views expressed by him in it.

Bhide J.—I agree with the conclusion reached by my learned brother *Blacker J.* In view of the scheme and the object of the Punjab Alienation of Land Act, I do not think it could ever have been intended by the Legislature that S. 16 of the Act should apply to a case of this kind, where the land was subject to an encumbrance when it first came into the hands of a member of an agricultural tribe. In such a case it may be said that the land does not really 'belong' to the latter in an unqualified sense, as contemplated by the Section. Moreover, after considering the wording of S. 16 and the other relevant provisions of the Act, it seems to me doubtful if S. 16 was really meant to apply at all when the question of liability of certain property to sale arises in the course of a suit and not in execution proceedings. S. 16 lays down

that no land belonging to a member of an agricultural tribe shall be sold in execution of a decree or order of a Court. This would show that the Section applies only when the question arises in execution whether such land should or should not be sold. Now, such a question can, I think, properly arise in execution only when the Court executing the decree has a choice in the matter and has to determine what property should be sold in execution. For, if the decree to be executed has already determined the liability of the property to sale, the executing Court cannot, according to the well-established principles governing execution of a decree, question the validity of the decree or refuse to carry it out: see 53 Cal 166⁶ and 9 Rang 480,⁷ etc.

This is the usual rule and the question therefore is whether S. 16 was intended to override this principle and give power to an executing Court to ignore and nullify the effect of a decree passed by a Court of law. If the intention of the Legislature were that no decree should be passed at all in any case directing the sale of land belonging to a member of an agricultural tribe, a provision to that effect could easily have been made. But it is significant that the Legislature has made no such provision. It appears therefore that the Legislature did not intend that a decree for sale of land should not be passed if it were not otherwise contrary to law. It seems reasonable in the circumstances to infer that S. 16 was meant to apply only to those cases where the liability of the land to be sold is not already determined by the decree itself, and the executing Court has to decide (as in the case of simple money decrees) what property should be sold to satisfy the decree. In other words, the Section seems to be analogous to S. 60, Civil P. C., which lays down that certain properties shall not be liable to be attached and sold in execution. It was held by the Bombay High Court in 4 Bom 25,⁸ that the house of an agriculturist, if specifically mortgaged, can be sold under S. 60 (c), Civil P. C., and a similar view was taken by a Full Bench of the Allahabad High Court in 34 All 25⁹ by a

6. *Goura Chand Halder v. Profulla Kumar Roy*, (1925) 12 A I R Cal 907=89 I C 685 = 53 Cal 166=42 C L J 1=29 C W N 948 (F B).

7. *Nathan v. Samson*, (1931) 18 A I R Rang 252 =135 I C 65=9 Rang 480 (F B).

8. *Bhagwan Das v. Hathibhai*, (1879) 4 Bom 25.

9. *Bhola Nath v. Mt. Kishori*, (1912) 34 All 25=11 I C 646=8 A L J 1045 (F B).

Division Bench of this Court in A I R 1935 Lah 164.¹⁰

I am aware of the fact that a wider interpretation has been placed on S. 16 in some rulings of this Court and it has been held that even when the sale of land has been directed by a decree in a mortgage suit the executing Court must refuse to sell the land if it belongs to a member of a notified agricultural tribe : *see e. g.*, A I R 1933 Lah 397¹¹ and 18 Lah 48.⁴ But with the greatest respect, I must say that certain aspects of the question do not appear to have been considered in these rulings. It seems to have been assumed that the object of the Punjab Alienation of Land Act would be defeated unless S. 16 was construed in the manner in which it was construed in these rulings. But there seems to be ample provision in the Act itself to ensure that no decree is passed by a Court which will be contrary to provisions of the Act and also if by any chance such a decree is passed, to get it rectified by a Court of appeal or revision. To take for instance, the case of mortgages (with which we are concerned in the present case) we find that S. 6 of the Act provides that a mortgage by a member of an agricultural tribe in favour of a person who is not a member of such a tribe must be for a limited period in one of the forms given in the Section. If the mortgage is effected in such a form, no question of sale of land in execution of a decree on the footing of such a mortgage can possibly arise.

If however a mortgage is effected in a different form in a case falling under S. 6, S. 9 gives power to a Deputy Commissioner to revise it and if such a mortgage comes before a Court in the course of a suit, the Court has also to refer the matter to the Deputy Commissioner. If the provisions of S. 9 are complied with no decree will therefore be passed for the sale of land belonging to a member of an agricultural tribe where the mortgage is in favour of a person who is not a member of such a tribe. If the mortgage is in favour of a member of the same tribe, the Legislature has not placed any restriction on the form of the mortgage and presumably the Legislature intended that the ordinary law should take its course in such cases : *cf* A I R 1929 All 421.¹²

10. Chittar Mal v. Mt. Ram Devi, (1935) 22 A I R Lah 164.

11. Thakar Das v. Roshan Din, (1933) 20 A R Lah 397=141 I C 634=34 P L R 523.

12. Kalika Prasad v. Ajudhia Prasad, (1929) 16 A I R All 421=121 I C 211=51 All 780=1929 A L J 448.

Lastly, if by any chance S. 9 is overlooked by a Court and a decree is passed for the sale of land on the footing of a mortgage which contravenes the provisions of S. 6, S. 21-A gives power to the Deputy Commissioner to refer it to a Court of appeal or revision in order to get it rectified and brought into conformity with the provisions of the Act. In view of these provisions, it seems to me scarcely likely that the Legislature could have intended by S. 16 that an executing Court should ignore a decree passed by a Court of law and refuse to carry it out. If it appears to an executing Court that a decree sought to be executed offends against any of the provisions of the Punjab Alienation of Land Act, it can easily stay the proceedings and give opportunity to the party concerned to get it corrected by bringing it to the notice of the Deputy Commissioner for necessary action under S. 21-A of the Act. If this course is adopted the objects of the Act will be served and the anomaly of an executing Court questioning the validity of a decree will be avoided.

If S. 16 applies only to those cases where a money decree is passed and the executing Court has to decide what property should be sold to satisfy the decree, the Section will not apply to the present case, as the question has arisen in this case in the course of a suit and not in execution proceedings. The land belonged originally to a member of a non-agricultural tribe and the encumbrance was created by him. The mortgage did not therefore offend against the provisions of the Act in any way. The land was sold subsequently to a member of an agricultural tribe and according to the principle embodied in S. 48, T. P. Act, the sale would be subject to the rights of the prior mortgagee. It would be obviously contrary to justice and equity to hold that the mortgage is wiped out merely because the land is sold to a member of an agricultural tribe. This view would only furnish a non-agriculturist mortgagor an easy method of evading his liability and throw open the door to fraud. I cannot believe that such a result could ever have been intended. It is not disputed that, apart from S. 16, Punjab Alienation of Land Act, the property in question would be subject to the right of the prior mortgagee to bring it to sale to satisfy his claim.

Dalip Singh J. — I have read the judgments of my learned brothers Bhide and

Blacker JJ. and concur with them and have nothing to add.

D.S./R.K. *Reference answered.*

*** A. I. R. 1940 Lahore 377**

FULL BENCH

**TEK CHAND, DIN MOHAMMAD AND
RAM LALL JJ.**

*Municipal Committee, Montgomery —
Defendant — Appellant.*

*Master Sant Singh —
Plaintiff — Respondent.*

Second Appeal No. 90 of 1939, Decided on 17th June 1940, from decree of Dist. Judge, Montgomery at Lahore, D/. 19th November 1938.

(a) Punjab Municipal Act (3 of 1911), Ss. 61 (1) (c) and 86—Tax demanded under S. 61 (1) (c) from person who is not owner but hirer of motor lorries is ultra vires of Committee—Suit by such person for perpetual injunction restraining Committee from recovering such tax is entertainable by Civil Court : 16 Lah 529 = A I R 1935 Lah 970 = 159 I C 1059, Overruled.

A Municipal Committee is a creature of the statute. It is brought into existence by, or under the authority of, an express legislative enactment to have control over municipal affairs within defined local limits and can exercise such powers of legislation, taxation and regulation as are entrusted to it by the Legislature. If, in the exercise of these powers, the Committee makes a mistake, it will merely be a case of erroneous exercise of jurisdiction, and the aggrieved party must seek his remedy in the manner, and from the forum, provided in the statute. If however its action is in excess of, or in contravention of the powers conferred on it by the statute, the subject has his ordinary remedy to seek relief in the Civil Courts unless their cognizance is either expressly or impliedly barred. The remedy provided in S. 84 is confined to those acts only which are done under the Act, and the bar provided in S. 86 is similarly confined to matters covered by the Act and does not extend any further. The word 'liability' as used in sub s. (1) of S. 86 refers to that liability which arises under the foregoing Sections only. It cannot be conceived that the Legislature, while enacting a bar under S. 86, contemplated any liability arising from a tax which was not permitted under the Act or any demand which was being made in contravention of the provisions of the Act. A tax demanded under S. 61 (1) (c) from a person who is not an owner but only a hirer of motor lorries is ultra vires and a suit by such person for perpetual injunction restraining the Municipal Committee from recovering such tax is entertainable by Civil Court : 16 Lah 529 = A I R 1935 Lah 970 = 159 I C 1059, Overruled ; Case law reviewed. [P 379 C 2 ; P 385 C 1 ; P 387 C 1]

(b) Punjab Municipal Act (3 of 1911), S. 61 (1) (c) — Hirer of motor lorries is not owner—Mere fact that lorry displays board of certain company does not necessarily show that company is owner thereof.

The mere fact that a lorry displays the board of

a certain Company does not necessarily lead to an inference that the Company is the owner thereof. The ordinary meaning of the word owner is "one who owns or holds something as his own ; a proprietor ; one who has the rightful claim or title to a thing" and nearly the same meaning attaches to this term in law. A hirer of lorries cannot be called an owner. [P 380 C 1]

* (c) Specific Relief Act (1877), S. 54 — Municipal Committee imposing illegal tax commits breach of obligation — Aggrieved person can sue for injunction restraining Committee from imposing and collecting such tax.

The word 'obligation' as used in the Specific Relief Act, is very wide in its application. The term 'obligation' covers all those things which it otherwise implies in its ordinary or legal parlance. An inhabitant of a municipality has a right not to be taxed illegally and the Committee has a corresponding obligation not to impose any illegal tax. If therefore a Committee imposes a tax on a person on whom it cannot be imposed under the Act, it does commit a breach of an obligation impliedly existing in his favour, and the person aggrieved can relieve himself from harassment by invoking the mode of relief provided under S. 54.

[P 385 C 1]

(d) Specific Relief Act (1877), S. 56—Person objecting to tax imposed under S. 61 (1) (c), Punjab Municipal Act on ground that it was ultra vires — He can be granted perpetual injunction under S. 56, Specific Relief Act, as he cannot be said to have equally efficacious relief under Punjab Municipal Act.

The question whether an "equally efficacious relief" can 'certainly' be obtained by "any other usual mode of proceeding" is a question of fact to be determined in each case on its own circumstances, and no hard and fast rule can be laid down in the matter. The remedy provided in S. 84, Punjab Municipal Act, applies only to those cases which arise under the Act and is not meant to meet those which are outside the Act. The prescribed remedy cannot therefore be considered as a usual mode of proceeding in cases where illegal taxation is objected to. So far as 'efficacy' is concerned, it is evident that an aggrieved person has still a right to move the Civil Courts if he is defeated in the forum prescribed in the Municipal Act, while a decision in the Civil Courts is final, and it cannot therefore be urged that the remedy prescribed by the Act, though it may turn out to be 'efficacious,' is 'equally' so. Similarly, the suggestion that a person may first pay an illegal tax and then sue for a refund is open to the objection that in certain cases it may turn out to be much more annoying and much more expensive than resort to Civil Courts. Hence, where a person objects to a tax imposed under S. 61 (1) (c) on the ground that it is illegal he can be granted perpetual injunction under S. 56, Specific Relief Act.

[P 386 C 1, 2]

Amar Nath Grover — for Appellant.

J. L. Kapur — for Respondent.

Din Mohammad J.—This case has been referred to a Full Bench in the following circumstances. The respondent, Sant Singh, was running a motor bus service known as the Nishat Bus Service. He himself owned only one lorry and the other

lorries he hired from different owners. For the purpose of his business, all these lorries were kept within the limits of the Municipal Committee, Montgomery. The Committee levies a tax under S. 61 (1) (c) payable by the owners on all vehicles kept within the Municipality. On 12th March 1937, the Committee served a notice of demand for Rs. 530 on Sant Singh on account of tax on all lorries used in the business of the Nishat Bus Service from August 1935 to March 1937. Sant Singh refused to meet the demand in relation to the lorries which he did not own and on 17th May 1937, instituted a suit against the Municipal Committee for a perpetual injunction to restrain the said Committee from realizing the tax demanded from him on the ground that he was not the owner of the lorries, and consequently, the demand made from him was illegal and ultra vires of the Committee. Various defences were raised by the Municipal Committee, with some of which we are not at present concerned. The main controversy raged round the questions whether the Civil Courts could entertain a suit of that nature and, if so, whether the relief by way of injunction could be granted. The trial Court found in favour of the plaintiff on both the points and the District Judge affirmed its decision on appeal. Thereupon, the Committee preferred a second appeal from the order of the District Judge which came for hearing before Dalip Singh J. Impressed by the fact that even in this Court there was an apparent conflict of authority on the question of the jurisdiction of Civil Courts, he recommended to the Hon'ble Chief Justice that the case be laid before a larger Bench, and the Hon'ble Chief Justice has placed it before a Full Bench.

In order to appreciate the nature and force of the objection raised on behalf of the appellant, it will be necessary to refer to the provisions relating to taxation in the Punjab Municipal Act. They are contained in Chap. V. By S. 61 (1) (c), a Committee is empowered to impose a tax, payable by the owner, on all or any vehicles among other things kept within the Municipality. S. 62 lays down the procedure to be followed in the imposition of taxes. S. 63 deals with preparation of assessment list and S. 64 with its publication and completion. S. 65 provides for the revision of assessment list, S. 66 for its settlement and S. 67 for further amendments to be introduced in the list. S. 68 lays down that no

new list need be prepared every year. Ss. 69 to 86 are headed "General provisions." S. 69 enacts that no assessment and no charge or demand of any tax made under the authority of this Act shall be impeached or affected by reason of any mistake in the name, residence, place of business, or occupation of any person liable to pay the tax or in the description of any property or thing liable to the tax, or of any mistake in the amount of assessment or tax, or by reason of any clerical error or other defect of form. It is also said that it shall not be necessary to name the owner or occupier of the property taxed or assessed. Ss. 70 and 71 deal with exemptions and S. 72 deals with remission of taxation.

Section 73 provides that every person shall, on the demand of an officer duly authorized by the Committee in this behalf, furnish such information as may be necessary in order to ascertain whether such person is liable to pay any Municipal tax. Sub-s. (1) of S. 74 provides that notice shall be given to the Committee of all transfers of title of person primarily liable to payment of property tax. By sub-s. (2), it is provided that a person primarily liable for the payment of a tax on any property, who transfers his title to or over such property without giving notice of such transfer to the Committee as aforesaid, shall, in addition to any other liability which he incurs through such neglect, continue liable for the payment of all such taxes payable in respect of the said property until he gives such notice or until the transfer shall have been recorded in the Committee's books. By sub-s. (3), whenever the title to or over any building or land devolves upon any person by inheritance, duty is cast upon the heir to give notice in writing of such inheritance to the Committee within three months. Sub-s. (4) provides that nothing in the Section shall be held to diminish the liability of the transferee (or heir) for the said taxes or to affect the prior claims of the Committee for the recovery of the taxes due thereupon. S. 75 gives power of entry into any building for the purpose of valuation. Ss. 76, 77 and 78 deal with octroi and terminal taxes. Ss. 78-A, 78-B and 79 deal with some other incidental matters arising out of taxation.

Section 80 is headed "Recovery of taxes payable by owners." By sub-s. (1), it is enacted that when any sum is due on account of a tax payable under this Act in respect of any property by the owner thereof,

the committee shall cause a bill for the amount to be delivered to the person liable to pay the same. By sub-ss. (2) and (3) it is provided that if the bill be not paid within ten days from the delivery thereof, the committee may cause a notice of demand to be served on the person liable to pay the same, and, if he does not, within seven days from the service of the notice, pay the sum due, the sum due may be deemed to be an arrear of tax and shall be a first charge on the property in respect of which it is payable and be recoverable as arrears of land revenue. Sub-s. (4) lays down that if any tax leviable under the Act from the owner is recovered from the occupier, such occupier shall, in the absence of any contract to the contrary, be entitled to recover the same from the owner and may deduct the same from the rent. Ss. 81 and 81-A prescribe the mode of recovering tax from defaulter. S. 82 provides for recovery of octroi and tolls in case of non-payment or refusal. S. 83 empowers the committee to lease the collection of octroi or tolls. S. 84 is headed "Appeals against taxation." Sub-s. (1) provides that an appeal against the assessment or levy of any or against the refusal to refund any tax under the Act shall lie to the Deputy Commissioner or to such other officer as may be empowered by the Provincial Government in this behalf. Sub-s. (2) lays down that if on the hearing of an appeal under the Section, any question as to the liability to, or the principle of assessment of, a tax arises on which the officer hearing the appeal entertains reasonable doubt, he may, either of his own motion or on the application of any person interested, draw up a statement of the facts of the case and the point on which doubt is entertained and refer the statement with his own opinion on the point for the decision of the High Court. Sub-ss. (3) to (6) deal with subsidiary matters. S. 85 provides for limitation of appeals in certain cases. S. 86 is headed : "Taxation not to be questioned except under this Act." Sub-s. (1) reads :

No objection shall be taken to any valuation or assessment nor shall the liability of any person to be assessed or taxed be questioned in any other manner or by any other authority than is provided in this Act.

Sub-s. (2) enacts that no refund of any tax shall be claimable by any person otherwise than in accordance with the provisions of the Act and the rules thereunder. In support of the contention raised by the appellant that the Civil Courts have no

jurisdiction in the matter, reliance is placed on S. 84, read with S. 86, Municipal Act. It is urged that, in the first place, the plaintiff is an owner of the lorries in respect of which the demand was made from him and consequently, he cannot contest his liability otherwise than in the manner prescribed in the Act itself. Secondly, even if it be held that the plaintiff is not an owner within the meaning of S. 61 (1) (c), Municipal Act, the plaintiffs' recourse to Civil Courts is barred by the terms of S. 86, Municipal Act. Counsel for the respondent, on the other hand, urges that under S. 9, Civil P. C., those suits alone are removed from the jurisdiction of the Civil Courts, of which the cognizance is either expressly or impliedly barred, that the bar contained in Ss. 84 and 86, Punjab Municipal Act, relates only to those matters which are covered by that Act, that the objection raised by the plaintiff in this case relates to a matter which was not within the competence of the Municipal Committee under the Act and that, consequently, the jurisdiction of the Civil Courts was not ousted. He further contends that, on general principles, a subject cannot be deprived of his right to redress his grievance in the Civil Courts, if the authority seeking to take advantage of the bar has acted beyond its jurisdiction.

In my view, the contention raised by the respondent's counsel is more in consonance with law than the one raised on behalf of the appellant. The entire scheme of the Act dealing with the subject of taxation clearly indicates that the remedy provided in S. 84 is confined to those acts only which are done under the Act, and that the bar provided in S. 86 is similarly confined to matters covered by the Act and does not extend any further. The word "liability" as used in sub-s. (1) of S. 86 refers to that liability which arises under the foregoing Sections only and this interpretation is supported by a reference to sub-s. (2) of S. 84, where the question as to the liability to a tax is clearly envisaged to arise in an appeal against the assessment or levy of any tax under the Act. It cannot be conceived that the Legislature while enacting a bar under S. 86 contemplated any liability arising from a tax which was not permitted under the Act or any demand which was being made in contraventions of the provisions of the Act.

A reference to the Sections dealing with taxation as summarized above would indicate that in more places than one the words

"liable" and "liability" are used and it was clearly in relation to those Sections that the word "liability" was used in S. 86. Reference in this connexion may be made to 21 Cal 319,¹ where a Division Bench, composed of Sir W.C. Petheram C. J., and Beverley J., placed a similarly restricted meaning upon the word "liability" used in similar circumstances. If therefore a demand made by a Committee is not authorized by the Act and the person affected thereby objects to the payment on the ground that in making the demand the Committee was exercising a jurisdiction not vested in it by law, it can, by no stretch of language, be said that he is objecting to his liability to be taxed under the Act. Any special piece of legislation may provide special remedies arising therefrom and may debar a subject from having recourse to any other remedies, but that bar will be confined to matters covered by the legislation and not to any extraneous matter. A corporation is the creature of a statute and is as much bound to act according to law as the constituents thereof, namely, the individuals ruled by the corporation and if the corporation does an act in disregard of its charter and intends to burden any individual with the consequences of its illegal act, an appeal by that individual to the general law of the land can in no circumstances be denied.

If therefore it is found that the plaintiff was not an owner of the lorries during the period in respect of which the tax is demanded from him, the demand will not be under the Act but outside the Act, inasmuch as a tax on vehicles is payable by the owners only and not by those who do not own them. Counsel for the appellant contends that the lorries used in the business of the Nishat Bus Service were running under the board of the Nishat Bus Service and that, consequently, it should be presumed that they were owned by that Company. This argument however is fallacious. The mere fact that a lorry displays the board of a certain Company does not necessarily lead to an inference that the Company is the owner thereof. The ordinary meaning of the word "owner" is "one who owns or holds something as his own; a proprietor; one who has the rightful claim or title to a thing" and nearly the same meaning attaches to this term in law. Here, it is alleged by the plaintiff and proved that he

has hired certain lorries for the purpose of his business and that the ownership of those lorries vests in somebody else, and it is obvious that a hirer cannot be called an owner. It is true that certain taxes imposed by the Committee on owners can be recovered from occupiers as visualized in S. 80 (4), Municipal Act, but the very use of the word "occupier" there denotes that those taxes relate to buildings or lands and can in no way be considered to relate to vehicles, inasmuch as the hirer of a vehicle, in the manner in which the appellant has hired them, can in no wise be described as an occupier thereof. This matter can be cleared by a concrete illustration. If a person obtains a money decree against the plaintiff, will it be open to him to attach these vehicles in execution of his decree and will the real owners of these vehicles be debarred from putting in a successful claim against their attachment? The answer to these questions cannot but be in the negative. A temporary possession of these vehicles, as the plaintiff has, can in no circumstances be confused with ownership, which connotes a complete dominion which one can exercise as against the whole world. It follows therefore that no demand could be made from the plaintiff within the Act and that the demand made by the Committee is in contravention of the Act.

For the proposition that even if the demand was not authorized by the Act, or, in other words, was ultra vires of the Committee, the plaintiff's remedy lay only under S. 84, reliance is placed on 38 P R 1911,² A I R 1933 All 163,³ A I R 1935 All 760⁴ and 16 Lah 529.⁵ In my view, however, these authorities are either distinguishable on facts or, if I may say so with all respect, do not lay down good law, if they mean to oust the jurisdiction of the Civil Courts even in those matters where the Committee has acted in contravention of the Act. In 38 P R 1911,² the plaintiffs had sued the Municipal Committee, Ambala, for a refund of the customs duty on goods exported by them. The rules made by the Local Govern-

2. Municipal Committee, Ambala v. Mohendar Singh, (1911) 38 P R 1911=9 I C 1000=118 P L R 1911.

3. Cantonment Board, Agra v. Kanhaiya Lal, (1933) 20 A I R All 163=144 I C 1016=1933 A L J 162.

4. Municipal Board, Benares v. Krishna & Co., (1935) 22 A I R All 760=156 I C 281=1935 A L J 635=57 All 916.

5. Nanbhar Hussain Shah v. Municipal Committee Batala, (1935) 22 A I R Lah 970=159 I C 1059=16 Lah 529=36 P L R 301.

1. Dwarka Nath Dutt v. Addya Sundari Mittra, (1894) 21 Cal 319.

ment under S. 154 (j), Punjab Municipal Act, 13 of 1884, which were maintained by the Punjab Municipal Act, 20 of 1891, provided that an appeal against an order passed under the rules would lie to the Deputy Commissioner or the Commissioner as the case may be. The plaintiffs, instead of appealing to the Commissioner, filed a suit after the President of the Municipal Committee had refused to refund the tax. Relying on some Madras judgments which laid down that when by an Act of the Legislature powers were given to any person for a public purpose, from which an individual might receive injury, if the mode of redressing the injury was pointed out by the statute, the jurisdiction of the Court was ousted and in case of injury the party could not proceed by action, a Division Bench of the Punjab Chief Court held that the suit did not lie, inasmuch as the plaintiffs were bound to exhaust the remedy by appeal before filing the suit. It would appear that it was not laid down in this judgment that no suit was at all competent, and all that it decided was that the remedies provided by the Act should be exhausted first. But if, as envisaged in this judgment, a suit is competent after the remedies provided in the Act have been exhausted, there appears to be no reason why it cannot lie if recourse is not had to the remedies provided in the Act, especially when the matter complained against does not fall under the Act. Further, even in this judgment a distinction was drawn between a suit contesting the incidence of a tax lawfully imposed and a suit to recover a sum paid on the ground that the so-called tax had no legal existence. It cannot but be admitted that the present case falls under the second category.

In A I R 1933 All 163,³ the case arose under Ss. 84 and 88, Cantonments Act (2 of 1924). The language of sub-s. (2) of S. 84, Cantonments Act, is somewhat similar to the language of S. 84, Punjab Municipal Act. S. 88, however, is differently worded and it says that the order of the appellate authority confirming, setting aside or modifying an order in respect of any valuation or assessment or liability to assessment or taxation shall be final. On a dispute arising between an assessee and the Cantonment Board, a Division Bench of the Allahabad High Court observed as follows:

We are in entire agreement with the view already taken by two Benches of this Court that the jurisdiction of the Civil Court is excluded in all

matters relating to any valuation, assessment, liability to assessment or taxation by a Cantonment Board.

In A I R 1935 All 760,⁴ the plaintiffs had instituted a suit against the Municipal Board, Benares, for a refund of certain octroi duty charged from them on certain goods imported into the municipal limits. The question arose whether such a suit could lie in view of S. 164, Municipalities Act, 1916, sub-s. (1) of which was framed in terms of sub-s. (1) of S. 86, Punjab Municipal Act and sub-s. (2) of which was framed in terms of S. 88, Cantonments Act. Its marginal note ran as follows: "Bar to jurisdiction of Civil and Criminal Court in matters of taxation". Taking this note into consideration along with the wording of the Section, a Division Bench of the Allahabad High Court ruled that no suit for a refund of the octroi lay in a Civil Court on the ground that the goods were not in fact assessable or that the amount of assessment was excessive. In both these judgments the tax was lawful and the only objection that was being raised was to the details of the tax or, in other words, to matters arising under a lawful tax. It is obvious, therefore, that the point which arose there was different from the one which arises in the present case. Further, even if the marginal note to S. 86, Punjab Municipal Act, be considered synonymous with the marginal note to S. 164, viz., "Bar to jurisdiction of Civil and Criminal Court in matters of taxation," the bar applied in the Allahabad cases was properly applied, inasmuch as the matter involved there arose under the Act. The general remarks made by the learned Judges to the effect that no suit lay in any case were not necessary for the decision of the case and are merely obiter dicta, carrying no weight of authority with them.

In 16 Lah 529,⁵ the Municipal Committee had levied a tax upon certain goods imported into the municipal limits at a certain rate under Art. 57 of the Terminal Tax Schedule. The plaintiff alleging that the tax could be levied only under Art. 55 and not under Art. 57 instituted a suit for an injunction to restrain the defendant from recovering the sum assessed. A Division Bench of the Lahore High Court, composed of the Hon'ble Chief Justice and myself, came to the conclusion that the suit did not lie. The Hon'ble Chief Justice, who delivered the judgment, while discussing Ss. 84 and 86 of the Municipal Act observed inter alia:

It does not appear to us to matter, with reference to the terms of these two sections, whether the assessment is illegal or ultra vires or not. Even if the assessment is illegal or ultra vires, it is an assessment.

The case, so far as it goes, was rightly decided, inasmuch as the objection raised there was to a matter of detail and no question of jurisdiction was involved. The difficulty, however, arises in connexion with the remarks quoted above, which was no doubt intended to bar suits even if the tax was illegal, but the Hon'ble Chief Justice has authorized me to say that on further consideration he has come to the conclusion that the opinion expressed by us was not necessary for the decision of the case and was in fact incorrect. There is, on the other hand, ample authority in support of the proposition that an illegal act of a committee, in spite of the special forum constituted under the Act which brings the committee into existence and of the special bar enacted to having recourse to any other authority in matters dealt with there, is liable to be interfered with by a Civil Court. In 74 P L R 1918,⁶ Scott-Smith J. while referring to S. 86, of the Municipal Act, remarked as follows:

The power conferred by a special Act on a local authority to impose a particular tax for particular purposes in a specified manner does not oust the jurisdiction of the Civil Court to give relief against an illegality committed by that body under cover of statutory powers. I think it is clear that a Civil Court has jurisdiction to determine the question whether the imposition of a tax is illegal and ultra vires and to give relief if a tax has been levied from a person who is not liable thereto.

There, the action of the Municipal Committee to impose a profession tax on a Munsif was challenged, and the learned Judge holding that the Munsif could not be said to follow a profession in the popular sense of the term maintained the decree of the Court below that the tax could not be imposed on him. In A I R 1924 Lah 619,⁷ Broadway J., while considering Ss. 84 and 86, Municipal Act, remarked that those Sections related only to acts done under the law but did not provide a remedy for what may be done outside or in violation of that law. He further observed that these Sections did not oust the jurisdiction of the Civil Court to relieve one subject of the Crown against an illegality imposed upon him by another. It may be observed, that

6. Committee of Notified Area, Una v. Chatar Behari Narain, (1919) 6 A I R Lah 68=44 IC 910=74 P L R 1918.

7. Municipal Committee, Pind Dadan Khan v. Bhagwan Singh, (1924) 11 A I R Lah 619 = 75 I C 737.

this judgment was expressly overruled by 16 Lah 529,⁸ but as remarked before, the general observations made in the latter judgment have been found to be erroneous and the authority of this judgment therefore remains unshaken. In A I R 1935 Lah 632,⁹ Dalip Singh and Bhide JJ. distinguished 16 Lah 529⁵ in the following words:

In the present case, the plaintiffs are not questioning the powers of the Municipal Committee under the Punjab Municipal Act, but are urging that in view of the terms of the sales of the sites in the mandi the Committee cannot impose the tax within the mandi limits.

In other words, it was indirectly held that the jurisdiction of Civil Courts was not barred, if the subject-matter of the suit did not fall under the Act. In A I R 1935 Lah 980,⁹ Monroe J. observed that S. 84 did not include suits for injunction instituted against the Municipal Committee to restrain the Committee from imposing a certain tax, and decreed the suit against the Committee on the ground that the tax had not been imposed in accordance with the provisions of the Municipal Act. In 18 Lah 567,¹⁰ Tek Chand and Dalip Singh JJ. once more questioned the correctness of the decision reported in 16 Lah 529.⁵ Dalip Singh J. who delivered the judgment with which Tek Chand J. agreed, after referring to S. 86, Municipal Act, remarked:

These words appear to me clearly to imply that the word "assessment" is to be read as an "assessment under the Act," for it is clear that no "authority" would be provided for an assessment which was not under the Act. If therefore 16 Lah 529⁵ intended to hold that even if an assessment which was ultra vires of the Act could not be made the subject of a civil suit, then with the greatest respect to the learned Judges who decided that case, I must humbly venture to dissent from that view.

In A I R 1939 Lah 372,¹¹ the provision of law which came for consideration was S. 39 (2), Village Panchayat Act, which provides that no civil or revenue suit could lie against any panchayat in respect of any act done in the discharge of any duties imposed under the Act. Tek Chand J. held that if the resolution was ultra vires of the panchayat, the prohibitory Section did not

8. Municipal Committee, Sonapat v. Dharam Chand, (1935) 22 A I R Lah 632=162 I C 59 =37 P L R 289.

9. Abdul Hamid v. Municipal Committee, Delhi (1935) 22 A I R Lah 980=160 I C 524.

10. Amrit Singh Daya Singh v. Municipal Committee, Jhelum, (1936) 23 A I R Lah 972=168 I C 82=I L R (1937) 18 Lah 567 = 39 P L R 976.

11. Raghunath Sahai v. Panchayat Village Sahsai Kalirawan, (1939) 26 A I R Lah 372=186 I C 377.

come into operation. In 11 Cal 275,¹² the Municipal assessor had made an annual assessment on a certain basis. The owners preferred an appeal to the Commissioners against his order and questioned the principle on which the assessor had fixed the rate. The Commissioners however refused to interfere. The owners made an application to the High Court on the original side on the ground of want of jurisdiction. The matter came before a Division Bench of the Calcutta High Court composed of Sir Richard Garth C. J. and Wilson J. Counsel for the owners contended that inasmuch as the Act laid down one rule for houses that were let and the Municipal Committee had set up another rule for their house, it had no power to assess on the basis on which it had done and as it had acted entirely out of its jurisdiction, the Court could interfere. This contention was opposed by the Advocate-General. The learned Judges however repelled the contention of the Advocate-General and interfered with the assessment. In the course of his judgment, Garth C. J. observed :

It is of course no part of our duty to say how such valuations should be made. We have only to see that, in making them, the Commissioners act within their powers.

Wilson J. in a separate judgment remarked among other things :

If the error goes to jurisdiction, we can and ought to interfere by certiorari; if not, we have no power to do so.

In 17 Cal 590¹³ the question that arose for decision was whether a certain order of the Board of Revenue, purporting to be made under Act 9 of 1847, subjecting a certain land to assessment was open to objection in a Civil Court. The case went up to the Privy Council where two questions were framed for decision : (1) Whether the provisions of Act 9 of 1847 were applicable to the land involved in that suit, and (2) whether, if those provisions were not so applicable, a Civil Court had jurisdiction to review the decision of the Board of Revenue and to declare that the proceedings of the revenue authorities in assessing such land were ultra vires. Their Lordships came to the conclusion that the first question ought to be answered in the negative. In other words, it was found that the land was not covered by the Acts. Thereupon, the second question arose that if this was so, could the Civil Courts interfere with

the order of the Board of Revenue which by the terms of the Act was final. In this connexion, their Lordships remarked :

The action of the revenue authorities was therefore, in their Lordships' opinion, wholly illegal and invalid. Their Lordships cannot hold that the Board of Revenue can, by purporting to exercise a jurisdiction which they did not possess, make their order upon such a matter final, and exempt themselves from the control of the Civil Court.

In 3 C W N 73,¹⁴ an assessment made by a Municipal Committee was challenged in a Civil Court. The Committee contended that by virtue of S. 116, Bengal Municipal Act (3 of 1884), no objection could be taken in any manner other than that provided in the Act. The assessee however urged that this could be so only if the assessment was not made ultra vires, but if the assessment was ultra vires, there was nothing in the Act to prevent a rate-payer from seeking a decision from a Civil Court that the action on the part of the Committee was ultra vires. This proposition was not disputed and was approved by a Division Bench composed of Maclean C. J. and Banerjee J. In 35 Cal 859,¹⁵ S. 116, Bengal Municipal Act, came for consideration once more before a Bench composed of Stephen and Mukerjee JJ. Mookerjee J. summarized the whole law on the point and in the course of his judgment remarked at page 867 :

The test is, as I have pointed out, whether the assessment is or is not in conformity with the statutory provisions. If it is not, it does not enjoy any security from collateral attack. If the assessment is open to objection on the ground of lack of jurisdiction, which, be it remembered, has to be exercised in conformity with the statute, it is open to collateral attack If errors or irregularities are committed, they must be corrected in the mode appointed by the statute, and, if not so corrected, they become conclusive, for Courts have not the power to control the quasi-judicial authority in a matter of discretion. But when the assessment proceeding is in clear violation of the provisions of the statute, the Court has jurisdiction to afford relief.

The learned Judge in coming to this conclusion relied among other judgments upon the dictum of their Lordships of the Judicial Committee that the Court would have jurisdiction to interfere and quash the order of the quasi-judicial authority upon the ground either of a manifest defect of jurisdiction in the tribunal that made the order or of manifest fraud in the party procuring it. Reference was further made to the principle enunciated by American Courts to the effect that all clear violations of law gave

14. *Navadip Chandra v. Purnanda Saha*, (1899) 3 C W N 73.

15. *Chairman of Giridhi Municipality v. Suresh Chandra*, (1908) 35 Cal 859=12 C W N 709=7 C L J 631.

12. *Nundo Lal Bose v. Corporation for the town of Calcutta*, (1885) 11 Cal 275.

13. *Secretary of State v. Fahamidannissa Begum*, (1890) 17 Cal 590=17 I A 40 (P C).

rise to jurisdictional questions. The point of distinction raised in A I R 1935 All 760⁴ in relation to this judgment is not material, so far as the general principle of law enunciated herein is concerned. The phrase that had been omitted from the Municipal Act when this judgment was given, was intact at the time of 21 Cal 319,¹ but still the decision was the same. In 16 I C 449,¹⁶ Stanyon A. J. C., also dealt with the matter at issue at great length and observed :

The allegation here is the imposition of a tax illegally and ultra vires of Municipal authority, and I have no doubt that, to give relief against such an imposition, the Civil Court has jurisdiction notwithstanding anything contained in the Berar Municipal law.

It may be observed that S. 53, Berar Municipal Act, was framed in terms of S. 86, Punjab Municipal Act. Elsewhere in the same judgment, he further remarked :

The ouster of ordinary jurisdiction in favour of a special jurisdiction can obviously apply only to the cases entrusted to the latter. The grant of a jurisdiction cannot carry with it the conferral of a power to act beyond and outside of that jurisdiction An enactment which creates a local authority, and invests it with power to impose particular taxes for particular purposes in a specified manner, creates a jurisdiction which the ordinary Courts never had : and the power of that local authority for lawful taxation, however exclusively reserved to it, involves no invasion of Civil Court jurisdiction. But it also usurps no fraction of the ordinary power of that Court to relieve one subject of the Crown against illegality imposed upon him by any other subject: and action, which is ultra vires of a special jurisdiction of the kind described, is an illegality which gives a cause of action in the Civil Court.

In 13 Mad 78,¹⁷ an assessee claimed a refund of tax and he was met with the objection that the suit could not be maintained in a Civil Court on the ground that it was provided in the Act that the adjudication of an appeal by the Municipal Council would be final. Muttusami Ayyar J. disallowed the objection remarking :

There can therefore be no doubt that a suit will lie when the provisions of the Act have not been complied with in substance and effect in regard to the assessment and levy of such tax and the tax cannot be considered to have legal sanction.

In 21 Mad 367,¹⁸ taxes were levied on buildings exclusively used for charitable purposes and the manager sued for a refund. A Division Bench of the Madras High Court remarked :

A tax upon such buildings and other similar buildings mentioned in the exception is not one which can be in legal existence, and therefore it

16. G. I. R. Ry. Co. v. Amraoti Municipality, (1912) 8 N L R 107=16 I O 449.

17. Tuticorin Municipality v. S. I. Ry., (1890) 13 Mad 78.

18. Fischer v. Twigg, (1898) 21 Mad 367.

cannot be said that the tax was collected under that Act. We prefer to base our judgment on the ground that an imposition which is expressly prohibited by the Act cannot be deemed to be made under the provisions of the Act.

In 26 Bom 294,¹⁹ it was observed by Sir Lawrence Jenkins C. J. with whom Chandavarkar J. agreed.

As no breach of the prescribed rules has been committed, then in the absence of any proof of mala fides, perversity, or manifest error, we do not think we ought to interfere on the mere suggestion that the valuation is too high.

In other words, it was conceded that had there been a breach of the rules, interference would have been possible. In 38 Bom 293,²⁰ Sir Basil Scott C. J. and Batchelor J. interfered with the enhancement of a tax imposed on the Turf Club on the ground that the enhancement was ultra vires, remarking that the case was one in which the jurisdiction of the Civil Court was not ousted. In A I R 1930 All 222,²¹ Dalal J. interfered with an order of assessment on the ground that there had been no assessment at all. Reference in this connexion may also be made to a judgment of their Lordships of the Privy Council reported in 27 Bom 344²² which, though not cited at the Bar, is in my view most pertinent to the case. The defendants in that case by the negligent construction of a railway made in exercise of their powers under the Railways Act had caused the plaintiff's land to be flooded in the rainy season and consequently damaged. The Act provides that a suit shall not lie to recover compensation for damage caused by the exercise of the powers thereby conferred, but that the amount of such compensation shall be determined in accordance with the Land Acquisition Act, 1870. In spite of this bar the plaintiff brought a suit for damages for injury alleged to have been caused to his fields. Before their Lordships it was contended inter alia that although the statutory authority of the Act of 1890 might have been abused or exceeded no suit would lie and that the respondent's only remedy was by proceeding for compensation under the Land Acquisition Act, 1870. Their Lordships observed as follows:

It would be simply a waste of time to deal seriously with such contentions as these. It has been determined over and over again that if a person or

19. Kasandas v. Ankleshwar Municipality, (1902) 26 Bom 294=3 Bom L R 882.

20. Secy. of State v. Major J. E. Hughes, (1914) 1 A I R Bom 33=23 I C 779=38 Bom 293=16 Bom L R 121.

21. Municipal Board, Benares v. Narsingh Dutt, (1930) 17 A I R All 222=127 I C 514.

22. Gaekwar v. Katchar Abai, (1903) 27 Bom 344=5 Bom L R 405.

a body of persons having statutory authority for the construction of works exceeds or abuses the powers conferred by the Legislature, the remedy of a person injured in consequence is by action or suit, and not by a proceeding for compensation under the statute which has been so transgressed.

I am in respectful agreement with the principles enunciated in these judgments and would hold that the jurisdiction of the Civil Court was not ousted in this case inasmuch as the demand made from the plaintiff was not authorized by the Act. I may add that the argument advanced by the appellant that here the tax itself was lawful, and that its recovery alone was defective in so far as it was being made from a wrong person, suffers from the fallacy that firstly it makes an erroneous distinction between 'tax' and 'demand' and secondly, it treats lawful a demand which was ab initio unlawful.

Counsel next contends that the suit was not competent under S. 54, Specific Relief Act, as there was no breach of any obligation which existed in favour of the applicant. In support of this proposition, reliance is placed on 47 Cal 733.²³ In my view, the proposition advanced is not legally sound, nor does the authority cited in its support serve the purpose. All that was stated in 47 Cal 733²³ was that the precise obligation, of which there had been a breach, should be formulated before an injunction can be granted and this is an elementary principle which cannot be disputed in face of the clear terms of S. 54. The word 'obligation' as used in the Specific Relief Act is very wide in its application as appears from the definition given in S. 3. It says " 'obligation' includes every duty enforceable by law" and this evidently connotes that the term 'obligation' covers all those things which it otherwise implies in its ordinary or legal parlance. An inhabitant of a municipality has a right not to be taxed illegally and the Committee has a corresponding obligation not to impose any illegal tax. If therefore a Committee imposes a tax on a person on whom it cannot be imposed under the Act, it does commit a breach of an obligation impliedly existing in his favour, and the person aggrieved can relieve himself from harassment by invoking this mode of relief. The use of the words "by implication" in relation to "obligation" in the opening paragraph of S. 54 is obviously intended to widen the scope of the Section and the Sec.

23. *Ram Kissen Joydoyal v. Pooran Mull*, (1920) 7 A I R Cal 289=56 I C 571=47 Cal 733=81 O L J 259.

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tion does come into play whenever it can reasonably be said that such an obligation exists and that it has been broken.

Counsel finally urges that no injunction could be granted to the plaintiff by virtue of S. 56 (i), Specific Relief Act, which says that an injunction cannot be granted when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust.

In this connexion he refers once more to 47 Cal 733²³ as well as 27 Bom 403.²⁴ In the Calcutta judgment a suit had been brought for a perpetual injunction to restrain arbitration proceedings and while dealing with this aspect of the case, Mookerjee J. remarked :

We are further of opinion that the injunction claimed should not be granted in view of the provisions of cl. (i) of S. 56 In the case before us the respondents allege that they did not enter into the alleged contract. If that case is well founded, the arbitration proceedings, even if they result in an award, can only terminate in an award which would be a nullity and could not possibly affect the rights of plaintiffs; if the arbitrators make an award in favour of the defendants (which itself is doubtful) the plaintiffs will have ample opportunity to protect themselves by an appropriate proceeding. We are clearly of opinion on all these grounds that the injunction claimed cannot be granted.

In the Bombay judgment a Division Bench composed of Crowe and Chandavarkar JJ., dismissed a suit against a Municipal Committee with the following observations:

The suit is substantially brought to restrain the Municipality from enforcing a money claim and there is neither principle nor authority for restraining by injunction one, who alleges that he has a money claim against another from enforcing that claim in the manner sanctioned by law. According to S. 56, cl. (i), Specific Relief Act, an injunction cannot be granted where an equally efficacious relief can certainly be obtained by any other usual mode of proceeding. Under S. 86 of Bombay Act, 3 of 1901, it was open to the appellant to resort to the remedy provided by that Section and obtain the relief which he seeks in this suit. Instead of resorting to it he has come to a Civil Court and asks the Court to give him an injunction restraining the Municipality from enforcing its claim for the arrears of house-tax against him. He does not deny his liability to pay the tax after 1899; all he says is that he is not liable to pay the arrears due for certain years previous to 1899. It is open to him to pay the amount and then sue the Municipality for a refund; on the other hand, it is open to the Municipality to recover the amount by a redress warrant and sale. In either case it cannot be said that there exists no standard for ascertaining the actual damage likely to be caused to the appellant or that pecuniary compensation cannot be given for invasion of the appellant's right. It is discretionary with a Civil Court to grant an injunction and that dis-

24. *Chunil Lal v. Surat City Municipality*, (1903) 27 Bom 403=5 Bom L R 267.

cretion must be exercised judiciously with extreme caution and only in very clear cases. The present is not a case of that kind.

These judgments, in my opinion, are not very helpful in determining the question now before us. It is obvious that the Calcutta judgment deals with the case of a different nature. Further, in that case the usual mode of proceeding was clear and the plaintiff could obtain an equally efficacious relief otherwise. The Bombay judgment no doubt deals with a case somewhat analogous to the present case, but with all respect it does not appear to me to be a correct exposition of the law on the subject. It would appear from the quotation reproduced above that while the learned Judges began by saying that it was open to the plaintiff to resort to the remedy laid down in the Municipal Act itself, they ended with the remark that the relief by way of injunction was merely discretionary and that in the case before them they could not judiciously exercise their discretion in the plaintiff's favour. No attempt whatever was made to explain how any other way of proceeding was available to the plaintiff and in what manner it was equally efficacious. Reference was no doubt made to the remedy provided by S. 86 of the Bombay Act and also to the ability of the plaintiff to sue for a refund.

But apart from the fact that neither way of proceeding could be treated as a "usual mode of proceeding" as contemplated by the Section, I am disposed to think that neither was "equally efficacious." The remedy provided in the Act as explained above applies only to those cases which arise under the Act and is not meant to meet those which are outside the Act. The prescribed remedy cannot therefore be considered as a "usual mode of proceeding" in cases where illegal taxation is objected to. So far as "efficacy" is concerned, it is evident that an aggrieved person has still a right to move the Civil Courts if he is defeated in the forum prescribed in the Municipal Act, while a decision in the Civil Courts is final, and it cannot therefore be urged that the remedy prescribed by the Act, though it may turn out to be "efficacious," is "equally" so. Similarly, the suggestion that a person may first pay an illegal tax and then sue for a refund is open to the objection that in certain cases it may turn out to be much more annoying and much more expensive than resort to Civil Courts.

Another objection which may be taken to the Bombay judgment is that the considerations which eventually prevailed with the learned Judges were those which are mentioned along with some other matters in para. 3 of S. 54 and as I read the Sections relating to injunctions, those matters cannot necessarily be considered under S. 56. By Sec. 54 of the Act, the existence or otherwise of a standard for ascertaining the actual damage and the possibility or otherwise of pecuniary compensation being allowed to redress the wrong done to the plaintiff are matters to be considered in those cases only in which the defendant invades or threatens to invade the plaintiff's right to, or enjoyment, of property, and in S. 56 where those circumstances are enumerated in which an injunction cannot be granted, they are not at all referred to. In my view, the question whether an "equally efficacious relief can "certainly" be obtained by "any other usual mode of proceeding" is a question of fact to be determined in each case on its own circumstances, and no hard and fast rule can be laid down in the matter. In the present case, I for myself am unable to conceive what "other usual mode of proceeding" was available to the plaintiff which could be considered to be "equally efficacious." I would accordingly hold that the plaintiff was not debarred under any provision of the Specific Relief Act from instituting the present suit. The result is that I would dismiss this appeal but leave the parties to bear their own costs throughout.

Tek Chand J.—I agree with my learned brother in the conclusions reached by him on all points and have very little to add. The jurisdiction of a Civil Court to entertain a suit for adjudicating that a tax imposed by a Municipal Committee was ultra vires of the Committee can only be ousted by a clear statutory provision to this effect. The appellant contends that S. 86, Punjab Municipal Act, contains such a provision and absolutely bars the jurisdiction of Civil Courts, even in cases where the assessment is one which the Committee is not authorized to make. This contention was considered and rejected by a Division Bench, (of which I was a member), in 18 Lah 567¹⁰ at p. 575, where it was held that S. 86 deals only with assessments made under the Act and that it does not bar the jurisdiction of Civil Courts to entertain suits relating to unauthorized assessment made by the Committee in excess of the powers conferred on it by the law. After hearing full argument

in the present case, I am confirmed in the view expressed in that case.

A Municipal Committee is a creature of the statute. It is brought into existence by, or under the authority of, an express legislative enactment to have control over municipal affairs within defined local limits and can exercise such powers of legislation, taxation and regulation as are entrusted to it by the Legislature. If in the exercise of these powers the Committee makes a mistake, it will merely be a case of erroneous exercise of jurisdiction, and the aggrieved party must seek his remedy in the manner, and from the forum, provided in the statute. If however its action is in excess of, or in contravention of the powers, conferred on it by the statute, the subject has his ordinary remedy to seek relief in the Civil Courts, unless their cognizance is either expressly or impliedly barred (S. 9, Civil P. C.) This rule has been applied in numerous cases relating to imposition or assessment of taxes by Municipal Committees. When a suit is brought to challenge such taxation or assessment, the Civil Court has first to decide whether the Committee has acted within, or in exercise of its statutory powers. If it finds that the Committee acted within its power, the suit must be dismissed forthwith. If, however, the taxation or assessment is *ultra vires*, the Court must adjudicate on the merits and grant relief accordingly. The only authority to the contrary is an obiter dictum in 16 Lah 529.⁵ But as my learned brother has shown in his exhaustive judgment, that dictum was too widely expressed and did not lay down the law correctly.

There is no doubt that in the present case, the assessment of the plaintiff-respondent by the Municipal Committee, Montgomery, was not under the Act, but was in contravention of its provisions. The plaintiff is not the owner, but is only the hirer of motor lorries, and the committee had no power to assess him under S. 61 of the Act. He, therefore, had a cause of action to sue in the Civil Courts and the lower Court has rightly entertained the suit and held that the assessment was illegal and *ultra vires*. The second contention raised is that the plaintiff is not entitled to relief by way of injunction restraining the committee from realizing the tax, as under S. 54, Specific Relief Act, a perpetual injunction can only be issued to prevent "the breach of an obligation existing in favour of the appellant, whether

expressly or by implication," and that in this case there has been no breach of such an obligation. In my opinion, this contention also is without force. Where a statute creates a body like the Municipal Committee and confers on it power to levy taxes of a particular kind in a particular manner, there is an implied "obligation" on the part of the committee not to tax the subject in a manner not covered by the statute, and if a committee does impose such a tax, it commits a breach of this obligation and a suit would lie for issue of a perpetual injunction restraining the Committee from imposing and collecting the tax. The law on the subject is well summed up by Kerr on Injunctions (Edn. 6, page 572) as follows :

Public bodies, incorporated by statutes for a public purpose, or the promotion of a public benefit, may not exceed the jurisdiction which has been entrusted to them by the Legislature. If, under pretence of an authority which the law does give them to a certain extent, they exceed their authority, and assume to themselves a power which the law does not give them, the Court no longer considers them as acting under the authority of their commission, but treats them as persons acting without legal authority.

Reference may also be made to (1835-40) 48 R R 88=4 My & Cr 249²⁵ where Lord Chancellor Cottenham laid down that:

If under pretence of an authority which the law does give to corporations to a certain extent, they go beyond the line of their authority, and infringe or violate the rights of others, they become, like all other individuals, amenable to the jurisdiction of this Court by injunction.

There are several reported cases in India in which such injunctions have been issued without objection. The latest instance in this Court will be found in AIR 1935 Lah 980⁹ (*cf. also* A I R 1930 Lah 824.²⁶) Lastly, it was argued that, in any case, injunction should not be granted in view of the provisions of S. 56 (1), Specific Relief Act. To constitute a bar to an injunction under this clause, however, three circumstances must be shown to co-exist: (1) that there is available some "other usual mode of proceeding," (2) that by that proceeding equally efficacious relief is entertainable, and (3) that such relief can certainly be obtained. In a case like this it cannot be urged that the alternative suggested, namely that the plaintiff should first pay the tax which has been imposed on him by the Committee illegally and without jurisdic-

25. *Frewin v. Lewis*, (1835-40) 4 My & Cr 249=48 R R 88.

26. *Municipal Committee, Delhi v. Moti Jan*, (1930) 17 A I R Lah 824 = 123 I O 536 = 31 P L R 547.

tion, then sue in the Court for its refund, and go on repeating this process year after year, is an 'equally efficacious relief' which can 'certainly' be obtained by 'other usual mode of proceeding.' The decision of the lower Courts is correct and I agree that this appeal should be dismissed and the parties left to bear their own costs throughout.

Ram Lall J.—I agree.

D.S./R.K.

Appeal dismissed.

*** A. I. R. 1940 Lahore 388**

TEK CHAND AND BLACKER JJ.

Emperor

v.

Chanan Singh — Respondent.

Criminal Revn. No. 1638 of 1938, Decided on 9th May 1939; case reported by Sess. Judge, Ferozepore, with his No. 1031-J of 1938.

*** Penal Code (1860), S. 64 — Various sentences of imprisonment in default of fine awarded in separate trials — Sentences cannot be made to run concurrently.**

A Criminal Court has no power in law to make the various sentences of imprisonment in default of payment of fine awarded in separate trials concurrent with each other: 5 S L R 263; A I R 1926 Bom 62 and A I R 1929 Sind 179, *Rel. on.* [P 389 C 1]

Mohammad Monir, Assistant to Advocate-General — *for the Crown.*

ORDER OF REFERENCE

Abdul Rashid J. — The question for determination in this criminal revision is, whether sentences of imprisonment in default of payment of fines awarded in separate trials can be made to run concurrently. No authority on the question involved in this case has been cited at the Bar: 13 Cr L J 536¹ and 27 Cr L J 111² deal with fines inflicted for various offences in the same trial and not with fines inflicted for different offences in separate trials. The question is one of great importance, and I therefore subject to the orders of the learned Chief Justice, refer it to a Division Bench for decision.

Order of Division Bench

Blacker J. — In this case Chanan Singh was convicted in four separate trials and on three charges in each trial, that is to say on 12 separate charges and he was punished as follows:

Trial	Charge	Imprisonment	Fine	Imprisonment in default.
1	(i)	6 months	Rs. 40-0-0	2 months.
	(ii)	3 years	Rs. 430-0-0	1 year.
	(iii)	1 year	Rs. 100-0-0	4 months.
2	(i)	1½ years	Rs. 199-0-0	8 months.
	(ii)	6 months	Rs. 33-0-0	2 months.
	(iii)	2 months	Rs. 7-0-0	1 month.
3	(i)	1 year	Rs. 87-0-0	4 months.
	(ii)	4 months	Rs. 17-0-0	1 month.
	(iii)	1½ years	Rs. 164-0-0	6 months.
4	(i)	6 months	Rs. 35-0-0	2 months.
	(ii)	4 months	Rs. 22-8-0	1 month.
	(iii)	6 months	Rs. 48-0-0	3 months.

The learned Magistrate directed that all the substantive sentences of imprisonment should be concurrent, but left the sentences of imprisonment in default of payment of fine to be consecutive. The net result of this would be that the prisoner would have to serve three years substantively and 46 months in all in default of payment of fine. The learned Sessions Judge dismissed his appeals, but ordered the sentences of imprisonment in default of payment of fine to be concurrent with each other in all the cases as he thought that the aggregate of the terms of imprisonment in default of payment of fine was excessive. Objection was taken to this on behalf of the Crown by the learned Public Prosecutor who relied upon three judgments reported in 13 Cr L J 536,¹ 27 Cr L J 111² and A I R 1929 Sind 179.³ In all these judgments, it was held that it was illegal to make sentences of imprisonment in default of payment of fine concurrent with each other or with a substantive term of imprisonment.

The learned Assistant to the Advocate-General appearing before us has contested this position, and has argued that there is nothing in the language of S. 397, Criminal P. C., or of S. 35 of the same Code to contradict the view that a sentence of imprisonment in default of fine is a sentence of imprisonment within the meaning of those Sections. This argument might have some force were it not for the existence of S. 64, I. P. C., in which it is clearly laid down that any sentence of imprisonment in default of fine has to be in excess of any other sentence of imprisonment to which the prisoner may have been sentenced. Learned counsel attempted to argue that this should be read as referring to one particular offence only. But the language of para. 2 of the Section puts this view out of Court. Even in a case where there has only been a fine,

1. Emperor v. Abidullah, (1912) 5 S L R 263 = 13 Cr L J 536 = 15 I C 808.

2. Emperor v. Subrao Sesharao, (1926) 13 A I R Bom 62 = 91 I C 543 = 27 Bom L R 1351 = 27 Cr L J 111.

3. Emperor v. Ghulam Ahmed, (1929) 16 A I R Sind 179 = 118 I C 224 = 30 Cr L J 907.

the Section directs that the imprisonment in default of that fine shall be in excess of any other imprisonment to which the offender may have been sentenced. These words necessarily imply that different convictions are contemplated. I therefore find myself constrained to follow the view held in the three rulings to which reference has been made above and to hold that the learned Sessions Judge had no power in law to make the various sentences of imprisonment in default of payment of fine concurrent with each other. That being so, I would meet the case by accepting his alternative recommendation, namely that the fines and with them the sentences of imprisonment in default be remitted altogether in the last three cases, and that they only stand in the first case in which Chanan Singh was fined Rs. 40, Rs. 430 and Rs. 100 and ordered to undergo two months, one year's and 4 months' rigorous imprisonment in default. These three terms will of course have to be consecutive making a total of 18 months' rigorous imprisonment which Chanan Singh will have to serve in default of payment of fine.

Tek Chand J.—I agree.

G.N./R.K. *Order accordingly.*

A. I. R. 1940 Lahore 389

YOUNG C. J. AND SALE J.

Fazal — Petitioner

v.

Emperor.

Criminal Revn. No. 118 of 1939, Decided on 12th June 1939; case reported by Sess. Judge, Hoshiarpur, D/- 18th January 1939.

Criminal P. C. (1898), Ss. 347 and 288—Magistrate deciding under S. 347 to commit—Proceedings de novo under Chap. 18, need not be commenced provided requirements of Ss. 208, 211, 212 and 213 are fulfilled—In aforesaid case statement recorded by Magistrate in presence of accused before commitment can be treated as substantive evidence under S. 288.

There is nothing in S. 347 to suggest that where a Magistrate decides to commit under that Section he should be required to commence proceedings de novo under Chap. 18. What is necessary is that as soon as a Magistrate acting under S. 347 has made up his mind to commit, he should be careful not to prejudice the accused by depriving him of the opportunities provided by Ss. 208 and 212, of offering defence evidence; and always provided that the requirements of Ss. 208, 211 and 212, as well as the formalities required by S. 213 of the Code, are carefully observed, there is no reason why a Magistrate should be required to take proceedings de novo under Chapter 18, Criminal P. C. In such a case any statement recorded by the Magis-

trate in the presence of the accused prior to the commitment would be the evidence of a witness duly recorded under Chap. 18, and may, therefore be transferred and treated as substantive evidence under S. 288 in the trial before the Sessions Court; and no prejudice to the accused can be said to have been caused by the transfer of the statements in question, where he is duly informed that he is to be committed to Sessions and is given every opportunity to produce his defence both before and after the aforesaid information: *A I R 1926 Cal 235, Rel. on.* [P 391 C 1, 2]

Mohammad Monir, Asst. to Advocate-General — *for the Crown.*

ORDER OF REFERENCE

Din Mohammad J.—This case has been reported by the Sessions Judge, Hoshiarpur, in the following circumstances: One Fazal was sent up to undergo his trial under S. 304, I. P. C., in the Court of a Magistrate, First Class with enhanced powers under S. 30, Criminal P. C. On 20th October 1938, the Magistrate started the trial of the case as a warrant case under Chap. 21, Criminal P. C., and on the same date after recording partial evidence he even framed a charge against the accused under S. 304, Part. 2, I. P. C. Action under S. 256, Criminal P. C., was then taken and the case was adjourned to the following day for further proceedings. On that date, one prosecution witness was cross-examined and the cross-examination of the remaining witnesses was given up by counsel for the defence. On that date, the Magistrate recorded an order that in his opinion there was a prima facie case under S. 302, I. P. C., and that he would amend the charge after the whole prosecution evidence was recorded and commit the accused for trial to the Court of Session. On 3rd November and again on 17th November the remaining prosecution evidence was recorded and the case was adjourned to 19th November for further proceedings. On that date, he framed a charge against the accused under S. 302, I. P. C., and committed the case to the Court of Session.

The trial of the accused began on 12th January 1939, and inasmuch as certain prosecution witnesses resiled from the statements made by them previously in the Court of the Magistrate, a question arose whether those statements could be treated as evidence in the case under S. 288, Criminal P. C. Counsel for the accused urged that inasmuch as no regular proceedings had been recorded under Chap. 18, Criminal P. C., which is a condition precedent

under S. 288, those statements could not be treated as evidence at the trial. This proposition was however resisted by counsel for the Crown. The Sessions Judge after completely recording the prosecution as well as the defence evidence, stayed further proceedings and on the following day recorded an order as stated above recommending that the commitment being illegal it should be quashed. There is unfortunately no authority of this Court dealing with the matter and the decisions of the other High Courts in India are conflicting. In A I R 1932 Cal 683,¹ A I R 1932 Mad 502,² 52 Mad 995,³ 17 I C 813⁴ and 23 I C 734⁵ it is laid down that unless the provisions of law are fully observed and the commitment proceedings are regularly taken under Chap. 18, the order of commitment is bad. 53 Cal 181⁶ and A I R 1931 Bom 517⁷ however lay down to the contrary. A I R 1932 Cal 683¹ is later than 53 Cal 181.⁶

The question involved in this case is important and it is likely to arise very frequently. S. 347, Criminal P. C., says that if in any enquiry before a Magistrate, or in any trial before a Magistrate before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, he shall commit the accused under the provisions hereinbefore contained. Prior to 1923 the words "he shall stop further proceedings and" existed before the word "commit" but they were deleted by the Criminal Law Amendment Act, 1923. Construed literally, it would be obligatory upon a Magistrate to follow the procedure as laid down in Chap. 18 and it is obvious that that procedure is different from the procedure to be followed in the trial of warrant cases. Under Chap. 18 an accused person can offer defence at two stages, i. e., under

S. 208 (1) as of right and under S. 212 at the discretion of the Magistrate : while in the trial of a warrant case he can only offer defence after a charge has been framed and at no other stage. If the trial of an accused person therefore starts under Chap. 21 and is at a later stage converted into a trial under Chap. 18, he is apparently prejudiced and this circumstance has prevailed with those learned Judges who have held that a commitment in such circumstances is bad. Further, in S. 288, Criminal P. C., the words "duly recorded in the presence of the accused under Chap. 18" were for the first time added by the Criminal Law Amendment Act 1923 and cannot be lightly ignored. I am personally inclined therefore to the view that if a Magistrate acts under S. 347, Criminal P. C., he should start proceedings de novo under Chap. 18, otherwise the commitment will be bad. But as the point is important and there is a conflict of authority, I refer the case to the Hon'ble the Chief Justice for such action as he deems necessary.

Order of the Division Bench.

Sale J. — This is a reference by a learned Judge of this Court sitting in Single Bench in a matter reported on the criminal revision side by the Sessions Judge of Hoshiarpur relating to a Sessions trial at present pending before him. The material facts have been set forth in the order of reference and need not be recapitulated here in detail. Briefly stated, the trial of the accused started before the Additional District Magistrate, Hoshiarpur as a warrant case under S. 304, Part II, Penal Code. After the charge had been framed under S. 304, Part II the Additional District Magistrate changed his mind and committed the accused to stand his trial before the Sessions Court as he was entitled to do under the provisions of S. 347, Criminal P. C. It is not suggested that the action of the Magistrate from the point at which he decided to commit the accused was not in accordance with the procedure laid down under Chap. 18, Criminal P. C., which deals with the enquiry preliminary to commitment, in so far as it was applicable. In the course of the Sessions trial the Sessions Judge, at the instance of the prosecution, directed the transfer of the statements of certain prosecution witnesses recorded by the Magistrate to the Sessions record as substantive evidence under S. 288, Criminal P. C. At the time of final arguments before the Sessions Judge it was urged, on behalf of the defence, that as the initial proceedings

1. Nagendra Nath v. Emperor, (1932) 19 A I R Cal 683=139 I C 470=33 Cr L J 770=36 O W N 926.

2. Lakshminarayana v. Suryanarayana, (1932) 19 A I R Mad 502=139 I C 343=33 Cr L J 765=63 M L J 101.

3. Damodaram v. Emperor, (1929) 16 A I R Mad 862=121 I C 618=31 Cr L J 273=52 Mad 995=57 M L J 555.

4. Emperor v. Channing Arnold, (1912) 6 L B R 129=17 I C 813=13 Cr L J 877 (F B).

5. In re Ohinnavan (1914) 1 A I R Mad 643=23 I C 734=15 Cr L J 366.

6. Abdul Gani v. Emperor, (1926) 13 A I R Cal 235=90 I C 537=53 Cal 181=26 Cr L J 1577=42 C L J 205.

7. K. R. Bhat v. Emperor, (1931) 18 A I R Bom 517=134 I C 1230=33 Cr L J 68=33 Bom L R 1192.

had taken place under Chap. 21, Criminal P. C., governing the trial of warrant cases, and not under Chap. 18, which deals with the enquiry preliminary to commitment, the statements could not be so transferred; and the Sessions Judge held that the accused would be materially prejudiced if the statements of these two witnesses were allowed as substantive evidence and referred the case to the High Court with the suggestion that the commitment be quashed.

In referring the case to us the learned single Judge has expressed the view that where a Magistrate acts under S. 347, Criminal P. C., he should start proceedings *de novo* under Chap. 18, Criminal P. C., and that otherwise the commitment would be bad. There appear to be three points for our decision in this case : (1) Whether the accused would be prejudiced in this case by the transfer of certain statements under S. 288, Criminal P. C., if used as substantive evidence against him? (2) Whether the commitment should be quashed? (3) Whether as a rule of practice, a Magistrate who acting under S. 347, Criminal P. C., decides to commit an accused to the Sessions Court, should start proceedings *de novo* under Chap. 18, Criminal P. C.?

It will be convenient first to deal with point 3. No authority of this Court has been cited before us by the learned Assistant Advocate-General. There is nothing in S. 347, Criminal P. C., to suggest that where a Magistrate decides to commit under that Section he should be required to commence proceedings *de novo* under Chap. 18. To lay down any general rule, as is suggested by the learned referring Judge, that a Magistrate, if he decides to commit under S. 347, Criminal P. C., should invariably commence proceedings *de novo* under Chap. 18 would, in our opinion, lead to intolerable delays in the trial of criminal cases without any compensating advantage to the accused or to the prosecution. What is necessary is that as soon as a Magistrate acting under S. 347 has made up his mind to commit, he should be careful not to prejudice the accused by depriving him of the opportunities provided by S. 208 and S. 212, Criminal P. C., of offering defence evidence; and always provided that the requirements of Ss. 208, 211 and 212, Criminal P. C., as well as the formalities required by S. 213, Criminal P. C., are carefully observed, there is no reason why a Magistrate should be required to take proceedings *de novo* under Chap. 18, Criminal P. C. Turning now to the second

question regarding the applicability in these circumstances of S. 288, Criminal P. C., the Section lays down that the evidence of a witness duly recorded in the presence of the accused under Chap. 18 may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of the Evidence Act, 1872.

In this connexion we find ourselves in complete agreement with the observation of their Lordships in 53 Cal 181⁶ which exactly covers the point now in issue. A suggestion has been made that because this Section specifically mentions Chap. 18, it should follow that the statement of a witness recorded under Chap. 21 cannot be so transferred. In our opinion, however, the mere mention of Chap. 18 does not imply that the provisions of Chap. 18 must, in order to attract the provisions of S. 288, Criminal P. C., have been followed in their entirety. Chap. 18 relates to the enquiry preliminary to commitment, and provided the necessary preliminaries prior to commitment as detailed above have been taken by the Magistrate who decides to commit under S. 347, Criminal P. C., we are of opinion that the evidence must be regarded as duly recorded in the presence of the accused in the "enquiry prior to commitment" that is under Chap. 18. In other words, we are of opinion that provided a Magistrate, in acting under S. 347, Criminal P. C., commits the accused subject to the safeguards relating to the rights of the accused discussed above, any statement recorded by the Magistrate in the presence of the accused prior to the commitment would be the evidence of a witness duly recorded under Chap. 18, and may therefore be transferred and treated as substantive evidence in the trial before the Sessions Court. As regards the question of prejudice in the present case, we are satisfied that there could be no prejudice to the accused by the transfer of the statements in question. The accused was duly informed that the Magistrate had decided to commit him to the Sessions and was given every opportunity to produce his defence both before and after this decision. The witnesses were re-called, offered for cross-examination and the only defence witness named by the accused appears to have been examined by the Magistrate. In these circumstances there can be no question of prejudice. With these observations we return the records to the Sessions Judge, with the order that we decline to quash the commitment proceedings and that the pro-

ceedings so far taken must stand: and we direct the Sessions Judge to proceed with the trial of the case in accordance with law.

G.N./R.K.

Order accordingly.

A. I. R. 1940 Lahore 392

ABDUL RASHID J.

Gurbakhsh Ram — Defendant —

Appellant.

v.

*Manak Chand, Plaintiff and another,
Defendant — Respondents.*

Second Appeal No. 298 of 1939, Decided on 1st April 1940, from decree of Dist. Judge, Jullundur, D/- 13th December 1938.

(a) Custom (Punjab) — Tarkhans of village Chanian, Jullundur district are governed by custom—Riwaj-i-am prohibits adoption of sister's or daughter's son—Fact that tarkhans were not consulted at time of preparation of riwaj-i-am is immaterial — Onus is on adoptee to prove custom to contrary.

According to the riwaj-i-am of Jullundur district in the Punjab the tarkhans of village Chanian in the Nakodar tahsil of Jullundur district who are governed by custom are prohibited from adopting a sister's or daughter's son. The fact that the tarkhans were not consulted at the time of the preparation of the riwaj-i-am is no ground for applying the provisions of the Hindu law. In view of the provisions of the riwaj-i-am the burden of proving that a sister's or a daughter's son is eligible for adoption lies on the adoptee. [P 393 C 1, 2]

(b) Custom — Riwaj-i-am—Construction—In case of lacuna in riwaj-i-am application of personal law is justified.

Once it is established that the parties to a litigation are governed by custom, the provisions of the riwaj-i-am become applicable in their case in all matters which are dealt with in the riwaj-i-am. In the case of a lacuna in the riwaj-i-am with respect to certain matters it would be legitimate to fall back on the provisions of the personal law.

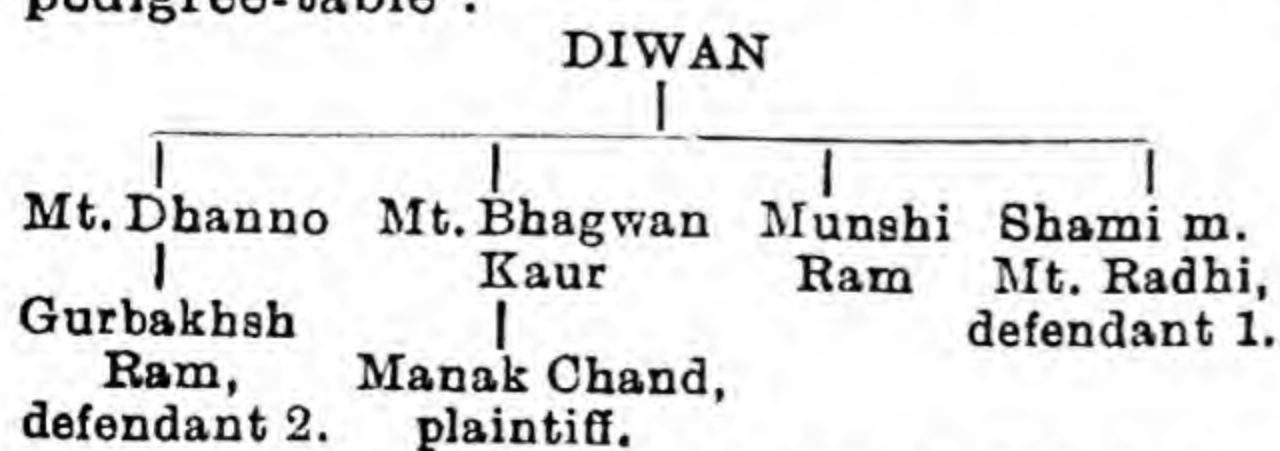
[P 393 C 1, 2]

Achhru Ram and Inder Dev —

for Appellant.

Mela Ram — for Respondents.

Judgment. — The parties to this litigation are tarkhans of village Chanian, Tahsil Nakodar, District Jullundur, and their relationship is apparent from the following pedigree-table :



On 20th January 1937, Mt. Radhi, defendant 1, made a gift of the property in dispute in favour of Gurbakhsh Ram, defendant 2. On 3rd June 1937 the present suit was instituted by Manak Chand for a declara-

tion to the effect that the gift made by Mt. Radhi on 20th January shall not affect his reversionary rights after the death of Mt. Radhi. The allegations in the plaint were that the plaintiff had been adopted by Munshi Ram and by virtue of his adoption he was entitled, as the son of Munshi Ram, to challenge the alienation made by Mt. Radhi in favour of Gurbakhsh Ram. The defendants pleaded, inter alia, that Mt. Radhi was the absolute owner of the property held by her, that the plaintiff was never adopted by Munshi Ram, that even if he was adopted his adoption was invalid under the Customary law which governed the parties. On these pleadings the following issues were framed :

1. Are the parties, and were their ancestors, governed by custom in the matters of succession and alienation. What is that custom ?

2. Had defendant 1 the right to make the gift in suit, and is the plaintiff bound by it ?

3. Did Munshi Ram validly adopt the plaintiff as his son ?

4. If so, cannot the plaintiff challenge the alienation in suit ?

The trial Court held that the parties were governed by Customary law and that the adoption of Manak by Munshi Ram had in fact taken place. It was further held that the adoption of Manak was valid under the Hindu law. The trial Court further came to the conclusion that Manak as the adopted son had no right to collateral succession and he was not therefore entitled to contest the alienation made by Mt. Radhi in favour of Gurbakhsh Ram. On these findings the plaintiff's suit was dismissed. The plaintiff preferred an appeal in the Court of the learned District Judge. It was held by the lower Appellate Court that parties were governed by custom in matters of alienation, but not regarding succession. It was further found that the defendants had failed to prove any custom according to which Munshi Ram had no power to make the adoption and that consequently the adoption was valid as parties were Shudras. According to the learned District Judge the adoption of Manak was a formal adoption and he could therefore succeed collaterally to the property of Shami. It was also held that even if no adoption under Hindu law be held to have been proved, Manak, as the sister's son of Shami, was an heir and was entitled to contest the alienation made by Mt. Radhi. On these findings the plaintiff was given the decree prayed for. Against this decision Gurbakhsh Ram, defendant, has preferred a second

appeal to this Court. The learned District Judge has granted a certificate in this case which states that the point of custom involved is whether among tarkhans of Nako-dar tahsil, Jullundur District, a sister's son can be adopted.

That the parties are governed by custom does not admit of any doubt. It is established on the record that village Chanian was founded by tarkhans, and that almost all the tarkhans living in this village depend on agriculture for their living. The plaintiff, as P. W. 1, himself admits that the entire proprietary body consists of tarkhans, that lambardars are chosen out of the tarkhans; that every one of the tarkhans lives on agriculture, and that tarkhans are not entitled to alienate ancestral property except for necessity. Several judgments have been produced which show that alienation made by tarkhans in this village had been set aside on the ground that the tarkhans are governed by custom. *Kaifiat dehi*, Ex. D-3, also shows that the village was founded by the ancestors of the present parties, and that the proprietary body consists almost entirely of tarkhans. In these circumstances the lower Courts were justified in holding that the parties were governed by custom. I do not agree with the finding of the learned District Judge to the effect that parties are governed by custom in matters of alienation and not in the matter of succession.

The answers to questions 69 and 70 of the *riwaj-i-am* of the Jullundur District compiled at the revised settlement, 1913-17, make it perfectly clear that according to custom a daughter's son or a sister's son is not eligible for adoption. This custom, according to the *riwaj-i-am*, generally prevails in the district with the exception of a few tribes. The tribes in which daughter's and sister's son can be validly adopted are Arains, Awans, Gujjars, Dogars and miscellaneous Mahomedan tribes of the Jullundur tahsil. It is clear from these answers that as far as the Hindu tribes are concerned a daughter's or a sister's son is not eligible for adoption. The principal argument addressed by Mr. Mela Ram, on behalf of the respondents, was that as the tarkhans of the district were not consulted at the time of the preparation of the *riwaj-i-am*, they are not bound by the answers to questions 69 and 70 even though they may be governed by Customary Law. In my opinion, this contention is without force. Once it is established that the parties to the present

litigation are governed by custom the provisions of the *riwaj-i-am* will become applicable in their case in all matters which are dealt with in the *riwaj-i-am*. If there is a lacuna in the *riwaj-i-am* with respect to certain matters it would be legitimate to fall back on the provisions of the personal law. If, however, the question of adoption is fully dealt with in the *riwaj-i-am* and the adoption of a daughter's or a sister's son is prohibited, it cannot be said that the case should be decided by applying the provisions of the Hindu law, simply because tarkhans were not consulted at the time of the preparation of the *riwaj-i-am*. In view of the provisions of the *riwaj-i-am* the burden of proving that a sister's son was eligible for adoption among tarkhans of village Chanian lay on the plaintiff. As he has failed to produce any reliable evidence on this question, it must be held that as he was the sister's son of Munshi Ram, he could not be validly adopted by him. The claim of Manak, so far as it depends on his adoption by Munshi Ram, must, therefore, be negatived.

Manak is the son of Mt. Bhagwan Kaur and Gurbakhsh Ram is the son of Mt. Dhano. Both Mt. Dhano and Mt. Bhagwan Kaur were the sisters of Shami, the last male holder of the property in dispute. It was stated by Mr. Achhru Ram that he had no objection to Manak succeeding to the property of Shami to the extent of one-half after the death of Mt. Radhi as a sister's son. The learned counsel submitted very rightly that if Manak gets one-half of the property of Shami so would his client Gurbakhsh Ram get one-half of the property of Munshi Ram and that both the plaintiff and defendant 2 will, therefore, inherit the property of both Shami and Munshi Ram in equal shares. I accordingly accept this appeal in part, set aside the judgment and the decree of the learned District Judge and hold that Manak is not the adopted son of Munshi Ram. He is, however, given a declaration that as the son of Mt. Bhagwan Kaur he is entitled to challenge the alienation made by Mt. Radhi and that the gift dated 20th January 1937 shall not affect his reversionary rights as the son of Mt. Bhagwan Kaur. Having regard to all the circumstances, I order that the parties shall bear their own costs throughout.

G.N./R.K.

Order accordingly.

*** A. I. R. 1940 Lahore 394**

DIN MOHAMMAD J.

Barkat Ram — Appellant.

v.

Bhagwan Singh and others —

Respondents.

Execution First Appeal No. 299 of 1939,
Decided on 5th February 1940, from order
of Sub-Judge, First Class, Delhi, D/- 10th
July 1939.

*** (a) Civil P. C. (1908), O. 21, R. 5—O. 21,
R. 5 not complied with — Transferee Court has
no jurisdiction to execute decree.**

The provisions of O. 21, R. 5 are mandatory.
Where the procedure laid down therein is not
complied with, and the decree is sent direct to
another Court instead of through the District Court,
the transferee Court has no jurisdiction to execute
the decree : 22 Cal 764; A I R 1914 Cal 786; A I R
1919 Pat 324; A I R 1933 Lah 839 and A I R
1924 P C 95, Rel. on; A I R 1928 P C 162, Dist-
ing.; A I R 1937 Lah 174, Not approved.

[P 397 C 1]

**(b) Execution — Limitation — Case pending
before executing Court for seven years — Plea
of limitation not raised — Case transferred to
another Court which executed decree by sale
of judgment-debtor's property — Plea held could
not be raised in objections to sale before trans-
feree Court, though it was competent to enter-
tain it.**

The execution case was pending before the exe-
cuting Court for seven years during which period
the judgment-debtor had several times moved the
High Court. It was subsequently transferred to
another Court which executed the decree by sale
of the judgment-debtor's property. In his objec-
tions to the sale the judgment-debtor sought to
raise the plea of limitation for the first time :

Held that the plea of limitation in the circum-
stances of the case could not be allowed to be
raised before the transferee Court, though it was
competent to entertain the same. [P 397 C 2]

**(c) Civil P. C. (1908), O. 21, R. 66, as amend-
ed by Lahore High Court — Sale proclamation
— Estimate of property not given — Nor reserved
price mentioned — Sale is illegal.**

Where the sale proclamation omits to include
the estimate given by either or both the parties
and even the reserved price is not mentioned in
the copies of the proclamation issued to the public,
the sale is illegal and must be cancelled.

[P 398 C 1, 2]

(d) Res judicata — Execution proceedings.

The principle of res judicata constructively
applies to execution proceedings. [P 397 C 2]

Malik Barkat Ali and C. L. Aggarwal —
for Appellant.

Chandra Gupta, J. N. Aggarwal and
Achhru Ram — *for Respondents.*

Judgment. — This appeal has arisen out
of certain execution proceedings which for
some reason or other have not so far ter-
minated and this is the fourth time that
this Court is called upon to deal with mat-

ters arising therefrom. In order to appre-
ciate properly the questions now falling for
determination in this case, it will be neces-
sary to set out the relevant facts in detail.
On 16th January 1923, a decree was made
by a Court at Ambala in favour of Rai
Bahadur Banarsi Das for Rs. 68,000 odd
against the Bharat Bank and its four Direc-
tors personally. They were Lala Barkat
Ram, Sardar Dhian Singh, Lala Sawan Mal
and Raja Mohammad Ikram Ullah Khan.
On 27th November 1923, some modifica-
tions in the decree were introduced by the
High Court on appeal, which, however, are
immaterial for the purposes of the present
appeal. On 21st November 1924, leave to
appeal to His Majesty in Council was dis-
missed and on 26th April 1927, an applica-
tion was made for the first time to the
Ambala Court that the decree be sent to
Sialkot for execution against Lala Sawan
Mal. On 29th November, a certificate for
transfer was granted, but in the absence of
the judgment-debtors. On 11th May 1928,
this certificate was returned to the Ambala
Court on the ground that Lala Sawan Mal
had been adjudged insolvent in the mean-
time. On the same day another application
was made that the decree be sent to Delhi
for execution against Sardar Dhian Singh.
On 19th May 1928 a certificate was issued
but that certificate, too, was returned by
the decree-holder on 4th May 1929. At the
same time, an application was made that
the decree be sent to Sialkot for execution
against Raja Mohammad Ikram Ullah Khan.
On 10th May, the certificate applied for
was granted but that, too, was returned,
inasmuch as Raja Mohammad Ikram Ullah
Khan resided not in the district of Sialkot
but in the district of Gujranwala. On 5th
June 1929 a fresh application was made
for sending the decree to Gujranwala for
execution against Raja Mohammad Ikram
Ullah Khan. A certificate was granted and
the Gujranwala Court was moved for the
arrest of the judgment-debtor. On 20th
April 1931 a new application was made
for sending the decree to Delhi for execu-
tion against Lala Barkat Ram. The certi-
ficate applied for was granted but the
proceedings appear to have been consigned
to the record room on 2nd May 1931.
On 24th July 1931 execution proceedings
pending against Raja Mohammad Ikram
Ullah Khan, too, were consigned to the
record room.

On 19th August 1931, Rai Bahadur
Banarsi Das assigned the decree to Sardar

Bhagwan Singh and on 4th November 1931, the assignee applied for substitution. On 20th May 1932, the order for substitution was made and on 25th August 1932 the assignee moved the Ambala Court once more for the necessary transfer certificate. On 15th October 1932, this application was granted and, thereupon, execution was taken out against Lala Barkat Ram. The decree was however sent to the Court of the Senior Subordinate Judge, Delhi, and not to the Court of the District Judge. Sometime before, Lala Barkat Ram had instituted a suit against Sardar Bahadur Sardar Dharam Singh for rendition of accounts and dissolution of certain partnerships that he had with him, and in the course of these execution proceedings, Lala Barkat Ram's share in the partnerships involved in the suit was attached. Lala Barkat Ram objected to this attachment, but his objections were disallowed by Sardar Sewa Singh, Senior Subordinate Judge, Delhi. An appeal against that order was preferred to this Court, which was allowed by Monroe J. on 30th May 1934. The decree-holder took an appeal to a Letters Patent Bench of which I was a member. The order of Monroe J. was reversed and that of the Senior Subordinate Judge was restored with this modification, that if the charge on the judgment-debtor's interest was not removed within one month from the date that order was received in the Court of the Senior Subordinate Judge, the judgment-debtor's entire interest in the partnerships, which were the subject-matter of the suit, would be sold subject to the reservation that if the sale proceeds did not amount to Rs. 22,500 the sale would not be confirmed. This order was made on 7th December 1934. On 12th January 1935, the decree-holder made an application for sale of the interest attached, and on 20th March 1935 the judgment-debtor put in an application for review of the order of the Letters Patent Bench. On 22nd March the judgment-debtor applied for the postponement of the intended sale, and on 23rd March 1935 his application was dismissed by the executing Court. The material part of the order in English reads as follows :

This application is merely a subterfuge to circumvent the order of the High Court. A notice will be given to the judgment-debtor under O. 21, R. 66 to enable him to furnish all the necessary particulars to the Court for the sale of the property attached.

The next date of hearing was however not mentioned in this order, but the order

of the Reader recorded in vernacular said that a notice should issue to the judgment-debtor for 1st April 1935, and he should be called upon to furnish the necessary particulars of the property to be sold. A postscript was added to the effect that the judgment-debtor was present and that the original order in English had been shown to him. It may be observed that no notice was issued to the judgment-debtor in pursuance of that order. On 1st April 1935, counsel for the judgment-debtor made an application that time for furnishing the particulars be extended by one month on the ground that the time allowed was too short. This application was dismissed by the Senior Subordinate Judge. No order in English appears to have been recorded but the vernacular order reads :

The judgment-debtor has not put in any further conditions relating to the sale. On the other hand, he has applied for adjournment but that application of his is dismissed. The sale should be advertised in certain papers mentioned therein and should be held in the precincts of the Court on 3rd May 1935.

On 8th April a note was recorded that the decree-holder had taken no action to state clearly what his demand was. On 29th April 1935, the application for review submitted by the judgment-debtor was admitted to a hearing and an order was made at the same time staying the sale. Consequently, on 10th May, an order was made by the executing Court that the sale be stayed as ordered by the High Court and the next date of hearing was fixed on 7th June 1935. The application for review came before the same Letters Patent Bench on 7th June 1935 and was dismissed. On the same day an order was made by the executing Court to wait for the records of the case that had been sent to the High Court and the case was fixed for 16th August 1935. On 8th August 1935 an order appears to have been made postponing the case to 30th August 1935. This order is signed by Mr. S. R. Puri, Senior Subordinate Judge, Delhi. There is no explanation on the record however as to how the case was laid before that officer on 8th August, although the date fixed in the case was 16th August. On 16th August an order was recorded to the effect that records had come back from the High Court and that the necessary order would be made later. On that day as well as on 7th June 1935 no one was present on behalf of the judgment-debtor, Lala Barkat Ram, and the orders were made *ex parte*. On 22nd August 1935 the Senior Subordinate Judge record-

ed an order again in the absence of the judgment-debtor that the property attached be sold on condition that the minimum price be reserved as Rs. 22,500. He further ordered that proclamation be made on the lines of the previous proclamation dated 10th April 1935. The date for the sale of the property was fixed as 21st October 1935. In pursuance of this order a proclamation was made which bears the date 26th August 1935. In that proclamation, however, the value of the property to be attached was not mentioned nor was any mention made of the minimum price. On 19th October 1935 the judgment-debtor moved the Court for the postponement of the sale on the ground that the proclamation issued was defective. The main objections taken were that :

- (a) The reserve price was not mentioned;
- (b) the estimated value of the property to be sold was not entered;
- (c) the particulars of the decree were omitted;
- (d) some immovable properties attached to the Dholpur and Makrana partnerships were not specified; and
- (e) no details of the assets were given.

This application was dismissed by the Senior Subordinate Judge on the ground that the judgment-debtor would be entitled to raise objections to the publishing and conducting of sale under O. 21, R. 90, Civil P. C., and consequently he was not entitled to raise those objections at that stage. The sale was held on the date originally fixed, that is 21st October 1935. Objections to the sale were put in by the judgment-debtor both under O. 21, R. 90 and S. 151, Civil P. C., and those objections were disposed of by the Senior Subordinate Judge on 9th December 1935. By that order he held that the property sold was moveable and consequently no objections under O. 21, R. 90 could be maintained. Dissatisfied with this order, the judgment-debtor made an appeal to this Court which came for hearing before Coldstream J. The learned Judge agreed with the Senior Subordinate Judge and dismissed the appeal. The judgment-debtor took a Letters Patent appeal against that order and a Division Bench of this Court, of which I was a member again, reversed the order of Coldstream J., and in the course of the judgment that was delivered made the following remarks :

The Senior Subordinate Judge did not apply his mind to the merits of the judgment-debtor's application solely on the ground that the remedy under

R. 90 of O. 21 was open to him and if it is eventually found that that remedy is not available to him under the law the judgment-debtor is entitled to claim an adjudication upon the objections taken by him at an earlier stage. The property in suit is considerable and consists of various items situated at various places. It was absolutely essential therefore that the proclamation for its sale should have been issued in the manner in which the law required it to be issued and if the judgment-debtor had intimated to the Court in time that the proclamation was defective the Senior Subordinate Judge should have disposed of his objections on the merits. The result is that we accept the appeal and send the case back to the trial Court with direction to dispose of the objections raised by the judgment-debtor on 19th October in accordance with law. If the objections succeed, the sale will be cancelled, otherwise the sale shall stand confirmed.

This order was made on 25th February 1937. On 4th June 1937 the executing Court framed the following two issues :

- (1) Is the judgment-debtor estopped from raising the objections regarding the defective nature of the proclamations of sale; and
- (2) Has there been any material irregularity or fraud in publishing or conducting the sale of the property by reason of which the applicant sustained substantial injury.

The proceedings that were taken on these issues took about two years to finish and ultimately the case was adjourned for arguments to 18th March. Counsel for the judgment-debtor was not prepared on that date and the case was once more adjourned to 1st April. On 15th April counsel for the judgment-debtor argued the case, but as the decree-holder's arguments could not be finished on that day, the case was adjourned to 22nd April. On that day a fresh application was made by the judgment-debtor contending that the application for execution was barred by time and further that the executing Court had no jurisdiction, inasmuch as, on 15th October 1932, the decree was transferred directly to the Court of the Senior Subordinate Judge and not to the District Court as required by O. 21, R. 5, Civil P. C. The Senior Subordinate Judge eventually disposed of this case on 10th July 1939. He held that no objections could be raised to the conduct of the sale, that the irregularities pointed out in the publishing of the sale were not such as to justify the Court in setting aside the sale, that the judgment-debtor was estopped from raising objections to the defective nature of the proclamation, that the jurisdiction of the Court was not affected by the decree not having been sent to the District Court for execution and that the question of limitation was one to be considered by the transferring Court and not by the trans-

ferree Court. He consequently dismissed the objections. Hence this appeal. Counsel for the appellant has raised the same questions before me as were raised in the Court below. He contends that the Senior Subordinate Judge, Delhi, had no jurisdiction to entertain and carry on the execution proceedings that the application for execution was barred by time and that the sale could not but be cancelled in compliance with the order of the Letters Patent Bench as the proclamation for sale was on the face of it defective.

Taking the question of jurisdiction first, O. 21, R. 5, Civil P. C., lays down that where the Court to which a decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the District in which the decree is to be executed. The provision as it stands is mandatory. The only question that arises is whether non-compliance with this procedure deprives the Court to which the decree is sent of jurisdiction to take proceedings thereon. In 22 Cal 764,¹ it was held that the Court to which the decree was sent direct had no jurisdiction to execute it without an express order of the District Judge. The same principle was affirmed by a Division Bench of the Calcutta High Court in 22 I C 682² and by a Division Bench of the Patna High Court in 49 I C 374.³ A similar question arose before Dalip Singh J. in a case reported in A I R 1933 Lah 839⁴ and the learned Judge followed the authorities cited above. There is however, a later judgment of this Court reported in A I R 1937 Lah 174⁵ where Coldstream J. did not choose to follow the judgment of Dalip Singh J. and observed that the omission to transfer a decree through the Court of the District Judge was only an irregularity in procedure and could be waived. The learned Judge relied on 3 Luck 314⁶ where, under a different section of the Code of Civil Procedure, their Lordships of the Privy Council had remarked that if a party

did not object to a Court making an order and took part in subsequent proceedings he waived the objection, if any, to the irregularity committed in procedure. This judgment however in my view is distinguishable inasmuch as in that case the Court that had made the order was properly seized of the case, but in a case under O. 21, R. 5, the decree cannot but be sent to the District Court and consequently, if it is sent to any other Court, that Court has no jurisdiction at all from the very start. It was remarked by their Lordships of the Privy Council in another case reported in 51 Cal 361⁷:

If it was any other point except the point of jurisdiction, their Lordships would pay no attention to it; but they are bound to take notice of an objection to the jurisdiction however late in the day it may be raised, if it be that on the facts admitted or proved it is manifest that there is a defect of jurisdiction.

With all respect to the learned Judge, who decided A I R 1937 Lah 174,⁵ I prefer to follow Dalip Singh J. and hold that as the Senior Subordinate Judge, Delhi, had independently of the order of transfer no jurisdiction to execute the decree of the Ambala Court, all the proceedings taken by him so far are null and void. The decision of this question is sufficient to dispose of this appeal but inasmuch as it is not impossible that if an appeal is taken against this order, a Letters Patent Bench might come to a different conclusion, I proceed to dispose of the other questions too arising in the case.

The question of limitation, in my view, could not be raised at the stage at which it was raised though counsel for the respondent agrees that the transferee Court was competent to entertain it if properly raised. The matter had been pending in the executing Court for at least seven years. The judgment-debtor had even moved the High Court on several occasions in the course of those proceedings. No plea of limitation however was ever raised at any stage of the case. It is well settled that the principle of *res judicata* constructively applies to execution proceedings and this being so the judgment-debtor is debarred now from agitating the question of limitation which he could and should have taken but failed to take in the earlier stages of the case.

On the merits although I consider the result is unfortunate, I am bound to hold

1. Debi Dayal Sahu v. Maharaj Singh, (1895) 22 Cal 764.

2. Prakash Chandra v. Baldeo Ram, (1914) 1 AIR Cal 786=22 I C 682.

3. Kunja Behari Singh v. Tarapada Mitra, (1919) 6 A I R Pat 324=49 I C 374=4 Pat L J 49.

4. Peary Lal Debi Sahai v. Nanne Mal Panna Lal, (1933) 20 A I R Lah 839=147 I C 584.

5. Ohetan Lal v. Jagat Prasad, (1937) 24 A I R Lah 174=164 I C 917=39 P L R 284.

6. Jang Bahadur v. Bank of Upper India Ltd., (1928) 15 A I R P C 162=109 I C 417=55 I A 227=3 Luck 314 (P C).

7. Ram Lal Hargopal v. Kishen Chand, (1924) 11 A I R P C 95=83 I C 531=51 I A 72=20 N L R 33=51 Cal 361 (P C).

that the sale could not be maintained. No proclamation was issued in accordance with law and in spite of the fact that the judgment-debtor had raised objections to it at a very early stage of the case, the executing Court for one reason or other refused to apply its mind properly to those objections and proceeded with the execution of the decree in utter disregard of the judgment-debtor's interests. In fact, most of the orders leading to sale were, as pointed out above, made in the absence of the judgment-debtor. As already stated, when the proceedings were restarted after the records were sent back by the High Court, an order was made on 8th August postponing the case to 30th August. Still we find that in pursuance of another order on the same record fixing the case for 16th August the case was taken up by the executing Court on that day and adjourned to 22nd August for necessary action. On that date, an order for sale was made, fixing the sale for 21st October. All these orders were made in the absence of the judgment-debtor and although it was known that the judgment-debtor had moved the Court to grant him time to furnish the necessary particulars in respect of the property to be sold, no heed whatever was paid to his request and no opportunity allowed to him to supply the necessary particulars. On 19th October he once more moved the Court in this direction, but his application was again dismissed, and, as found by the Letters Patent Bench, on a clear misconception of law. The Bench referred the case back to the executing Court with a direction that if the proclamation was found to be irregular, the sale could not stand and must therefore be cancelled. In spite of this, the executing Court has brushed aside the irregularities in the publishing of the sale by merely stating that the sale price fetched was not inadequate.

In my view, in face of the order of the Letters Patent Bench this consideration could not be taken into account to get over the irregularities committed in the publishing of the sale. O. 21, R. 66, as amended by this Court, makes it incumbent upon the Court issuing the proclamation to include the estimate if any given by either or both the parties, and in this case neither was given. Further, even the reserved price was not mentioned in the copies of the proclamation issued to the public although it formed part of the original proclamation which had been signed by the Subordinate

Judge. The two irreconcilable orders, one recorded on 7th June 1935, and the other on 8th August 1935, further raise suspicion in my mind that there was some foul play going on in the Court of the Senior Subordinate Judge. I accordingly hold that even if the Court had jurisdiction to take out execution proceedings against the judgment-debtor, it was bound to cancel the sale in face of the irregularities found to have been committed in the publishing of the sale. The result is that I allow this appeal and set aside all the proceedings taken in the executing Court including the sale, declaring them to be null and void. The appellant will get his costs from the respondent in both the Courts.

G.N./R.K.

*Appeal allowed.***A. I. R. 1940 Lahore 398**

TEK CHAND AND DALIP SINGH JJ.

*Dhani Ram and others—Plaintiffs —
Appellants.*

v.

*Hamira and others—Defendants —
Respondents.*

Letters Patent Appeal No. 102 of 1939, Decided on 5th April 1940, from decree of Bhide J., in S. A. No. 1857 of 1938, D/- 13th March 1939.

(a) Words and Phrases—Word 'kuhl' means artificial watercourse.

The word 'kuhl' means an artificial watercourse, and not a natural stream or khad.

[P 399 C 2]

(b) Riparian Rights — Proprietors of certain patti having right to irrigate their land from certain kuhl— Right in abeyance partly owing to subsidence of channel bed and partly owing to their non-contribution towards expenses — Level of water subsequently raised — Proprietors held could not be prevented from exercising their right.

Certain proprietors of patti had the right to irrigate their lands from certain kuhl but this right was in abeyance for a number of years, partly owing to natural causes, by which the bed of the kuhl had subsided and it was not possible to irrigate their fields, and partly because they had not contributed towards the expenses. Subsequently the level of the water in the channel had been raised and it was possible for the proprietors to irrigate their fields :

Held that the proprietors were entitled to exercise their right and the fact that they had not contributed to the expense was no adequate ground for issuing injunction against them. [P 400 C 2]

Shamair Chand—for Appellants.

J. L. Kapur—for Respondents.

Tek Chand J. — The suit which has given rise to this appeal was instituted by the proprietors of two patts in Mauza

Amlehar, Tehsil Una, District Hoshiarpur, against 20 proprietors of the third patti for a declaration that the defendants had no right to irrigate their fields from a certain kuhl and for issue of a perpetual injunction restraining them from obstructing the kuhl in any way and taking water therefrom for irrigating their fields. The trial Court passed a decree for the declaration and injunction asked for against defendants 1 to 6 and 8 to 20 and dismissed the suit against defendant 7. On appeal, the Additional District Judge found that the plaintiffs were not entitled to the declaration or injunction against any of the defendants and dismissed the suit in its entirety. This judgment has been affirmed on second appeal by a Single Bench of this Court. The learned Judge in Single Bench however has granted a certificate for an appeal under Cl. 10 of the Letters Patent.

Mauza Amlehar, to which the parties belong, is divided into three tarafs, known as taraf Baba Wali, taraf Sikhan and taraf Dari Wali. The last named taraf (Dari Wali) is further sub-divided into three pattis, called patti Bare Wali, Patti Behari Wali and patti Dari Wali. The plaintiffs are proprietors in the first two of these pattis and the defendants are proprietors in patti Dari Wali. The kuhl in dispute passes through this village as well as another village called mauza Bhanjal and irrigates the lands in both villages. It is clear from the pleadings of the parties and the proceedings before the Court of first instance, that it was common ground between the parties at the trial that this kuhl was an artificial watercourse which was fed by a khad (natural mountain stream). The Additional District Judge on appeal appears to have assumed however that the water-channel in question was a natural stream and he decided the case on that basis. On second appeal the learned Judge observed that the dictionary meaning of the word kuhl was "a brook or rivulet, though at times it was also used to describe a canal." He considered the case in both aspects and after referring to the wajib-ul-arz of 1869 and the riwaj-i-ab-pashi of 1913-14 came to the conclusion that the defendants (except defendant 7) had the right to irrigate their fields from the kuhl.

Before us it was urged by counsel for the plaintiffs-appellants that the Additional District Judge and the learned Judge in Single Bench had erroneously assumed that the channel in question was a natural

stream. He rightly pointed out that this was not the contention of either party at the trial and he maintained that the word 'kuhl' does not mean a natural stream, a brook or a rivulet as has been supposed. In my opinion, these contentions are well founded and the case must be decided on the basis that the channel in question is an artificial watercourse. In the "Glossary of Vernacular Terms" given in Appendix 4 (p. 7) of the Final Report of the Second Revised Settlement 1910-14 of the Hoshiarpur District by Humphreys and Shuttleworth the word 'kuhl' is translated as meaning "an irrigation channel, from a stream." The same definition is to be found at p. 38 of the "Glossary of Vernacular Terms in the Settlement Report of Dera and Hamirpur Tahsils" of the neighbouring district of Kangra. There is no doubt that in these districts at least 'kuhl' is always used as meaning an artificial watercourse, and not a natural stream or khad. So far as the 'kuhl' in dispute is concerned, the matter is put beyond all doubt by the entries in the wajib-ul-arz of Mauza Amlehar prepared in the Settlement of Sambat 1926 (=1869 A. D.) which is the earliest available record dealing with the matter. In this wajib-ul-arz it is clearly stated that the lands in this village are irrigated by a kuhl, which had been constructed many years ago and which was fed from a khad (natural stream) known as Bari Wali and that the lands in the two villages were irrigated from this watercourse according to certain specified shares. Further, in the plaint, the jawab-i-dawa, the statements of the counsel for the parties and the evidence produced at the trial, there is not the slightest suggestion that the kuhl in dispute was not an artificial watercourse but was a natural stream. The learned District Judge therefore was wrong in treating the watercourse in question as a natural stream and deciding the rights of the parties on that basis.

It appears from the entries in the wajib-ul-arz of 1869 that this kuhl had existed for a very long time and that the proprietors of Mauza Bhanjal and Mauza Amlehar were entitled, respectively, to irrigate their fields for 11 and 4 days out of 15 days. It was further stated that during the four days allotted to Mauza Amlehar water was distributed amongst the three tarafs in certain specified shares, and in taraf Dari Wali amongst the proprietors of the three pattis, namely pattis Bari Wali, Behari Wali and Dari Wali. It was further stated that the

kuhl had fallen into disrepair and in order to effect the necessary repairs a takavi loan of Rs. 500 had been raised from Government, but as the proprietors of patti Dari Wali had declined to pay their pro rata share on the ground that their lands were higher than the level of the bed of the kuhl as it existed at that time, "therefore now they would not take share in the water." It is clear from the entry that the right of this patti to take their pro rata share of the water from the kuhl was admitted, but because they had declined to contribute towards the expenses for repairs the right remained in abeyance. In the riwaj-i-ab-pasi prepared in the Settlement of 1913-14 (Ex. P.3) it is clearly stated that the proprietors of taraf Dari Wali had got the right to take water from this kuhl and as between the proprietors in the tarafs inter se the distribution of water was to be according to ancestral shares. It is nowhere stated that the defendants, that is the proprietors of patti Dari Wali, had no right at all to irrigate their fields from this kuhl or that this right, if it ever existed, had been extinguished. It is no doubt true that in the statement of the proprietors recorded in 1912 in the course of the Settlement (Ex. P.2), it is mentioned that the proprietors of patti Dari Wali did not take water from the channel, but that was merely a record of the state of affairs as existing at the time and did not contain any declaration that their right had never existed or that it had become extinct.

It appears that in spite of the extensive repairs done in 1869, the kuhl again fell into disrepair and it did not contain sufficient water to irrigate the neighbouring fields, partly because the course of the channel was circuitous and partly because the bed had subsided by erosion, etc. In 1929 therefore the proprietors of Mauza Amlehar again made a joint effort to set it right and in order to ensure a continuous supply of water they straightened its course by constructing a parnala of galvanized iron sheets wound in iron wire, about 300 feet in length. By this device, the water level was considerably raised and it became possible for the defendants to irrigate their lands also. The funds for the construction of this parnala were contributed by proprietors in the various tarafs and pattis, and it has been found that six of the defendants contributed their pro rata shares at Rs. 2 per kanal for an area of $10\frac{1}{2}$ or 11 kanals. After the parnala had been con-

structed these defendants began to irrigate their fields, with the result that the present suit was brought by the plaintiffs (proprietors in the other two pattis or tarafs Dari Wali.) So far as the claim for declaration is concerned, I have no doubt that the suit must fail. As has been stated above, originally the defendants had the right to irrigate their lands from this kuhl, but this right was in abeyance for a number of years, partly owing to natural causes, by which the bed of the kuhl had subsided and it was not possible to irrigate the defendants' fields, and partly because they had not contributed towards the expenses in 1869. Now that the level of the water in the channel has been raised and it is possible for the defendants to irrigate their fields, there is no reason why they should not be allowed to exercise that right.

Nor has any case been made out for the issue of the injunction asked for. It is contended that assuming that the proprietors of this patti had the right to take water to irrigate their fields, they were liable to contribute their share of the cost of construction of the parnala and effecting other repairs and so long as they did not do so, they cannot exercise the right. There is ample evidence on the record—and it has been so found by the Courts below—that six of the defendants had contributed their pro rata share of the cost qua 11 kanals of land owned by them. It was conceded that on this finding no injunction could issue against these defendants as regards the remaining defendants, and also as regards the other lands of these six defendants, the plaintiffs may have a good claim for contribution if and when the defendants or any of them, attempted to irrigate these lands. But this is not an adequate ground for issuing the injunction asked for against them. No claim for contribution had been made in this suit, and there are no materials on the record on which the amount of contribution could be assessed. I would therefore say nothing about this matter, leaving it open to the parties to seek such relief as they may be entitled to in appropriate proceedings. For the foregoing reasons, I would affirm the judgments of the learned Judge in Single Bench and dismiss the appeal, but having regard to all the circumstances I would leave the parties to bear their own costs throughout.

Dalip Singh J. — I agree.

D.S./R.K.

Appeal dismissed.

A. I. R. 1940 Lahore 401

FULL BENCH

TEK CHAND, MONROE AND SKEMP JJ.

Lachhman Singh — Defendant —
Appellant.

v.

Natha Singh through Harnam Singh
and others—Plaintiffs—Respondents.

Second Appeals Nos. 1574 and 1208 of 1938 and Nos. 518, 851, 1323, 1447 and 1481 of 1939, Decided on 11th July 1940, from decree of Senior Sub-Judge, Amritsar, D/- 13th October 1938.

(a) Transfer of Property Act (1882), S. 58—Applicability to Punjab — Definitions of mortgages in Act are accepted in Punjab.

Though the Transfer of Property Act is not in force in the Punjab, the definitions of the various kinds of mortgages given in it have always been accepted as correctly describing their essential ingredients and incidents. [P 403 C 2]

(b) Mortgage — Usufructuary mortgage — Principal characteristics stated—Mortgagee in possession to enjoy usufruct in lieu of interest —Mortgagee to retain possession until mortgagor chose to redeem by paying principal — Mortgage is usufructuary.

The principal characteristics of a usufructuary mortgage are that there is no personal liability of the mortgagor to pay, nor has the mortgagee a right to have the mortgaged property brought to sale. Where the rents and profits of the property mortgaged are to be set off against interest and the mortgagee is entitled to retain possession until such time as the mortgagor chooses to redeem on payment of the principal sum secured, the transaction is a usufructuary mortgage: *Indian and English cases referred.* [P 404 C 1, 2]

(c) Mortgage — Usufructuary — Interest of usufructuary mortgagee is not debt within ordinary meaning of the word.

The essence of a "debt" is the liability of the obligor which the obligee is entitled to enforce by action. Where therefore a transaction neither imports the personal liability of the obligor to pay, nor confers on the obligee the right to recover the amount by the coercive machinery of the law, it cannot be called a "debt." A usufructuary mortgagor is under no liability to the mortgagee. He is under no legal obligation to pay; it is his option to redeem if and when he chooses. Consequently the interest of a "usufructuary mortgagee" is not a "debt" within the ordinary meaning of the word: 35 Bom 288; A I R 1928 Mad 648 and A I R 1938 All 577 (F B), Rel. on; 16 All 259 (F B), Expl. and Disting.; A I R 1938 All 564, Expl. [P 405 C 1, 2]

(d) Succession Act (1925), S. 214—Mortgage — Suit by mortgagee for recovery of amount due by sale of mortgaged property—Succession certificate is not necessary (Obiter).

A succession certificate is not necessary for maintaining a suit by a mortgagee for recovery of the amount due by sale of the mortgaged property: 16 All 259 (F B), Doubt; 29 Mad 77; 28 Bom 630; A I R 1934 Rang 369 and 26 Cal 839, Rel. on. [P 405 C 2; P 406 C 1]

(e) Punjab Relief of Indebtedness Act (7 of 1934), S. 7—Definition of "debt" in S. 7 is not exhaustive — Usufructuary mortgage does not create debt within meaning of S. 7 (1) — Nor is usufructuary mortgagor debtor within meaning of S. 7 (2).

The definition of "debt" in S. 7 (1) is not exhaustive. It enlarges the ordinary meaning of "debt," so as to include certain liabilities of the debtor enumerated therein, and at the same time, it excludes from its purview certain other of his liabilities which would otherwise be included in it. A "usufructuary mortgage" does not create a "debt" as contemplated by S. 7 (1) nor is a "usufructuary mortgagor" a "debtor" within the meaning of S. 7 (2). [P 405 C 1; P 406 C 2]

(f) Punjab Relief of Indebtedness Act (7 of 1934), S. 7 (2) — Last paragraph of S. 7 (2) does not refer to adjudication by Board as to whether transaction entered into by debtor is "debt"—It makes Board final judge as to whether a person possesses qualifications required under Section.

The last paragraph of S. 7 (2) makes the Board the final judge as to whether a particular debtor possesses the qualifications required under the Section. It does not refer to an adjudication as to the nature of the transactions entered into by him i. e., whether or not they are debts as defined in the Act. All that S. 7 (2) provides is that if the Board had decided that the person concerned earns his livelihood in one of the manners mentioned in the sub-section or that he has, or has not, lost his status for any of the reasons given in the "explanation," its decision cannot be questioned in a Civil Court. [P 407 C 2]

(g) Punjab Relief of Indebtedness Act (7 of 1934), S. 21 (c)—S. 21 (c) has no applicability to suits relating to transaction which does not create "debt" as defined in Act.

Section 21 (c) refers to suits to recover a "debt;" it has no applicability to suits relating to transactions like a "usufructuary mortgage" which does not create a "debt" as defined in the Act. [P 407 C 2]

(h) Punjab Relief of Indebtedness Act (7 of 1934), S. 13 (2) — Jurisdiction of Board is limited to dealing with "debts" under Act — Usufructuary mortgage—Order by Board treating amount secured as "debt" and declaring it to have been discharged under S. 13 (2) is ultra vires—Civil Court can question validity of order.

The jurisdiction of the Debt Conciliation Boards under the Punjab Relief of Indebtedness Act is limited to dealing with "debts" as defined in the Act. They have no authority to deal with transactions of any other kind with which the debtor might be concerned. If therefore a Board purports to pass an order, or make a declaration in respect of a transaction which is not a "debt" as defined in the Act, it clearly does so in excess of its jurisdiction and its decision can be questioned by the Civil Court. An order passed by the Board, treating the amount secured on a usufructuary mortgage as a "debt" and declaring that it has been discharged for all purposes and all occasions, is ultra vires of the Board, and the Civil Courts are not debarred from entertaining the plea of the mortgagee that his mortgage is not affected by the order: A I R 1937 Nag 259; A I R 1938 Nag 203;

169 I C 268 and I L R (1939) Nag 281, Rel. on.

[P 406 C 2; P 407 C 1, 2; P 408 C 1]

(i) Jurisdiction—Civil Courts — Exclusion by special law.

It is well settled that the powers of a tribunal of special jurisdiction are circumscribed by the statute under which it was constituted. Such tribunal must act within its powers, and so long as it does so, its orders—whether right or wrong—cannot be challenged except in the manner and to the extent prescribed in the statute, and Courts of ordinary jurisdiction cannot question them. But where, and in so far as, its actions are in excess, or in contravention of the powers conferred on it, they are ultra vires and of no legal effect and obviously cannot have the same immunity: (1874) L R 5 P C 417; 35 Cal 859 and A I R 1940 Lah 377 (F B), Rel. on. [P 407 C 1]

Achhru Ram — *for Appellant.*Yashpal Gandhi — *for Respondents.*

Tek Chand J.—The following seven cases have been referred by different Benches of this Court to a Full Bench and as the questions involved are the same, they have been heard together and will be disposed of in one judgment: R. S. A. 1208-38, Amar Chand v. Hoshnak Singh; R. S. A. 1574-38, Lachhman Singh v. Harnam Singh, etc.; R. S. A. 518-39, Bhagat Singh v. Khanu; R. S. A. 851-39, Sardar v. Lal Khan, etc.; R. S. A. 1323-39, Labh Singh, etc. v. Parma Nand; R. S. A. 1447-39, Narindar Singh v. Narinjan Singh, etc.; R. S. A. 1481-39, Gurbachan Singh v. Gulab.

The material facts are no longer in dispute and are substantially the same in all cases. In each case, a mortgage with possession of agricultural land had been effected and the conditions were that the mortgagee would pay the land revenue, cultivate the land himself or through tenants and realize the produce, which will equalize interest, and that redemption would take place whenever the mortgagor paid to the mortgagee the principal sum secured. There was no provision empowering the mortgagee to bring the mortgaged property to sale, nor was there any stipulation indicating that the mortgagor had incurred personal liability for repayment of the mortgage money. The mortgagee was put in actual possession of the land and (except in one case to which reference will be made presently) retained it till institution of the suit. It may be stated that none of these mortgages infringed the provisions of the Punjab Alienation of Land Act; in some of them both the mortgagor and the mortgagee are members of agricultural tribes and in others both are non-agriculturists. After the passing of the Punjab Relief of Indebtedness Act, 7 of 1934, an application was made under S. 9

of the Act before the Debt Conciliation Board, established in the area where the land concerned in each case is situate, to "effect a settlement of the debts" due by the mortgagor with his creditors. In the list of debts, alleged to be due by him, the mortgage in question was also included and the mortgagee was mentioned as one of the creditors. The Board, in accordance with the provisions of the Act, served notice on the mortgagee to appear on the date fixed. The mortgagee however either did not appear, or, if he appeared, did not produce the mortgage deed nor did he submit a statement of the amount due to him on foot of the mortgage. On this the Board, treating the amount secured on mortgage as a "debt," passed an order under sub-s. (2) of S. 13 of the Act declaring that, as the mortgagee had not complied with the provisions of sub-s. (1) of that Section, his mortgage "shall be deemed for all purposes and all occasions to have been fully discharged."

In three of these cases (R. S. A. No. 1208 of 1938, R. S. A. No. 1574 of 1938 and R. S. A. No. 1447 of 1939) the mortgagors, on the strength of the order passed by the Board, instituted suits in the Civil Court against the mortgagee for possession of the mortgaged land without any payment. In three others (R. S. A. No. 518 of 1939, R. S. A. No. 851 of 1939 and R. S. A. No. 1323 of 1939) the mortgagees sued for a declaration that they were in lawful possession as mortgagees and were entitled to retain it until redemption on payment of the mortgage money in accordance with the terms of the deed. In the seventh case (R. S. A. No. 1481 of 1939), after the order of the Board, the mortgagor had taken forcible possession of the land and, accordingly, the mortgagee sued for recovery of possession, alleging that the mortgage was still subsisting, that the mortgagor's act was unlawful and that possession be restored to him till the mortgage is redeemed as provided in the deed. In each case the mortgagee contended that the mortgage in his favour was 'usufructuary,' that such a mortgage does not create a 'debt,' nor is the mortgagor a 'debtor,' as defined in S. 7, Punjab Relief of Indebtedness Act, and, therefore, the Board had no jurisdiction to "effect a settlement" between them in respect of the mortgage and its order declaring that the mortgage shall be deemed to have been discharged was ultra vires, void and of no legal effect whatever. On behalf of the mortgagor these contentions were traversed,

and it was averred that the order passed by the Board under S. 13 (2) was valid and proper and that Civil Courts had no jurisdiction to question its validity or to adjudicate upon the question as to whether the mortgage had been discharged or was still subsisting.

Four of these cases (R. S. A. No. 518 of 1939, R. S. A. No. 851 of 1939, R. S. A. No. 1323 of 1939 and R. S. A. No. 1481 of 1939) were heard by the same Subordinate Judge at Rawalpindi, who decided in favour of the mortgagee. On appeal the Senior Subordinate Judge, Rawalpindi, however, came to the contrary conclusion and held that a usufructuary mortgage created a 'debt' within the meaning of the Act and that Civil Courts had no jurisdiction to question the validity of the declaration made by the Board. In two other cases, (R. S. A. No. 1574 of 1938 and R. S. A. No. 1447 of 1939) which are from Amritsar district, the trial Judges decided against the mortgagees and their decisions were upheld on appeal by the Senior Subordinate Judge and the Additional District Judge of Amritsar respectively. In R. S. A. No. 1208 of 1938, the trial Judge decided in favour of the mortgagor, but his decision was set aside on appeal by the Senior Subordinate Judge, Hoshiarpur. In all seven cases second appeals were preferred in this Court; two of which (R. S. A. No. 1208 of 1938 and R. S. A. No. 1574 of 1938) came up for hearing before Skemp J. sitting in Single Bench, who in an elaborate order tentatively expressed his opinion in favour of the contentions of the mortgagee, but in view of the difficulty and importance of the questions involved referred them to a Full Bench. Subsequently, four other appeals (R. S. A. No. 1447 of 1939, R. S. A. No. 851 of 1939, R. S. A. No. 1323 of 1939 and R. S. A. No. 1481 of 1939) came up before Din Mohammad J., and the fifth, R. S. A. No. 518 of 1939, before Dalip Singh J., and they also referred them to the Full Bench. The two questions which require decision are: (1) Does a mortgage of the type described above create a 'debt' within the meaning of S. 7, Punjab Relief of Indebtedness Act? and (2) Where after a Debt Conciliation Board, constituted under Part IV of the Act, has passed an order purporting to be under S. 13 (2) of the Act, declaring that a particular debt shall be deemed to have been discharged for all purposes and all occasions, is a Civil Court competent to decide that the 'transaction' in question does not create a 'debt'

as defined in the Act, and that the order of the Board was ultra vires and of no legal effect?

Before examining the provisions of the Act, it seems necessary to determine the exact nature of the transactions in question and the rights and obligations of the parties under them. From the conditions of the mortgages already given, it will appear that they are "usufructuary mortgages" as defined in cl. (d), S. 58, T. P. Act. That Act, of course, is not in force in the Punjab, but the definitions of the various kinds of mortgages given in it have always been accepted as correctly describing their essential ingredients and incidents. This definition is as follows:

(d) Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee and authorizes him to retain such possession until payment of the mortgage money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage money, or partly in lieu of interest and partly in payment of the mortgage money, the transaction is called a "usufructuary mortgage," and the mortgagee a "usufructuary mortgagee."

It will be seen that the characteristics of a usufructuary mortgage, as defined above, are: (1) that the possession of the mortgaged property is delivered, or agreed to be delivered, to the mortgagee; (2) that he is to appropriate the rents and profits either (a) in lieu of interest, or (b) towards the principal, or (c) partly in lieu of interest and partly in payment of the principal; (3) that in none of these cases the mortgagor incurs any personal liability to repay; and (4) as the mortgagor has not bound himself to repay (but may repay if and when he chooses) there can be no "forfeiture" and therefore the remedies by way of foreclosure or sale are not open to the mortgagee.

These propositions are too well established to require an elaborate discussion. In 44 Cal 388¹ at p. 401 their Lordships of the Privy Council after examining the particular deed before them held that, having regard to the nature of the deed which was a usufructuary mortgage only and to its terms, any personal liability on the part of the "mortgagor was excluded." Again, there is a large number of cases in which it has been held that a usufructuary mortgagee is not entitled to sue for sale of the property

1. *Ram Narain Singh v. Adindra Nath*, (1916) 3 A I R P C 119=38 I C 932=44 I A 87 = 44 Cal 388 (P C).

(12 Mad 109,² 20 Bom 296,³ 11 All 367⁴ and 24 Cal 677⁵) and where there is a stipulation to the contrary the transaction ceases to be one of "usufructuary mortgage" but is what is described as an "anomalous mortgage." As stated in (2) above, usufructuary mortgages are of three kinds. Of these, the two described in (b) and (c) are self redeeming; the mortgagee has to look to the rents and profits only to re-pay himself and when his entire charge is so liquidated he must re-deliver possession of the mortgaged property to the mortgagor free from all encumbrances. A common instance of this kind of mortgage found in the Punjab, especially in the western districts, is the *lekha mukhi* mortgage where the mortgagee takes over the land and binds himself to keep the *lekha* (account) of the produce, and as soon as the principal and interest have been paid off therefrom, he must surrender the property to the mortgagor. In this mortgage the mortgagor undertakes no personal liability and while he is competent at any time to claim redemption on payment of the amount found to be due under the mortgage the mortgagee is not entitled to sue for his debt (per Plowden J. in 90 P R 1881⁶). Another familiar instance of this kind of mortgage is the one permitted under S. 6 or S. 14, Punjab Alienation of Land Act, in which the entire principal and interest is automatically wiped off within a specified period, not exceeding 20 years, irrespective of whether the rent and profits actually realized by the mortgagee are more or less than the principal sum secured and interest due thereon. In this case also there is no personal liability of the mortgagor to pay nor has the mortgagee a right to bring the property to sale.

The most common form of usufructuary mortgage however is that described in 2 (a) above, and it is to this class that the mortgages in the cases before us belong. Here the rents and profits are to be set off against interest and the mortgagee is entitled to retain possession until such time as the mortgagor chooses to redeem on payment of the principal sum secured. This form of mortgage has been in vogue in India since ancient times. It was known to the Hindu lawyers

under the expressive name of *bhog bandakam* which literally means "mortgage (bandaka) by enjoyment (bhog)." It was a mortgage for an indefinite period, during which the mortgagee enjoyed the usufruct and the mortgagor was entitled to redeem at any time on payment of the principal. It retained its popularity during the Mughal period, especially among the Mahomedan creditors who by obtaining possession of property (as a *zer-i-peshgi* lessee and under other similar names) and appropriating the rents and profits till redemption, could find a safe investment for their money without charging interest. This form of mortgage is not peculiar to India alone. It has been described by Dr. Ghose and other standard writers as analogous to what was known as a 'Welsh mortgage' in England, where it has now become obsolete. But it has been the subject of judicial consideration in Ireland in recent times, and there are reported cases to which reference may usefully be made. In (1842) 2 Dr & War 480⁷ Lord St. Leonards described a Welsh mortgage as one

under which the lender goes into possession of the rents and continues to receive them until the party who borrowed the money, chooses to redeem and this he is always permitted to do, so that the peculiarity is that while there can be no foreclosure on the part of the mortgagee, still the right of redemption subsists in the mortgagor.

More recently in Ireland, in (1890) 24 L R Ir 577,⁸ Johnson J. described a Welsh mortgage as

a kind of security by which on the one side the land is assured to the lender as his security — his possession of the land and enjoyment of the profits being in lieu of interest — while on the other side, the borrower is under no personal obligation to pay the principal money but is entitled to redeem at any time upon its payment.

Again, in (1914) 1 Ir R 23⁹ it was pointed out that

a power of sale was wholly inconsistent with the 'continuing' right of redemption which the Welsh mortgage carries and that the express inclusion in the security of such a stipulation showed that security was not a Welsh mortgage.

It will be clear from the foregoing discussion that the principal characteristics of a usufructuary mortgage are that there is no personal liability of the mortgagor to pay, nor has the mortgagee a right to have the mortgaged property brought to sale. The next question for consideration is whether a mortgage of this kind creates a 'debt' and the mortgagor is a 'debtor' as defined

2. *Chathu v. Kunjan*, (1889) 12 Mad 109.

3. *Sadashiv v. Vyankatrao*, (1896) 20 Bom 296.

4. *Umda v. Umrao Begam*, (1889) 11 All 367 = 1889 A W N 140.

5. *Luchmeshar Singh v. Dookh Mochan Jha*, (1897) 24 Cal 677.

6. *Gahimal v. Shera*, (1881) 90 P R 1881.

7. *Balfe v. Lord*, (1842) 2 Dr & War 480 = 1 Con & L 519 = 59 R R 786.

8. *Cassidy v. Cassidy*, (1890) 24 L R Ir 577.

9. *Re Cronin*, (1914) 1 Ir R 23.

in the Punjab Relief of Indebtedness Act. S. 7 (1) of the Act reads as follows :

'Debt' includes all liabilities of debtor in cash or in kind, secured or unsecured, payable under a decree or order of a Civil Court or otherwise, whether mature or not, but shall not include debts incurred for the purposes of trade, arrears of wages, land revenue or anything recoverable as an arrear of land revenue, or any debt which is barred by the law of limitation, or debts due to Co-operative Banks, etc. etc.

It will be seen that this definition is not exhaustive. It enlarges the ordinary meaning of 'debt,' so as to include certain liabilities of the debtor enumerated therein, and at the same time, it excludes from its purview certain other of his liabilities which would otherwise be included in it. Now, can money secured by a 'usufructuary mortgage' be called a 'debt' either according to the ordinary meaning of the word, or its enlarged significance under the Act? In Webster's Dictionary, 'debt' is defined as that which is due from one person to another, whether money, goods or services; that which one person is bound to pay to another or to perform for his benefit; thing owed; obligation; liability.

Similarly, in the Oxford English Dictionary the definition given is that which is owed or due; anything (as money, goods or service) which one person is under obligation to pay or render to another.

In Stroud's Judicial Dictionary a debt is described as being a "sum payable in respect of a liquidated money demand, recoverable by action." The essence of a "debt," thus, is the liability of the obligor which the obligee is entitled to enforce by action. Where therefore a transaction neither imports the personal liability of the obligor to pay, nor confers on the obligee the right to recover the amount by the coercive machinery of the law, it cannot be called a "debt." This was not seriously disputed by the learned counsel for the mortgagors. But they contended that under the enlarged definition, as given in the Act, "debt" includes a "secured liability of the debtor" and a usufructuary mortgage is a "secured liability." This contention is however based on a misconception of the legal significance of "liability." As pointed out by Salmond in his Jurisprudence (Edn. 9, page 498), liability is the *vinculum juris* not of mere duty; . . . it pertains not to the sphere of 'ought' but to that of 'must.' It has its source in the supreme will of the State, vindicating its supremacy by way of physical force in the last resort against the un-conforming will of the individual. A man's liability consists in those things which he must do or suffer, because he has already failed in doing what he ought. It is the ultimatum of the law.

Judged in this light, it must be conceded

that a usufructuary mortgagor is under no liability to the mortgagee. He is under no legal obligation to pay; it is his option to redeem, if and when he chooses. That the interest of a "usufructuary mortgagee" is not a "debt" and cannot be attached as such under O. 21, R. 46, Civil P. C., has been held in numerous cases. In 35 Bom 288¹⁰ Scott C. J. and Batchelor J. held that in the case of a usufructuary mortgage there was no "debt" payable by the mortgagor to the mortgagee which could be attached in execution of a money decree against the assignees of the mortgagee and therefore the procedure laid down in S. 268 of the Code of 1882 (= O. 21, R. 46 of the Code of 1908) was not applicable. To the same effect is the decision of the Madras High Court in 111 I C 218.¹¹ A Full Bench of the Allahabad High Court in I L R (1938) All 904¹² has described the interest of a usufructuary mortgagee as "a right to the benefits and usufructs arising out of it" and nothing more.

The learned counsel for the mortgagors referred us to a decision of the Full Bench of the Allahabad High Court in 16 All 259¹³ where it was held that a suit for sale of property on a mortgage could not be maintained without a succession certificate as the suit related to a "debt" within the meaning of the Succession Certificate Act, 7 of 1889. The mortgage under consideration in that case however was not usufructuary, as appears from the statement of facts at page 269, for the plaintiff in his plaint had in the first instance claimed a decree against the defendant for a certain sum of money together with interest and costs, and had also prayed that in default of payment, the mortgaged property be sold and in case the sale proceeds were found to be insufficient, a decree for the balance be passed against the mortgagor personally or against her property other than that which was the subject of the mortgage. It may also be stated that the correctness of the rule laid down by the Allahabad High Court in the case cited, that a succession certificate is necessary for maintaining a suit by a mortgagee for recovery of the amount due by

10. Mani Lal v. Motibhai, (1911) 35 Bom 288=10 I O 812=13 Bom L R 233.

11. Subraya Pai v. Subramania Pattar, (1928) 15 A I R Mad 648=111 I C 218.

12. Fateh Singh v. Raghubir Sahai, (1938) 25 A I R All 577=178 I C 12 = I L R (1938) All 904=1938 A L J 881 (F B).

13. Fateh Chand v. Muhammad Bakhsh, (1894) 16 All 259=1894 A W N 74 (F B).

sale of the mortgaged property is open to serious doubt, and that case has been dis-sented from expressly in 29 Mad 77,¹⁴ 28 Bom 630,¹⁵ 12 Rang 690¹⁶ and 26 Cal 839.¹⁷ The practice in the Punjab has uniformly been not to require succession certificates in such cases. Counsel next relied upon A I R 1938 All 564,¹⁸ a case under the U. P. Agriculturist Debtors' Relief Act, 27 of 1934, the headnote of which seems at first sight to support the mortgagor's contention. In that case however it was definitely found by the learned Judges (p. 566, col. 2) that the transaction in question was not a usufructuary mortgage. The discussion in the judgment as to whether the usufructuary mortgage creates a "debt" and the usufructuary mortgagor is a "debtor" was thus really obiter. Further the suit was by the mortgagor under S. 33 of the Act for an account of "money lent" to him by the defendant-mortgagee, and the decision turned on whether "money lent" on the mortgage was a "loan" within the meaning of the Act. In S. 2 (10) of that U. P. Act, "loan" is defined as meaning

an advance to an agriculturist, whether in money or in kind and shall include any transaction which is in substance a loan.

This definition is much wider than that of "debt" in the Punjab Relief of Indebtedness Act, as it stands at present. The provisions of the two Acts are not in pari materia and therefore the case cited is of no real assistance in interpreting the Punjab Act. Before concluding this part of the case, a passing reference must be made to sub-s. (2) of S. 7, Punjab Act, which defines a "debtor" as meaning "a person who owes a debt" and possesses certain other qualifications (which are set out in detail in the sub-section and which need not be reproduced here as they are not material for our present purposes.) It was admitted that this definition does not carry the matter further, for, where a transaction is not a "debt" as defined in the Act, a party to it cannot be described as a "debtor." For the foregoing reasons, the first question must be answered in the negative, and it must be

held that a "usufructuary mortgage" does not create a "debt" and a "usufructuary mortgagor" is not a "debtor" within the meaning of the Act.

The next question is whether a Debt Conciliation Board, constituted under Part IV of the Act, has jurisdiction to deal with a mortgage of this kind, and if it has actually passed an order under S. 13 (2) declaring that the mortgage shall be deemed to have been discharged for all purposes and all occasions, whether such order is final, or can its validity be questioned in Civil Courts. An examination of the provisions of this Part of the Act shows that Debt Conciliation Boards are established for the purpose of "amicable settlement between 'debtors' and their creditors:" (S. 8). The proceedings before the Board are started on application made by a "debtor" or any of his creditors, who has to state, inter alia, that the "debtor" is unable to pay his "debts" (Ss. 9 and 11). The Board is then to fix a date for hearing the application, when it has to publish a notice in the prescribed manner, calling upon every creditor of the "debtor" to submit a statement of the "debts" owed to him by the "debtor" within a specified time (S. 13 (1).) The failure of a creditor to submit a statement in response to this notice entails very serious consequences. Sub-s. (2) of that Section lays down that

every "debt" of which a statement has not been submitted to the Board in compliance with the provisions of sub-s. (1) shall be deemed for all purposes and all occasions to have been duly discharged.

The succeeding Sections contain the procedure for submission of the statement of debts, the manner in which the creditor and the debtor are to explain their respective cases "regarding each debt;" the method by which the Board is to attempt to bring about an amicable settlement; and if it succeeds in doing so, how the agreement is to be registered; and if a creditor refuses to accept a 'fair offer' by the debtor the circumstances in which the Board is to issue a certificate in "respect of debts." It is clear from this analysis of the relevant provisions of the Act, that these Boards have been established for the purpose of bringing about amicable settlement between a 'debtor' and his creditors in respect of his 'debts' as defined in the Act; and their jurisdiction is limited to dealing with such 'debts' only. They have no authority to deal with transactions of any other kind with which the debtor might be concerned.

14. Palaniyandi Pillai v. Veerammal, (1906) 29 Mad 77.

15. Nanchand v. Yenawa, (1904) 28 Bom 630 = 6 Bom L R 588.

16. Saw Chong Gye v. Hafiz Bibi, (1934) 21 A I R Rang 369 = 153 I C 375 = 12 Rang 690.

17. Mahomed Yusuf v. Abdur Rahim Bepari, (1899) 26 Cal 839 = 4 C W N 558.

18. Wahiduddin v. Makhan Lal, (1938) 25 A I R All 564 = 178 I C 177 = I L R (1938) All 781 = 1938 A L J 872.

If therefore a Board purports to pass an order, or make a declaration in respect of a transaction which is not a 'debt' as defined in the Act, it clearly does so in excess of its jurisdiction. It is well settled that the powers of a tribunal of special jurisdiction are circumscribed by the statute under which it was constituted. Such tribunal must act within its powers, and so long as it does so, its orders, whether right or wrong, cannot be challenged except in the manner and to the extent prescribed in the statute, and Courts of ordinary jurisdiction cannot question them. But where, and in so far as, its actions are in excess, or in contravention of the powers conferred on it, they are ultra vires and of no legal effect and obviously cannot have the same immunity. As pointed out by their Lordships of the Privy Council in the leading case (1874) LR 5 P C 417,¹⁹ where an order of a quasi-judicial authority is objected to before a Court, it has to be seen whether the objection relates

to defect of jurisdiction, founded on the character and constitution of the tribunal, the nature of the subject-matter of the enquiry or the absence of some preliminary proceeding which was necessary to give jurisdiction to it.

If any of these things is established, the order is *coram non iudice* and of no effect whatever. If however, the objection rests solely on the ground that the tribunal has erroneously found a fact which it was competent to try, the objection cannot be entertained.

See also the judgment of Mookerjee J. in 35 Cal 859²⁰ (at pp. 865-8) where the question is discussed at great length and the authorities are collected, and the recent decision of a Full Bench of this Court in Second Appeal No. 90 of 1939.²¹ For the mortgagors reliance was placed on the last paragraph of sub-s. (2) of S. 7 and S. 21 of the Act and it was contended that they specifically bar the jurisdiction of Civil Courts to go into matters decided by the Debt Conciliation Board. But neither of these Sections affects the matter under consideration before us. In the last paragraph of S. 7 (2) it is laid down that if any question arises in proceedings under this part of the Act, whether a person is a debtor or

not, the decision of a Debt Conciliation Board shall be final.

This sentence appears after the definition of 'debtor' given in the earlier part of the sub-section, which defines a 'debtor' as meaning a person who owes a debt and who possesses certain qualifications, namely that he earns his livelihood mainly by agriculture and is either a landowner, tenant etc. It is clear that this paragraph makes the Board the final judge as to whether a particular debtor possesses the qualifications required under the Section. It does not refer to an adjudication as to the nature of the transactions entered into by him, i. e. whether or not they are debts as defined in the Act. In other words, all that this Section provides is that if the Board had decided that the person concerned earns his livelihood in one of the manners mentioned in the sub-section or that he has, or has not, lost his status for any of the reasons given in the "explanation," its decision cannot be questioned in a Civil Court.

Section 21 debars Civil Courts from entertaining suits (a) to question the validity of any procedure or the legality of any agreement made under this Act, or (b) to recover any debt in respect of which an agreement has been recorded in S. 17, or (c) to recover any debt which has been deemed to have been duly discharged under sub-s. (2) of S. 13. Admittedly, cls. (a) and (b) are irrelevant to the cases before us; cl. (c) refers to suits to recover a "debt;" it has no applicability to suits relating to transactions like a "usufructuary mortgage" which, as already shown, does not create a "debt" as defined in the Act. In this connexion, reference may be made to 170 I C 905,²² A I R 1938 Nag 203,²³ 169 I C 268²⁴ and 169 I C 323,²⁵ where similar provisions of the C. P. Debt Conciliation Act were held not to bar consideration by Civil Courts of matters decided by Debt Conciliation Boards, in excess, or in contravention, of the powers conferred on them by the Act. For the foregoing reasons, the second question must be answered in the affirmative, that an order passed by the Board, treating the amount secured on a usufructuary mortgage as a "debt" and declaring that it

19. Colonial Bank of Australasia v. Willan, (1874) LR 5 P C 417=48 L J P C 39=30 LT 237=22 W R 516.

20. Chairman of Giridhi Municipality v. Suresh Chandra, (1908) 35 Cal 859=7 C L J 631=12 O W N 709.

21. Municipal Committee of Montgomery v. Sant Singh, Reported in (1940) 27 A I R Lah 377 (F B).

22. Shivdin v. Ramratan, (1937) 24 A I R Nag 259=170 I C 905=I L R (1938) Nag 489.

23. Kanhaiya Lal v. Govind Tukaram, (1938) 25 A I R Nag 203=174 I C 962.

24. Motiram v. S. S. Bhuramalsao, (1936) 169 I C 268.

25. Ram Lal v. Sheo Lal, (1936) 169 I C 323=I L R (1939) Nag 281.

has been discharged for all purposes and all occasions, is ultra vires of the Board, and that Civil Courts are not debarred from entertaining the plea of the mortgagee that his mortgage is not affected by this order. With this expression of opinion on the questions of law involved, the cases are remitted to the Single Bench for disposal.

Monroe J.—I agree entirely.

Skemp J.—So do I.

G.N./R.K. *Order accordingly.*

A. I. R. 1940 Lahore 408

BHIDE J.

Hafiz Karim-ud-Din and another —
Plaintiffs—Appellants.
v.

Mt. Nasiban and another —
Defendants—Respondents.

Second Appeal No. 45 of 1939, Decided on 6th March 1940, from decree of Senior Sub-Judge, Karnal, D/- 31st August 1938.

Custom (Punjab) — Succession — Arains of Karnal town — Self-acquired property — Brothers do not exclude daughters.

According to the custom governing the Arains of the Karnal town in the Punjab in matters of succession to the self-acquired property of the propositus the brothers do not exclude daughters and are not entitled to succeed in preference to the daughters. The *Riwaj-i-am* of 1880 recording the aforesaid custom should be preferred to the Customary law of the Karnal District compiled in 1910 : 52 P R 1885; 19 P R 1906; 43 P R 1913 and A I R 1925 Lah 306, *Rel. on.* [P 408 C 1; P 409 C 1, 2]

Shamair Chand—*for Appellants.*

Ghulam Rasul—*for Respondents.*

Judgment.—The plaintiffs who are the brothers of one Allah Dia (deceased) sued in this case for possession of certain land left by him, on the ground that they were entitled to succeed to it in preference to the defendants who are daughters of Allah Dia. The Courts below have dismissed the suit and plaintiffs have preferred a second appeal. The parties to the suit are 'Arains' of Karnal town and the property in dispute is not alleged to be ancestral (*vide* trial Court's decision on issue 1). The Courts below in deciding the suit in favour of the defendants have relied on the *Riwaj-i-am* of 1880 relating to pargana Karnal and certain instances cited by the defendants including four in the family of the parties. The learned counsel for the plaintiffs-appellants contended that the Customary law of the Karnal district prepared in 1910 supported the claim of the plaintiffs and should have

been preferred to the old *Riwaj-i-am* of 1880. Secondly he urged that the instances produced by the defendants are of little or no value.

The main point for decision in this appeal is whether the Courts below were right in relying on the *Riwaj-i-am* of 1880 in preference to the Customary law of the Karnal District prepared in 1910. According to the answer to question 18 in the latter compilation, it would appear that a daughter is not entitled to succeed amongst 'Arains.' There is no specific mention of 'Arains' in the answer to question 18. But after specifying certain exceptions it is stated in the answer to that question that in no other tribe can a daughter succeed. This statement would seem to apply to 'Arains' who were amongst the tribes who were consulted at the time of the preparation of the Customary law, according to the list of tribes given at the commencement of the book. The learned counsel for the respondents invited attention to the note to question 18 appended by the author of the Customary law and contended that this note shows that the statement of custom given in the answer to question 18 could not be correct so far as 'Arains' are concerned. The note is as follows :

The Customary law in Rohtak and Gurgaon agrees with the opinion of the leading tribesmen of Karnal pargana and Panipat Tehsil recorded at the last Settlement and affirmed unchanged on revision to the effect that under no circumstances whatever is a daughter entitled to succeed to an estate. Any male, no matter how distant, is considered by the zamindars of this tract — and it would seem therefore of the entire Delhi territory — to be entitled before daughters of the last proprietor.

Now the above note does not certainly represent correctly the customary rule of succession of daughters as stated in the *Riwaj-i-am* of 1880. The *Riwaj-i-am* of pargana Karnal prepared in that year clearly shows that amongst Arains, a daughter succeeded in the absence of male issue. This rule, as regards succession of daughters in the case of 'Arains,' was distinctly stated in 1880 to be different to that prevailing amongst other tribes (*vide* Ex. D/17). If this rule as given in 1880 was considered by the compiler of the Customary law of the Karnal District (1910) to be incorrect, he would have said so. But no such statement appears in the latter compilation. In the circumstances, there is force in the contention of the learned counsel for the respondents that the rule as regards daughters' succession amongst 'Arains' as stated in 1880

seems to have been somehow overlooked by the author of the 'Customary law' prepared in 1910. The entry in the *Riwaj-i-am* of 1880 is further supported by the instances relied upon by the defendants which have been carefully considered in the judgment of the trial Court. Three of these instances have been moreover found to be from the family of the parties, viz. instances Nos. 2, 10 and 11 (*vide* pedigree-tables Nos. 28 and 31 and evidence of D. W. 4, D. W. 10, etc.). Instance No. 1 was of a case decided in 1871 after an elaborate enquiry and this old instance is also a valuable piece of evidence in support of the correctness of the entry in the *Riwaj-i-am* of 1880. The learned Judge of the trial Court has ignored instances Nos. 3 to 7 relied on by the defendants on the ground that they were cases of gifts. But if the collaterals were entitled to succeed in preference to daughters as amongst other tribes, it is not likely that these gifts would have been allowed to go unchallenged by them. There are some reported judicial decisions also which go to show that succession of females is favoured amongst Arains: see e. g. 52 P R 1885,¹ 19 P R 1906,² 43 P R 1913³ at p. 73, 6 Lah 332⁴ at p. 336.

The appellants have, on the other hand, not been able to produce any good instances from Karnal Tehsil in support of their case as pointed out by the trial Court. The evidence produced by them was merely oral and in two cases where documentary evidence was produced, there were special circumstance owing to which the instances could not be considered to be of much value. It may be noted here that it has not been suggested that the custom of Arains had changed since 1880. The only contention of the learned counsel for the appellants was that the custom had not been correctly recorded in 1880. If this were so, the appellants should have been able to produce ample evidence in the shape of instances to the contrary. But they have entirely failed to produce any such evidence. After carefully considering the evidence on the record, I agree with the conclusion of the Courts below that the *Riwaj-i-am* of 1880 correctly represents the custom applicable to the parties to the present case. I accordingly up-

hold that decision and dismiss the appeal with costs.

G.N./R.K.

Appeal dismissed.

*** A. I. R. 1940 Lahore 409**

TEK CHAND AND BHIDE JJ.

Nand Lal and another—Defendants — Appellants.

v.

Mengh Raj—Plaintiff — Respondent.

Letters Patent Appeal No. 141 of 1939, Decided on 2nd May 1940, against order of Ram Lal J., Reported in A I R 1939 Lah 558.

*** Registration Act (1908), S. 17 (1) (d) — Lease for one year certain with option to landlord to permit tenants to continue to live thereafter—Registration is not necessary.**

A lease for one year certain, with the option to the landlord to permit the tenants to continue to live thereafter, is not a tenancy from year to year or for the term exceeding one year, or for an indefinite period in which yearly rent had been reserved. Hence the rent deed does not require registration: 3 Bom 21, Rel. on. [P 410 C 1]

V. N. Sethi — *for Appellants.*

Shamair Chand — *for Respondent.*

Tek Chand J. — This appeal arises out of a suit instituted by Mengh Raj, plaintiff-respondent, against Nand Lal and Murli, defendant-appellants, for recovery of arrears of rent and ejectment. The plaintiff alleged that on 11th June 1927 the defendants executed a rent deed, Ex. P-2, in his favour, that they continued to pay rent at the stipulated rate until 33 months before the suit, but that they had not paid rent since and were liable to be ejected. The defendants, who are real brothers, denied the tenancy. They alleged that Ex. P-2 was not executed by them and that they were in possession of the house as owners. They further averred that Ex. P-2 required to be compulsorily registered under S. 17 (1) (d), Registration Act, and not being registered was inadmissible in evidence. The trial Judge found that Ex. P-2 had been executed by Nand Lal but that its execution by Murli had not been proved. He held that Ex. P-2 was a rent deed reserving a yearly rent and was inadmissible in evidence for want of registration and consequently the alleged tenancy could not be proved *aliunde*. On these findings he dismissed the suit against both defendants. The plaintiff appealed to the Senior Subordinate Judge who agreed with the trial Judge on all points and dismissed the appeal.

On second appeal, a learned Judge of this Court, sitting in Single Bench held

1. *Bhaga v. Mt. Sandi*, (1885) 52 P R 1885.

2. *Mt. Chiragh Bibi v. Mt. Hassan*, (1906) 19 P R 1906=70 P L R 1906.

3. *Zainab Bibi v. Badaruddin*, (1913) 43 P R 1913=17 I C 187=20 P L R 1913.

4. *Pir Buksh v. Mt. Abo*, (1925) 12 A I R Lah 306=88 I C 71=6 Lah 332=26 P L R 688.

that the rent deed (Ex. P-2) did not require registration. The learned Judge passed a decree for ejectment and for recovery of the sum claimed as arrears of rent against both defendants, without expressly setting aside the finding of the Courts below that execution of the deed by Murli had not been proved. He, however, granted a certificate for a further appeal under Cl. 10, Letters Patent. The first question for consideration is whether the rent deed Ex. P-2 requires registration. A perusal of this document shows that it was not a lease in which a yearly rent was reserved. On the other hand, it was a lease for one year certain (Jeth, Sambat 1985) on a rent of Rs. 40-8-0 for the whole year, which the executants could pay at the rate of Rupees 3-6-0 per mensem month by month. It was agreed, that in default the landlord could eject them and recover arrears of rent in any manner he liked. It was further stipulated that after the expiry of the term, it would be the option of the landlord to give it to other tenants. The terms clearly show that it was a lease for one year certain, with the option to the landlord to permit the tenants to continue to live thereafter. A case very similar to the present one will be found in 3 Bom 21¹ where it was held that a lease for one year certain, containing an expression, on the tenant's part, of readiness to hold the land longer at the same rent if the landlord should desire it, is a lease for a term not exceeding one year, the registration of which is optional under cl. 18, Registration Act. This is not a tenancy from year to year or for the term exceeding one year or for an indefinite period in which yearly rent had been reserved. We, therefore, hold that the deed (Ex. P-2) did not require registration and that it was admissible in evidence.

The Courts below have concurrently found execution of Ex. P-2 by Nand Lal proved. He admitted his thumb-mark on the document but alleged that the deed related to some other house. This explanation is obviously false and had been rightly rejected. The plaintiff's case against him is, therefore, fully proved. With regard to Murli, however, we are of opinion that the matter requires further investigation. The plaintiff examined the scribe as well as one of the attesting witnesses, who deposed that Murli had put his thumb-mark on Ex. P-2 in their presence. The Senior

Subordinate Judge has rejected the scribe's evidence on the ground that "he had not the courage to bring his register to show that Murli had thumb-marked the register." It appears, however, that neither party had asked the scribe to produce the register. If the learned Judge thought that the production of the register was necessary he should have directed him to produce it and if he had then failed to do so, an inference might have been drawn against him. As it is, the reason for rejecting his testimony is unjustified. The trial Judge, as well as the Senior Subordinate Judge, have laid emphasis on the circumstance that the plaintiff did not get the thumb impression of Murli on the deed compared by an expert. The plaintiff is prepared to have this done now and we think that in the circumstances he should be allowed to have this done.

We, therefore, send the case to the trial Court with the direction (1) that the thumb-impression of Murli on Ex. P-2 be sent to Phillaur for comparison with his thumb-impression which may be taken by the Court in its presence, (2) that the scribe, Sheikh Mohammad Ismail, (P. W. 3), be summoned with his register containing entries relating to the execution of Ex. P-2. If the register contains a thumb-impression purporting to be that of Murli, appellant, he will be examined in reference to it, and if he denies that that thumb-impression is his, the register also be sent to Phillaur for comparison. The return, with the finding of the trial Judge, shall be submitted through the Senior Subordinate Judge (who also will record his finding) within four months. Both counsel have been directed to cause their clients to appear before the Junior Subordinate Judge, Campbellpur on 3rd June 1940. Murli, who is present here, has also been directed to be present in the Subordinate Judge's Court on that date.

D.S./R.K.

*Order accordingly.***A. I. R. 1940 Lahore 410**

TEK CHAND AND DALIP SINGH JJ.

Banwari Lal — Plaintiff — Appellant.

v.

Mt. Hussaini and another — Defendants — Respondents.

Letters Patent Appeal No. 112 of 1939, Decided on 27th March 1940, from judgment of Sale J., Reported in A I R 1939 Lah 455.

(a) Limitation Act (1908), Art. 139 — After expiry of period of lease lessee continuing in possession without payment of rent—Possession

1. Apu Budgavda v. Narhari Annajee, (1878) 3 Bom 21.

not shown to be with assent of lessor — Suit by lessor for possession beyond twelve years after expiry of lease is barred.

Where in case of a tenancy for a fixed term the lessee remains in possession after the expiry of the period of lease without paying rent and there is nothing to show that the lessor assented to the lessee continuing in possession, the suit by lessor for possession beyond twelve years from the expiry of period of lease is time barred under Art. 139 : *Case law referred.* [P 411 C 2; P 412 C 2]

(b) Landlord and tenant — Tenancy-at-will and tenancy for fixed term — Difference explained.

There is a distinction between a tenancy-at-will and a tenancy for a fixed term. In the former case the tenancy does not determine until notice to quit has been served on the tenant, or he has denied the landlord's title. In the latter case, the tenancy is determined automatically at the expiry of the term of the lease, and after that date the relationship of landlord and tenant does not subsist, unless it is proved that there was a novation of contract, express or implied and the tenancy has been converted into a tenancy-at-will or a tenancy from year to year. [P 412 C 1, 2]

R. C. Mital — for Appellant.

Qabul Chand Mital — for Respondents.

Tek Chand J.—This is an appeal under Cl. 10, Letters Patent, from the judgment of a Single Bench of this Court affirming the decree of the Senior Subordinate Judge, Rohtak, which reversed the decision of the Court of first instance and dismissed the plaintiff-appellant's suit for ejectment of, and recovery of arrears of rent of a house from the defendants. The material facts are that on 18th December 1919, two brothers, Ibban and Kura, mortgaged with possession the house in dispute and one-third share in a shop to Banwari Lal, plaintiff-appellant, for Rs. 1200. The principal sum secured carried interest at 12 per cent. per annum and it was stipulated that the rent realized by the mortgagee would be given credit towards the interest due at the above-mentioned rate. On the same day the mortgagee, Banwari Lal gave a lease of the mortgaged house to Ibban and Kura for a period of one year, the rent fixed being Rs. 2 per mensem, and Ibban and Kura executed a rent deed in favour of Banwari Lal reciting the conditions of the lease. The term of the lease, namely one year, expired on 18th December 1920. Ibban and Kura however continued to be in possession. Ibban died some years later and was succeeded by his widow Mt. Hussaini. On 1st July 1937, the present suit was instituted by Banwari Lal for ejectment of Mt. Hussaini and Kura and for recovery of Rs. 24 as rent for one year. It was alleged in the plaint that the defendants had paid rent up

to 18th December 1935, and that the rent for the remaining nineteen months was due but the plaintiff remitted the rent for seven months and sued for recovery of Rs. 24 as rent for one year only. The defendants resisted this suit on various grounds, of which those material for the purposes of this appeal are that no rent was paid after the expiry of the term of the lease in December 1920 and that the suit was barred by time under Art. 139, Limitation Act.

The trial Judge found for the plaintiff on both these points and decreed the suit. On appeal the Senior Subordinate Judge, in a confused judgment, came to the contrary conclusion and dismissed the suit. On second appeal the learned Single Judge of this Court found that the learned Senior Subordinate Judge had misconceived the case for the plaintiffs and had misunderstood the evidence. He therefore under S. 103, Civil P. C., examined the evidence himself in order to come to an independent finding on the question of fact involved, namely as to whether the defendants had paid rent to the plaintiff up to December 1935 as alleged and whether the relationship of landlord and tenant had continued to subsist between the parties after the expiry of the term of the lease as originally fixed. After examining the evidence the learned Judge found against the plaintiff on both these points. He then summarized the position as follows : (1) that the defendant-respondents mortgaged the house in suit to the plaintiff on 18th December 1919 ; (2) that on the same day they re-entered into possession as tenants under the mortgagee for one year only ; (3) that no rent had in fact been paid by them since 1920 ; (4) that the defendants had not denied the landlord's title in the house in dispute ; and (5) that although the defendants had remained in possession of the property after 1920, there was nothing to show that the plaintiff-appellant assented to the defendants' continuing in possession after 1920. On these facts the learned Judge found that the tenancy had determined on 18th December 1920, when the term of one year as originally fixed in the lease had expired. He therefore held that the suit was barred by limitation and dismissed the appeal. He however granted a certificate that the case was a fit one for appeal under Cl. 10, Letters Patent.

Before us the learned counsel for the plaintiff-appellant challenged the finding of the learned Judge in Single Bench that

the defendant had not paid any rent after 1920. He took us through the accounts filed by the plaintiff and also read to us the oral evidence of the plaintiff and his son and three other witnesses, who were produced by the plaintiff to prove the alleged payment of rent. After examining this evidence and hearing counsel at length, we see no reason to dissent from the conclusion of the learned Judge on this point. The accounts of the plaintiff appear to be regularly kept, but there is no entry in them which shows that any payment was made on account of rent of the house within 12 years from 18th December 1920 when the term of the tenancy expired. The only entry on which the learned counsel relied is of Rs. 9-13-0 dated 3rd May 1931 but that entry does not show that the amount was paid on account of rent of the house. The oral evidence of Piare Lal is too vague to be of any value. The other entries relied upon relate to payments made in 1933 and 1934 which was more than 12 years after the expiry of the term of the lease and therefore they cannot help the plaintiff. Moreover the books do not show that these payments were made on account of rent of the house. The conclusion of the learned Judge on this point must therefore be affirmed.

Counsel then argued that the plaintiff appellant "assented" to the continuance of the defendants-respondents in possession of the house as tenants under him, after the expiry of the term of the lease. He is however unable to point out to any facts or circumstances from which this inference could be raised, except the bare fact that the defendants continued to hold over after the tenancy had determined. It is no doubt true that there was no denial of the title of the plaintiff by the defendants but, at the same time, there is nothing to indicate that the relationship of landlord and tenant continued between the parties after December 1920. The plaintiff therefore should have brought his suit for possession within 12 years from 1st December 1920, as laid down in Art. 139, Limitation Act. A large number of rulings were cited by counsel for the parties before us but it is not necessary to discuss them in detail. There is no real conflict between them if the distinction between a tenancy-at-will and a tenancy for a fixed term is borne in mind. In the former case the tenancy does not determine until notice to quit has been served on the tenant, or he has denied the landlord's title. In the latter case, the tenancy is deter-

mined automatically at the expiry of the term of the lease, and after that date the relationship of landlord and tenant does not subsist, unless it is proved that there was a novation of contract, express or implied and the tenancy has been converted into a tenancy-at-will or a tenancy from year to year.

As instances of cases of tenancies for fixed terms where the landlord's right to recover possession was lost on the expiry of 12 years from the termination of the tenancy, reference may be made to 97 P R 1915,¹ A I R 1934 Lah 129,² A I R 1930 Lah 386,³ A I R 1933 Lah 509⁴ and 24 Bom 504⁵ which has been approved by their Lordships of the Privy Council in A I R 1922 P C 184.⁶ See also to the same effect 31 All 318,⁷ 44 All 583,⁸ A I R 1927 Bom 650,⁹ A I R 1938 Mad 73¹⁰ and 3 Pat 534.¹¹ It must therefore be held that the learned Judge in Single Bench rightly held that the suit was barred by limitation. I would accordingly dismiss this appeal; but, in the circumstances, would leave the parties to bear their own costs throughout.

Dalip Singh J.—I agree.

D.S./R.K.

Appeal dismissed.

1. Umar Bakhsh v. Baldeo Singh, (1916) 3 A I R Lah 353=32 I C 35=97 P R 1915.
2. Kirat Singh v. Kalu Singh, (1934) 21 A I R Lah 129=149 I C 948=35 P L R 24.
3. Asa Ram v. Kishan Chand, (1930) 17 A I R Lah 386=120 I C 166.
4. Ubedul Rahman v. Darbari Lal, (1933) 20 A I R Lah 509=146 I C 845=34 P L R 262.
5. Chandri v. Daji Bhau, (1900) 24 Bom 504=2 Bom L R 491.
6. Mohunt Bhagwan Ramanuj v. Ramkrishna Bose, (1922) 9 A I R P C 184=74 IC 561 (PC).
7. Khunni Lal v. Madan Mohan Lal, (1909) 31 All 318=1 I C 208=6 A L J 239.
8. Bisheshar Nath v. Kundan, (1922) 9 A I R All 318=75 I C 454=44 All 583=20 A L J 593.
9. Purshottam v. Vishnu, (1927) 14 A I R Bom 650=105 I C 859=29 Bom L R 1332.
10. Sitharamiah v. Ramaswamy, (1938) 25 A I R Mad 73=176 I C 84.
11. Hari Gir v. Kamakhya Narain Singh, (1924) 11 A I R Pat 572=78 I C 511=3 Pat 534.

A. I. R. 1940 Lahore 412

TEK CHAND AND ABDUL RASHID JJ.

Harkishen Singh — Plaintiff — Appellant.

v.

National Bank of India Ltd., Amritsar — Defendant — Respondent.

First Appeal No. 429 of 1938, Decided on 23rd February 1940, from decree of Sub-Judge, First Class, Amritsar, D/- 30th August 1938.

Contract Act (1872), S. 189—Goods perishable or perishing — Agent selling them by deviating from principal's instructions as to time and price at which they are to be sold—In principal's suit for damages agent is protected under S. 189.

Section 189 is meant to protect the agent, if, for the purposes of safeguarding the interests of his principal, the agent does certain acts without any express instructions from the principal. In such a case the agent is exempted from all liability, if his acts are the acts of a man of ordinary prudence and are performed at the time of an emergency. The agents are ordinarily expected to carry out instructions of their principals in all respects. If, however, the goods are perishable or perishing, the agent is entitled to deviate from his instructions as to the time or price at which they are to be sold. If the principal thereafter sues the agent for damages as a result of his selling the goods without the principal's instructions, the agent is protected under S. 189. [P 415 C 2]

C. L. Aggarwal and Durga Das Jain —
for Appellant.

Norman Edmunds and Krishan Lal Kapur — *for Respondent.*

Abdul Rashid J.—This appeal has arisen out of a suit brought by Harkishen Singh against the National Bank of India, Ltd., for recovery of Rs. 7229-8-0. The allegations of the plaintiff were that, on 14th June 1934, he employed the defendants as his agents for sale of four casks of wet-salted sheep casings valued at Rs. 6500. The shipping documents together with the invoices relating to the goods were handed over to the defendants and they were instructed to sell the goods in Germany. The defendants obtained from the plaintiff a sum of Rs. 729-8-0 towards the cost of cables, railway fare and other charges for the purposes of the sale of the goods in question. By the defendants' negligence and by the negligence of their agents in Berlin and London the goods were destroyed by the German authorities. It was the duty of the defendants' Berlin agents to save the goods by re-exporting them to India, if no other course was left open to them, and to debit the charges to the plaintiff.

It was pleaded on behalf of the defendants that they were not employed by the plaintiff as his agents for the sale of the goods in dispute. One Mr. Ernst Wachholz was appointed by the plaintiff as his agent for the sale of the goods, and the defendants were only to forward the goods to the agent of the plaintiff. It was further pleaded that the defendants' London office, their agents in Berlin as well as the defendants themselves, conducted the work diligently

and in accordance with the instructions of the plaintiff given to them from time to time. The defendants did their best to safeguard the interests of the plaintiff and, in spite of the best endeavours of the defendants and their agents in Berlin, the goods could not be saved. The defendants had no control over the laws and regulations prevailing in Germany with respect to the destruction of the goods that are unfit for human consumption. The defendants also pleaded that Rs. 725-8-0 received by them from the plaintiff were their out of pocket expenses and that they had actually spent this money on behalf of the plaintiff. According to the defendants, the plaintiff and his agent Wachholz were solely responsible for the destruction of the goods in question. On these pleadings the trial Court framed the following issues :

1. Whether the goods were destroyed on account of the negligence of the defendants in carrying out the plaintiff's instructions without due diligence ?
2. If so, whether the defendant Bank is liable to pay damages and how much ?
3. Whether the plaintiff is entitled to the refund of all the charges paid by him to the defendant-Bank in respect of these goods and what is the amount of such charges ?

After a consideration of the entire oral and documentary evidence on the record, the trial Court came to the conclusion that the defendant-Bank carried out the instructions of the plaintiff faithfully, and that the Bank was not responsible for the destruction of goods by the German authorities. It was further held that the plaintiff was not entitled to the refund of the charges paid by him to the defendants in respect of the goods in question. On these findings the plaintiff's suit was dismissed with costs. Against this decision the plaintiff has preferred an appeal to this Court in forma pauperis. Before dealing with the arguments addressed to us by the learned counsel for the appellant it is necessary to refer to certain important letters that passed between the plaintiff and the defendants. It was by means of a letter, dated 14th June 1934 (Ex. D-18), that the plaintiff entrusted the goods to the defendants. In this letter it was stated by the plaintiff that he had already shipped four casks containing wet-salted sheep casings to Hamburg and that the defendants should forward the shipping documents, which he was enclosing with his letter, to Berlin and get the goods stored there in the Bank's name. The agents of the Bank in Berlin were to get the goods insured from Hamburg

to Berlin. The plaintiff further stated in this letter that he had arranged through Rudolf Mettig of Amritsar that his partner Ernst Wachholz would sell the goods to the prospective customers and the amount realized by him would be paid by him to the Bank's agents in Berlin. Wachholz was allowed to take out 10 to 15% of the contents of each cask as samples. When the entire amount of the sale price was received by the Bank, the Bank was to pay 6% thereof to Mettig as his selling commission. Mettig was to be informed by the Bank about the details of the arrangement made by the plaintiff with the Bank.

The Bank sent a reply to the above mentioned letter on the same day, (Ex. D-19), informing the plaintiff that they were forwarding the shipping documents to their Berlin agents for disposal in terms of his instructions. The defendant Bank sent the shipping documents to the Deutsche Bank, Berlin, and the instructions given by the plaintiff were also communicated to that Bank. On 2nd September 1934, the plaintiff wrote another letter to the Bank, (Ex. D-2), in which the defendant Bank was instructed to request its Berlin agents to despatch the plaintiff's goods to Vienna by goods train as Wachholz had sold the above goods at Vienna. The Vienna agent was asked to allow the buyer to inspect the goods. The plaintiff requested the Bank to send the above instructions by cable. On 8th September 1934, a letter was sent by the Deutsche Bank to the National Bank of India stating that the goods had been despatched to Vienna and, in accordance with the letter of Wachholz, they had instructed the Vienna Bank to allow Carl Vogler to take samples up to 15% of each cask against a trust receipt. On 6th October the plaintiff wrote to the defendant Bank to have the goods in dispute railed back from Vienna to Berlin and to allow Wachholz to inspect them.

On their arrival at Berlin, the goods were detained by the Customs authorities. The Veterinary Doctor examined the goods on 2nd November 1934, and declared them to be unfit for human consumption. The Deutsche Bank was told that the goods must either be destroyed or deposited with the Foreign Custom House. The Berlin Bank forwarded this information to the National Bank of India both by letter and cable and further stated that they would no longer take any responsibility with respect to the goods in question. On 8th November this information was conveyed to the plaintiff who was

asked to call immediately and give further instructions. On the same day the plaintiff wrote a letter to the Bank (Ex. D-4) instructing them to deliver the goods to H. Khan at Berlin against payment of the agent's charges only. On 13th November, the defendant Bank wrote back to the plaintiff stating that they had received a cable to the effect that Khan had left for Switzerland and that his address was unknown and enquiring whether under the circumstances they should deliver the goods to Wachholz. On 14th November the plaintiff wrote to the Bank stating that Wachholz had been playing tricks with him and that the goods should either be given to H. Khan or Karl Chiffard of Hamburg "whoever reaches first." Various efforts were made by the Deutsche Bank to hand over the goods to Khan or Karl Chiffard. Khan continued to remain in Switzerland and took no steps to obtain delivery of the goods. Karl Chiffard refused to take the goods into possession as soon as he learnt that they had been condemned by the Customs authorities.

On 25th November 1934, the plaintiff is alleged to have sent a letter to the National Bank of India stating that if Khan and Karl Chiffard refused to take delivery of the goods then the goods may be re-exported to India via Karachi and that as soon as the goods reached Karachi he would be prepared to pay the charges that the Bank would incur. The Bank denies having received this letter. According to the plaintiff the defendant Bank sent a reply to this letter. The letter which the Bank is stated to have sent in reply is dated 26th November 1934, (Ex. P-21), and is reproduced in extenso :

We do not confirm your letter, dated 25th November 1934, the reason being that you have written that the goods be returned to Karachi, India. It be probable that there may not be any rule of the German Government for returning the goods. Please write to Mr. Chiffard and H. Khan to get the delivery of the goods over there. We be instructed as if the delivery of the goods be made to Mr. Wachholz. In case no one will take the same then the goods will be thrown over there.

"Yours faithfully,
Morrison, Manager."

The defendant Bank stated that this letter was a forgery and that no such letter was sent by it to the plaintiff. On 22nd December the Bank informed the plaintiff that it had received a cable to the effect that Chiffard had declined to take the goods, that Khan had not taken delivery and that the Customs authorities state that they will destroy the goods failing immediate

clearance. Further instructions were asked for by means of a telegram. On 28th December, the plaintiff wrote to the Bank to instruct its agents to deliver the above goods to Wachholz against payment of charges only. Wachholz however did not take delivery of the goods and the goods were destroyed by the German Customs authorities on 8th January 1935. This information was conveyed to the plaintiff by means of a letter, Ex. D-91, dated 9th January 1935. It may be stated that the only letter sent by the plaintiff containing an unconditional order to re-ship the goods to Karachi was despatched by him on 8th January 1935. Before these instructions could reach Berlin the goods had already been destroyed.

Besides the correspondence referred to above, there is a large number of other letters which it is unnecessary to reproduce. After going through the entire correspondence, I am of the opinion that the destruction of the goods of the plaintiff was due to the fact that his selling agents, Wachholz and Mettig, did not take any interest in disposing of the goods in question. On the other hand, they continued to avoid taking delivery and meanwhile the goods continued to decay and rot. The goods were condemned by the Customs authorities on 2nd November 1934, and ultimately destroyed on 8th January 1935. For a period of over three months Wachholz did nothing to save the goods. Once the goods had been condemned it is very doubtful whether Wachholz would have succeeded in selling them. In any case, the defendant Bank carried out all the instructions of the plaintiff and if, in spite of their best efforts to save the goods, the goods were destroyed, it is due to the inaction of Wachholz, Mettig, Hassan Khan and Chiffard, all of whom were at one time or another appointed by the plaintiff as his selling agents, and the defendant Bank was in no way responsible for their inactivity.

It was contended by the learned counsel for the appellant that, under S. 151, Contract Act, the defendant Bank was bound to take as much care of the goods of the plaintiff as a man of ordinary prudence would of his own goods under similar circumstances. It was further urged that under S. 189, Contract Act, an agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances. The learned

counsel contended that as soon as the goods had been condemned by the German Customs authorities, the defendant Bank ought to have got the goods exported from Germany to India and this procedure would have saved the plaintiff from a great deal of loss. In my opinion, the contentions of the learned counsel are wholly devoid of force. The defendant Bank was throughout acting under the instructions of the plaintiff. Even after the goods had been condemned by the Customs authorities, the plaintiff continued to instruct the Bank to hand over the goods to Khan, Chiffard and Wachholz. As late as 28th December 1934, the plaintiff again wrote to the Bank to hand over the goods to Wachholz. S. 189 is meant to protect the agent, if, for the purposes of safeguarding the interests of his principal, the agent does certain acts without any express instructions from the principal. In such a case the agent is exempted from all liability, if his acts are the acts of a man of ordinary prudence and are performed at the time of an emergency. The agents are ordinarily expected to carry out the instructions of their principals in all respects. If however the goods are perishable or perishing, the agent is entitled to deviate from his instructions as to the time or price at which they are to be sold. If the principal thereafter sues the agent for damages as a result of his selling the goods without the principal's instructions, the agent is protected under S. 189, Contract Act. This Section is based on certain observations made at pp. 225-227 of Story's Law of Agency.

It was next contended by the learned counsel for the appellant that, if the goods could not be sold for human consumption, they could be sold for industrial purposes. The evidence of Mr. Chiffard shows that these goods could probably be sold for industrial purposes in Hamburg, but the expenses of sending the goods to Hamburg would have been higher than the proceeds of the sale for industrial purposes. In these circumstances, the defendants were not guilty of any negligence in not selling the goods for industrial purposes. It was also urged that Carl Voglar had received 4 per cent. of the goods as samples and that the defendant Bank was at least liable for the price of the samples. Carl Voglar produced a letter of Wachholz and it was under the instructions of Wachholz that 4 per cent. of the goods were entrusted to him as samples. Wachholz was the sales agent of the plain-

tiff. If the defendant Bank has failed to recover the price of the samples from Wachholz, it cannot be said that the defendant Bank has failed in the discharge of its duties. The learned counsel for the appellant laid the greatest stress on Ex. P.21 and stated that by means of this letter the Bank informed the plaintiff that in case Khan, Chiffard and Wachholz refused to take delivery of the goods "the goods will be thrown over there." It was urged that this letter shows that, after 26th November 1934, the Bank refused to carry out the instructions of the plaintiff. The Bank denies that the letter Ex. P.21 was sent to the plaintiff. In fact, it was strenuously contended on behalf of the defendant Bank that this letter was a forgery. The letter contains a number of grammatical mistakes. The phraseology of the letter and the fact that no reply was sent to it by the plaintiff, though the Bank threatened by means of this letter that the goods will be destroyed in Germany, clearly show that this letter was not sent by the Bank to the plaintiff on 26th November 1934, or at any other time.

The Bank charged Rs. 4-15-6 as its commission in respect of the forwarding of the goods in dispute. The remaining amount out of the sum of Rs. 729-8-0 was spent in meeting the railway freight, cost of cables and other charges incurred by the Bank. As the Bank has not been proved to be guilty of any negligence the plaintiff is not entitled to the refund of Rs. 729-8-0 or to the sum of Rs. 4-15-6 charged by the Bank as commission. For the reasons given above, I would affirm the decision of the Court below and dismiss this appeal with costs. A sum of Rs. 547-8-0 is due from the plaintiff on account of the court-fee payable on the memorandum of appeal. The plaintiff is ordered to pay this sum under the provisions of O. 33, R. 11, Civil P. C. Under R. 14 of O. 33, Civil P. C., a copy of the decree shall be forwarded to the Collector.

Tek Chand J. — I agree.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1940 Lahore 416

TEK CHAND AND ABDUL RASHID JJ.

Tara Singh—Defendant—Appellant.

v.

Bibi Suraj Kaur daughter of Raja Bhagwan Singh—Plaintiff—Respondent.

First Appeal No. 46 of 1939, Decided on 17th April 1940.

(a) Custom (Punjab) — Succession — In absence of agnates of childless proprietor, cognate succeeds in preference to stranger.

In the Punjab, in the absence of all agnates of a childless proprietor, a cognate, however distantly related to him, is entitled to succeed to his property in preference to a stranger: *Case law relied on.* [P 420 C 1]

(b) Custom (Punjab)—Succession — Agricultural tribes — Widow has only life estate in property of her husband — Mere fact that no agnatic relation or near cognate of husband is alive does not make her absolute owner.

Among the agricultural tribes of the Punjab who in matters of succession and alienation, are governed, not by their personal law, but by custom, a widow takes only a life interest in her husband's estate. In this respect her position is analogous to that of a widow under Hindu law. The restrictions imposed upon her power of alienation are inseparable from her estate, and the mere fact that no agnatic relation, or a near cognate, of the husband is alive does not enlarge her powers of alienation and make her an absolute owner. She has only a life-estate in the property of her husband. Her life-estate comes to an end at her death. Hence where she has made a will which is to take effect after her death, there is no property on which the will can operate: *Case law referred.* [P 420 C 2; P 421 C 1, 2]

Mehr Chand Mahajan and Yashpal Gandhi — *for Appellant.*

Achhru Ram and Sardar Jhanda Singh — *for Respondent.*

Abdul Rashid J. — Sardarni Bhagwan Kaur, widow of Nihal Singh, a Dhillon Jat of village Mani Mazra, District Ambala, died on 7th April 1936, in the hospital of Mani Mazra. On 5th April 1936, she had made a will in favour of her nephew Tara Singh, defendant. This will was registered on 6th April. On the death of Sardarni Bhagwan Kaur the entire landed property left by her was mutated in the name of Tara Singh, defendant, on the strength of the will. The defendant also obtained possession of the house of the widow, and recovered her moveable property from the supurdar to whom it had been entrusted by the police on her death. The present suit was instituted by Bibi Suraj Kaur, daughter of Bhagwan Singh, on 2nd October 1937, in respect of the entire property mentioned above and for Rs. 600 as mesne profits of the land for three harvests up to rabi 1937. It was stated in the plaint that the plaintiff was the daughter of Raja Bhagwan Singh who was a collateral of Nihal Singh, the husband of Sardarni Bhagwan Kaur, in the sixth degree, and that in the absence of any male collateral or any other nearer female heir of Nihal Singh, she was entitled to succeed. It was further pleaded that the will made by Sardarni Bhagwan Kaur in

favour of the defendant was invalid, and that, in any case, she was not competent to make a will as she herself was a limited owner.

The defendant pleaded, *inter alia*, that though Bibi Suraj Kaur was the daughter of Raja Bhagwan Singh, the latter was not a collateral of Nihal Singh. Sardarni Bhagwan Kaur was the absolute owner of the property in her possession, and the will made by her, in favour of the defendant, was valid and could not be challenged by the plaintiff as it had been held by the High Court that she was not competent to contest alienations effected by her own mother. It was further pleaded that the suit for mesne profits could be tried by a Revenue Court only, and, in any case, no mesne profits had accrued. On these pleadings the trial Court framed the following issues:

1. Whether Raja Bhagwan Singh, father of the plaintiff, was a collateral of Nihal Singh, the last male holder of the disputed property?

2. If issue 1 be proved, whether the plaintiff is the legal heir of the said Nihal Singh after the death of his widow Mt. Bhagwan Kaur?

3. Whether Mt. Bhagwan Kaur made any valid will with respect to the disputed property in favour of Tara Singh, defendant?

4. If issue 3 be proved, whether the plaintiff is competent to challenge the will?

5. If issue 4 be proved, whether Mt. Bhagwan Kaur was in any way competent to make a will with respect to this property?

6. If the will be found to be invalid and inoperative, whether the plaintiff is not entitled to succeed to the property in dispute as against the

defendant when issue 2 is decided in her favour?

7. Whether the suit for mesne profits in respect of agricultural land lies in the Civil Court?

8. If so, how much mesne profits accrued to the defendant for the three crops mentioned in the plaint?

It was held by the trial Court that Raja Bhagwan Singh, father of the plaintiff, was a collateral of Nihal Singh in the sixth degree, that Bibi Suraj Kaur was the legal heir of Nihal Singh after the death of his widow Sardarni Bhagwan Kaur, that the execution and registration of the will had been duly proved, but that the will was invalid as Sardarni Bhagwan Kaur was not in a disposing mind at the time of the making of the will. It was also held that plaintiff was entitled to contest the alienation by Sardarni Bhagwan Kaur as she was the heir. As regards mesne profits, it was found that no mesne profits had accrued. On these findings the plaintiff was granted a decree for possession of the immovable property left by Sardarni Bhagwan Kaur. The suit was dismissed with respect to the moveable property and mesne profits. Against this decision Tara Singh, defendant, has appealed to this Court. It was contended by Mr. Mehr Chand Mahajan, on behalf of the appellant, that it had not been established that Raja Bhagwan Singh, the father of Bibi Suraj Kaur, was a collateral of Nihal Singh. It would be convenient to refer, at this stage, to the following pedigree table propounded by the plaintiff:

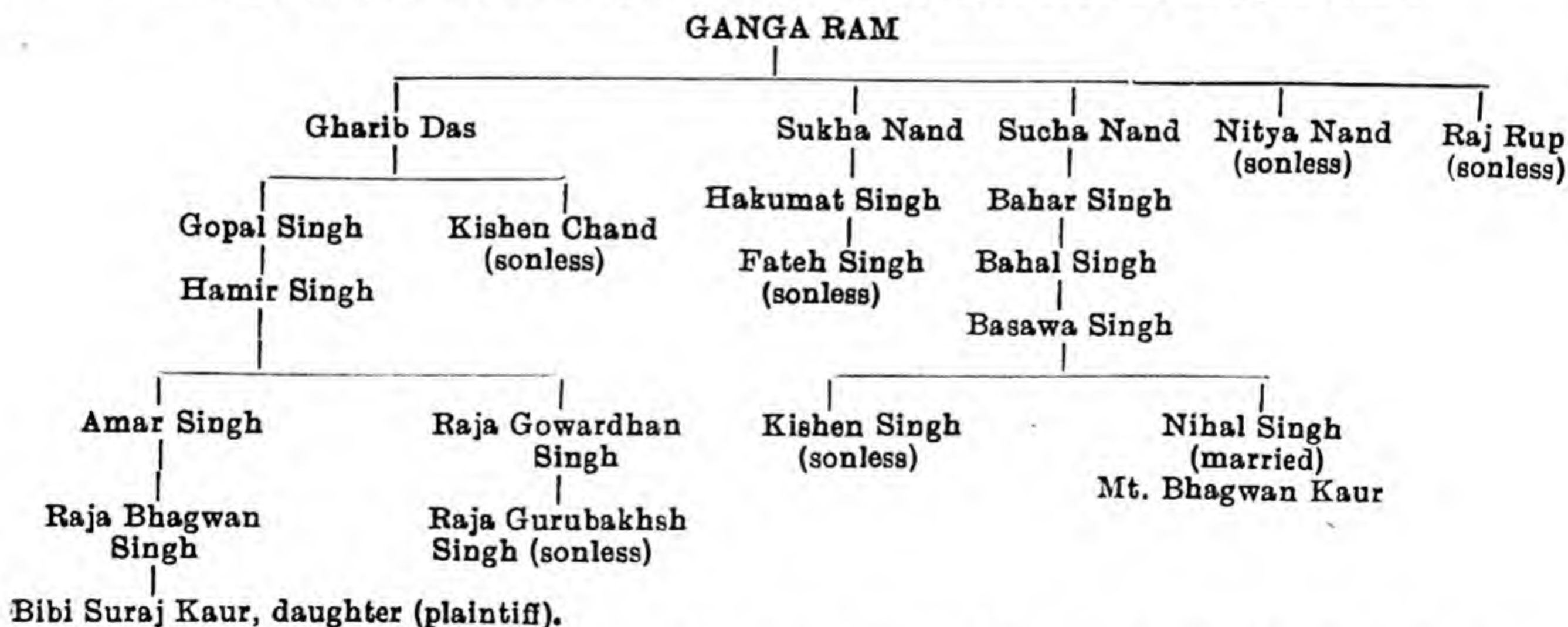


Exhibit D.18 is a certified copy of the pedigree table prepared during the settlement of 1888 with respect to village Mani Mazra. This shows that Raja Bhagwan Singh was the great grandson of Gopal Singh. The pedigree table prepared in the settlement of 1888 relating to village Judian is Ex. D.16. This pedigree table shows

that Nihal Singh, the husband of Sardarni Bhagwan Kaur, was a descendant of Sucha Nand. It is thus clear from the revenue records that Raja Bhagwan Singh and Nihal Singh were the descendants of Gopal Singh and Sucha Nand respectively. (After examining certain evidence their Lordships proceeded further.) In view of the evidence

summarized above we are of the opinion that the trial Court was right in holding that Raja Bhagwan Singh, the father of Bibi Suraj Kaur, was a sixth degree collateral of Nihal Singh, the husband of Sardarni Bhagwan Kaur.

The next question for consideration is whether Bibi Suraj Kaur is an heir of Sardarni Bhagwan Kaur or her husband Nihal Singh. The lower Court has held her to be Nihal Singh's heir under Hindu law, according to which it was assumed she was a bandhu. This is obviously incorrect, and Mr. Achhru Ram for the respondent frankly admitted that Bibi Suraj Kaur was not a bandhu of Nihal Singh under the Mitakshara School of Hindu law. He, however, maintained that in the absence of any agnates, or nearer cognates, she was an heir under custom, as generally prevalent among the agricultural communities of the Punjab. To meet this argument, Mr. Mehr Chand Mahajan for the appellant referred to questions 28, 39-A and 40 of the *riwaj-i-am* of the Ambala district. In the answer to question 28, it is stated that in this district the land of a proprietor belonging to an agricultural tribe devolves on the following persons: (a) Male lineal descendants; (b) the widow for her lifetime; (c) own brothers; (d) male collaterals reckoned downwards from the great-great-grandfather; (e) failing collaterals, on the daughters. This list is, however, by no means exhaustive and it is clear that the representatives of the tribes were not interrogated about the right of a cognate to succeed in the absence of all agnates. In the answer to question 39-A it is stated that a widow succeeds to the estate of a collateral of her husband subject to the general conditions and limitations governing widow-succession. The reply to question 40 is that different tribes say that :

Collaterals traced variously from four to ten generations will exclude the daughter but the distinctions drawn depend more upon variations in the method of counting generations than on any real difference of custom. The commonly received custom is to exclude the daughter wherever collaterals can be traced up to the great-great-grandfather. Jats and Gujjars are strongly inclined to go still further and to say that daughters never succeed, the land going to the proprietors of the patti rather than the daughter, but this is doubtful as an actual custom though correct as to the feeling of the people.

From this it was sought to be argued, that amongst the agricultural tribes of the Ambala district, even the proprietors of the patti are preferred to cognates, and that it follows that female cognates cannot succeed

under any circumstances. This broad proposition however can by no means be inferred from this answer. The *riwaj-i-am* is really silent on the point and throws no light on the actual question before us. The oral evidence produced by the parties is equally worthless. No instance, from this tribe or district, has been proved by either party, of the succession, or exclusion, of a cognate from inheritance in the absence of all agnates. It was urged by the learned counsel for the plaintiff that in the absence of any specific entry in the *riwaj-i-am* or proof of actual instances on the record, we must apply the well-established principle of Punjab Customary law that in the absence of agnates, cognates were entitled to exclude strangers. He pointed out that the nephew of Sardarni Bhagwan Kaur was a stranger to the family of Nihal Singh, and that he was under no circumstances entitled to succeed to the property left by the last male holder as long as a cognate of Nihal Singh, whether male or female, was alive. In this connexion he referred us to the statement of custom as given in Rattigan's Digest of Customary law (Edn. 12) p. 156, that

the general principle of Customary law is that, in the absence of all agnates of a childless proprietor, any cognate, however distantly related to him, is entitled to succeed to his property in preference to the proprietary body of the village or a stranger.

Similarly, at p. 97 of "Notes on Punjab Custom" by Ellis (Edn. 2), the rule is stated as follows :

Generally speaking the rights of cognates are postponed till after the agnatic heirs are exhausted. They are nevertheless ultimate heirs

These propositions are based upon several decisions of the Chief Court and this Court. In 178 P R 1888,¹ a case relating to the Jats of the Ferozepore district, the proprietors of a patti sued to set aside a deed of adoption executed by the widow of a deceased pattidar in favour of a cognate relation. It was held by Plowden and Tremlett JJ. that the plaintiffs had failed to prove that they, as the collective pattidari body consisting of various castes and tribes, were in the presence of the defendant, the next reversioners, and consequently they were not entitled to maintain the suit. In 63 P R 1908² it was held by Robertson and Chevis JJ. that it was quite clear that in accordance with the recognized principles of Customary law, direct

1. *Budh Singh v. Basawa Singh*, (1888) 178 P R 1888.

2. *Waryama v. Hiranand*, (1908) 63 P R 1908 = 126 P W R 1908.

descendants of a daughter and daughter's son of a deceased proprietor's ancestor are entitled in the absence of all male collaterals to succeed to the estate of the latter in preference to a heterogeneous proprietary body of a different *got*. The parties to this case were residents of the Hoshiarpur district. In 135 P W R 1912³ it was laid down by Kensington and Chevis JJ. that the general principle of the Customary law is that in the absence of all agnates a cognate is entitled to succeed to a childless proprietor.

In 28 P R 1917⁴ Shah Din J. held that the general principle of Customary law was that in the absence of all agnates of a childless proprietor any cognate, however distantly related to him, was entitled to succeed to his property in preference to the proprietary body of the village. It was consequently clear that, in the absence of proof of a custom to the contrary, the father's sister's son among the Mahomedan Rajputs of the Ludhiana district had a preferential right of succession to the village proprietary body and that the entry in the *riwaj-i-am* of Tahsil Ludhiana in favour of sisters and their issue was not meant to limit the succession to cognates of a certain degree. In 78 I C 778,⁵ Abdul Raoof and Martineau JJ. laid down that the general principle of Customary law is that in the absence of all agnates of a childless proprietor any cognate, however, distantly related to him, is entitled to succeed to his property in preference to the proprietary body of the village or a stranger. Mr. Achhru Ram, also invited our attention to the observations of Plowden J. in 50 P R 1893⁶ at page 223, which may be reproduced in extenso :

There are in the rural portions of the Province numerous groups of persons connected with the land who follow in most matters customary rules, which are not identical with the rules of the Hindu or the Mahomedan law. A considerable mass of information as to the customary rules observed by numerous groups in different parts of the Province, has been, and is being accumulated by the labours of Settlement Officers and in the records of the Civil Courts. There are in existence numerous bodies, so to speak, of customary law of different land-holding societies or communities in the Punjab, which can be compared, and which exhibit a remarkable degree of similarity in many particulars ; and it is possible after such comparison, to propound, on some points, a rule which

can be stated in an abstract form, irrespective of any particular group or locality, and to affirm that it is generally recognized by custom in the Punjab, so far as it has been ascertained. An example is that, in the Punjab, by custom the widow of a sonless man is ordinarily only entitled to possession and enjoyment of her husband's land for life, or till re-marriage. The phrase under notice really imports no more than this, that among the various groups who are governed by custom in the Punjab a particular usage is generally found to prevail or not to prevail, as the case may be.

It was urged on the strength of the observations quoted above that the exclusion of strangers by the cognates of the last male-holder, whether male or female, has been so often recognized by custom in the Punjab that such a custom should be given effect to even though it is not mentioned specifically in the *riwaj-i-am* of the Ambala District. It was further contended that the list of heirs as given in the *riwaj-i-am* was not exhaustive, and no specific questions regarding the succession of cognates, when there is no agnate alive, were put to the representatives of the tribes. In reply, it was contended by Mr. Mehr Chand Mahajan that in view of the observations of their Lordships of the Privy Council in 45 Cal 450⁷ it was incumbent on the plaintiff to prove, firstly, that the parties were governed by custom and, secondly, what that custom was. It was also urged by the learned counsel that there was no such thing as a general custom of the Punjab, and that custom could not be extended by analogy or by logical deductions from certain well-recognized principles governing the agricultural communities of the Punjab. In this connexion certain observations of their Lordships of the Privy Council made at page 785 of 41 Mad 778⁸ may be reproduced with advantage :

No attempt has been, as already stated, made by the plaintiff to prove any special custom in this *zemindari*. That by itself in the case of some claims would not be fatal. When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case. It becomes in the end truly a matter of process and pleading. Analogy may be found in instances in the law merchant or in certain customs in copyhold tenure. In the matter in hand their Lordships do not doubt that the right of sons to maintenance in an impartible *zemindari*

3. *Jhindu v. Gopala*, (1912) 135 P W R 1912=15 I C 266=235 P L R 1912.

4. *Rahman v. Karim Bakhsh*, (1917) 4 A I R Lah 157=39 I C 113=28 P R 1917.

5. *Mt. Champeli v. Bishna*, (1920) 7 A I R Lah 460=78 I C 778.

6. *Ralla v. Budha*, (1893) 50 P R 1893.

7. *Abdul Hussain Khan v. Mt. Bibi Sona Dero*, (1917) 4 A I R P C 181=43 I C 306=45 I A 10=45 Cal 450=12 S L R 104 (P O).

8. *Gangadara Ramrao v. Raja of Pittapur*, (1918) 5 A I R P C 81=47 I C 354=45 I A 148=41 Mad 778 (P C).

has been so often recognized that it would not be necessary to prove the custom in each case.

Similarly, in 162 I C 461⁹ it was observed by their Lordships of the Privy Council that

material customs must be proved in the first instance by calling witnesses acquainted with them until the particular customs have, by frequent proof in the Courts, become so notorious that the Courts take judicial notice of them.

These observations were made in a case which went up on appeal from the Supreme Court of the Gold Coast Colony. The cases relating to the succession of cognates in the total absence of all agnates are necessarily of very rare occurrence in this province. It is therefore significant that whenever a case of this nature has arisen, the decision has always been that a cognate (*qarabati*) has succeeded as heir in preference to the proprietary body or other strangers. The cases referred to above show that the custom relied upon by the plaintiff has been given effect to by a large number of Judges of this Court and the Punjab Chief Court for a period of over fifty years. No decision to the contrary was cited at the bar, and we are not aware of any. The custom whereby cognates, however distantly related, exclude strangers from succession is in accordance with the sentiments of the agricultural communities in this province. The agriculturists invariably favour a relation to a stranger so far as devolution of agricultural land is concerned. It may be correct to say that there is no general Customary law of the Punjab, in the sense that every person residing in the Punjab would be governed by it. There are however certain customs which are almost universally prevalent in the Punjab, of which, in the words of their Lordships of the Privy Council, judicial notice should be taken, once it is established that the parties are governed by custom. Some of the instances of such customs are that the widow only takes a life-estate, that sons exclude daughters and that the sons of a predeceased son, by right of representation, get the same share from their grandfather's property as their deceased father would have got. The custom that in the absence of all agnates of a childless proprietor a cognate, however distantly related to him, is entitled to succeed to his property in preference to a stranger must be placed on the same footing as the instances referred to above. We accordingly hold that Bibi Suraj Kaur must be regarded as an

heir of Nihal Singh under the Customary law. We agree with the trial Court that due execution and registration of the will by Sardarni Bhagwan Kaur has been established. We are however constrained to hold that the trial Court has failed to grasp the fact that the evidence of Dr. Ghulam Mohammad (D. W. 11) definitely establishes that Sardarni Bhagwan Kaur was in a disposing mind when she executed the will in question in favour of the defendant. Dr. Ghulam Mohammad has been regarded by the trial Court as an important, disinterested and respectable witness. His evidence is that Sardarni Bhagwan Kaur was suffering from a wound in the leg when she was admitted to the hospital, that she was in her senses when the will was executed and that she could understand its contents fully when she signed the will in the presence of the doctor. Dr. Ghulam Mohammad was present when the will was read over to the lady. He was also present when the document was attested by the Sub-Registrar. Below the endorsement of the Sub-Registrar the doctor definitely noted that Sardarni Bhagwan Kaur was in full possession of her senses. The only argument put forward by Mr. Achhru Ram on this point was that Sardarni Bhagwan Kaur made the will in favour of Tara Singh as she had been assured by Mohammad Shafi that Bibi Suraj Kaur had no objection to the will being executed in favour of Tara Singh. This fact does not show that Sardarni Bhagwan Kaur was not in possession of a disposing mind at the time of the execution of the will.

It was never pleaded by the plaintiff that the will was secured from Sardarni Bhagwan Kaur by fraud or misrepresentation. We therefore hold that Sardarni Bhagwan Kaur made the will in favour of Tara Singh when she was in a disposing mind. We are not inclined to attach any importance to the evidence of Ali Hussain, compounder (P. W. 4), as his evidence is contradicted by the testimony of Dr. Ghulam Mohammad and a number of other witnesses produced by the defendant. The next question for consideration is whether Bibi Suraj Kaur was entitled to challenge the will made by Sardarni Bhagwan Kaur. Sardarni Bhagwan Kaur had only a life-estate in the property of her husband. Her life-estate came to an end at her death. The will made by her was to take effect after her death. As the estate of a widow comes to an end at her death there was no property on which the will could operate.

9. *Amissah v. Krabah*, (1936) 23 A I R P C 147 = 162 I C 461 (P C).

It is beyond dispute that among the agricultural tribes of this province, who, in matters of succession and alienation, are governed, not by their personal law, but by custom, a widow takes only a life-interest in her husband's estate. In this respect her position is analogous to that of a widow under Hindu law. The restrictions imposed upon her power of alienation are inseparable from her estate, and the mere fact that no agnatic relation, or a near cognate, of the husband is alive does not enlarge her powers of alienation and make her an absolute owner: *see inter alia* 74 I C 639,¹⁰ 5 Lah 450¹¹ and 7 Lah 543¹² at p. 549. In these cases the principles laid down by their Lordships of the Privy Council in 8 M I A 529¹³ were held applicable to the estate of a widow under custom and the obiter dictum to the contrary in 3 P R 1914¹⁴ at p. 7 to which Mr. Mehr Chand Mahajan referred, was dissented from.

The appellant's learned counsel also referred us to 48 P R 1916¹⁵ in which a suit, instituted by the present plaintiff for a declaration that an alienation made by her mother would be ineffectual against her reversionary rights after the death of the alienor, was dismissed on the ground that a female, even though she is an heir, cannot control an alienation by another female. This view of the law has not been accepted as correct in subsequent rulings of this Court and is not based on any sound principle: *see* 73 I C 583,¹⁶ 5 Lah 450,¹¹ 100 I C 1014,¹⁷ 11 Lah 415¹⁸ at p. 420, 13 Lah 826,¹⁹ 15 Lah 563²⁰ and 160 I C 152.²¹ But

10. *Diyal Kaur v. Mehtab Kaur*, (1921) 8 A I R Lah 168 = 74 I C 639.

11. *Gobinda v. Nandu*, (1922) 9 A I R Lah 217 = 74 I C 644 = 5 Lah 450.

12. *Kundan v. Secy. of State*, (1926) 13 A I R Lah 673 = 96 I C 895 = 7 Lah 543 = 27 P L R 859.

13. *Collector of Masulipatam v. Cavalry Vencata Narrainapah*, (1859-61) 8 M I A 529 = 2 W R 61 = 1 Suther 476 = 1 Sar 820 (P O).

14. *Allah Ditta v. Gauhra*, (1914) 1 A I R Lah 283 = 23 I C 127 = 3 P R 1914 = 129 P L R 1914.

15. *Dalipa v. Suraj Kaur*, (1916) 3 A I R Lah 177 = 34 I C 581 = 48 P R 1916.

16. *Nawaz Khan v. Mt. Zohra Jan*, (1924) 11 A I R Lah 187 = 73 I C 583.

17. *Imam Din v. Khamandi*, (1927) 14 A I R Lah 366 = 100 I C 1014.

18. *Fateh Din v. Mohammad Bibi*, (1930) 17 A I R Lah 971 = 122 I C 727 = 11 Lah 415 = 31 P L R 760.

19. *Waras Khan v. Mehran*, (1932) 19 A I R Lah 473 = 139 I C 110 = 13 Lah 826 = 33 P L R 564.

20. *Barkurdar Shah v. Sat Bharai*, (1931) 18 A I R Lah 677 = 132 I C 881 = 15 Lah 563.

21. *Rasul Bibi v. Sardar Khan*, (1935) 22 A I R Lah 923 = 160 I C 152.

it is not necessary to discuss the matter further, as the point does not arise in this case. Here the testator Sardarni Bhagwan Kaur, had died, and succession opened out, before the institution of the suit, which is for possession and not for declaration by a presumptive heir in the lifetime of the alienor. Moreover, as already pointed out, the so-called 'alienation' by Sardarni Bhagwan Kaur was by way of a bequest, which could not take effect after her death, as she herself had only a life interest in the property and had nothing to bequeath. For the reasons given above, we affirm the decision of the Court below and dismiss the appeal. But having regard to all the circumstances we order that the parties shall bear their own costs throughout.

D.S./R.K.

Appeal dismissed.

A. I. R. 1940 Lahore 421

DALIP SINGH AND SALE JJ.

Salamat Rai and others — Defendants
— Appellants.

v.

Mokand Lal and others, Plaintiffs and another, Defendant — Respondents.

First Appeal No. 422 of 1938, Decided on 8th February 1940.

(a) **Hindu law—Debts—Money borrowed by manager to pay female member her share of produce appropriated by manager is not loan to pay debts of joint family.**

The money raised by manager in order to pay a female member's share of the produce which was due to her and which the manager is proved to have appropriated to himself, cannot be said to be loan borrowed to pay the debts of the family.

[P 423 C 2]

(b) **Hindu law — Partition — Widow of pre-deceased son is not entitled to share in property.**

According to Hindu law the widow of a pre-deceased son is entitled only to maintenance out of the joint family fund and not to a share in the property.

[P 424 C 1]

(c) **Mutation — Entry in — Value.**

A mere entry in the mutation register will not give any title.

[P 425 C 1]

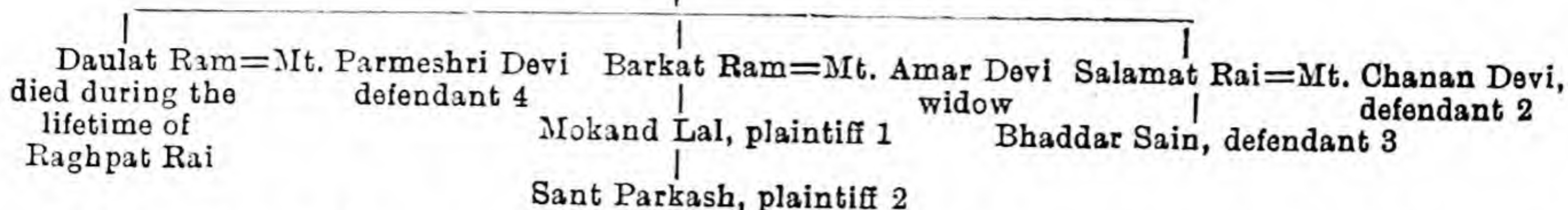
Achhru Ram and Chandra Gupta

— for Appellants.

Shamair Chand and Champat Rai; Nihal Singh — for Respondents (*Plaintiffs and Defendant, respectively*).

Sale J. — This is an appeal from a preliminary decree in a partition suit. The parties are members of a joint Hindu family living at Alawalpur in the Jullundur District and the suit relates to house property and vacant sites situated both in Jullundur city and Alawalpur. The following pedigree table illustrates the relationship between the parties :

RAGHPAT RAI=Mt. SHIV DEVI, widow, plaintiff 3



Raghpat Rai, the head of the family, died in 1917. His two sons, Daulat Ram and Barkat Ram, both pre-deceased him, Barkat Ram dying in 1916 and Daulat Ram some time before 1902. The suit was brought by Mokand Lal, son of Barkat Ram, on behalf of himself and his minor son Sant Parkash, and with him is associated as a co-plaintiff Mt. Shiv Devi, widow of Raghpat Rai. They claim possession by partition of a two-thirds share in the house property and the vacant sites in dispute, that is one-third share for Mt. Shiv Devi, and one-third share for Mokand Lal with his minor son. The remaining third share, originally that of Salamat Rai, had already been gifted by him to his wife Mt. Chanan Devi. This gift, though contested in the lower Court, was upheld by the trial Court, and is accepted in appeal. The suit was mainly contested by Salamat Rai, husband of Chanan Devi, who pleaded that as the managing member of the joint family after the death of Raghpat Rai, he had paid off the debts of Raghpat Rai and Mokand Lal by alienating his own share in the landed property (which is not the subject of the present case), and he claimed that account should be taken of these payments before allotment of separated shares to Mokand Lal and Mt. Shiv Devi. The suit was also contested by Mt. Parmeshri Devi, widow of Daulat Ram, with the claim that she had a third share in the property in suit.

The trial Court found against Salamat Rai on the question of the payment of Raghpat Rai's debts and partially upheld the claim of Mt. Parmeshri Devi. The learned Senior Subordinate Judge granted a preliminary decree, holding that Mokand Lal, on behalf of himself and his minor son Sant Parkash, is entitled to one-third share in the property, and that Mt. Chanan Devi, wife of Salamat Rai, is entitled to the third share gifted to her by her husband. As regards Mt. Parmeshri Devi, he found that she is entitled to a third share only in the house at Jullundur marked A on the plan, but he found that Mt. Shiv Devi is entitled to one-third share, in preference to Mt. Parmeshri Devi, in the remaining property.

Against this decision, Salamat Rai has preferred an appeal jointly with his wife and minor son. Of the grounds of appeal the only points which Mr. Achhru Ram has argued on behalf of Salamat Rai are (1) that the trial Court is 'wrong in holding that Salamat Rai has not discharged debts due from the joint Hindu family by money obtained from the alienation of his own share of the property, and he urges that Salamat Rai, having paid such debts, is entitled to have the payments taken into account, and (2) he has also 'attacked the finding of the lower Court that Mt. Parmeshri Devi is entitled to a one-third share in the house at Jullundur. Mt. Parmeshri Devi though served as a respondent in the case, did not originally enter an appearance before us; and during the hearing of the appeal we allowed an adjournment to enable counsel to appear on her behalf in support of the decision of the trial Court in her favour.

Before dealing with the case presented by Mr. Achhru Ram in appeal, it is necessary to make some reference to the previous family litigation. This family owns in addition to the property in suit landed property which is, or has been, the subject of partition proceedings by the revenue authorities. Raghpat Rai had made a will in 1902, following the death of his son Daulat Ram, providing for the maintenance of Mt. Parmeshri Devi, the widow, by the grant to her inter alia of five shops at Alawalpur for her lifetime. Nevertheless, when Raghpat Rai died in 1917 (his other son Barkat Ram also having pre-deceased him) his landed property was mutated by the revenue authorities, one-third to Mt. Parmeshri Devi, one-third to Mokand Lal and one-third to Salamat Rai. Salamat Rai as the eldest member of the family became the manager, and assumed control of the income and expenditure of the joint Hindu family property. His managements caused disputes; and on 11th December 1922 Mt. Parmeshri Devi was compelled to bring three suits against Salamat Rai for her share of the produce of the agricultural land. These suits were decreed on 10th January 1924 for Rs. 3149. During the

pendency of these suits, Salamat Rai sued for a declaration that Mt. Parmeshri Devi had no share in the family property, on the ground that the property should have passed by survivorship under Hindu law to the sons. A compromise, however, was effected and the suit was withdrawn. In 1925 Salamat Rai again sued for the same relief, but his suit was dismissed on 20th November 1925, the Court holding that a second suit on the same cause of action did not lie. The suit now under appeal was instituted on 30th July 1935 for partition of the house property and vacant sites (belonging to the joint family).

It will be convenient first to deal with the claim of Salamat Rai, that he has paid off debts on behalf of the joint family, by alienating his own share of the landed property, and that account should be taken of these payments in effecting partition. It is admitted that, on the death of Raghpat Rai, Salamat Rai took sole control of the management of the affairs of the joint Hindu family. He was then the only surviving major son of Raghpat Rai, Mokand Lal, the present plaintiff, being still a minor. The onus, therefore, lay heavily on Salamat Rai to prove by cogent evidence that he paid the joint family debts by alienating his own share of landed property. As to the amount of these joint family debts, Salamat Rai himself made varying statements on which the learned Senior Subordinate Judge has commented adversely though not quite accurately. In the judgment the learned Senior Subordinate Judge attributes to Salamat Rai the assertion that in his original statement he alleged the total amount of the debts to be Rs. 30,000. A reference to his original statement dated 15th April 1936 will show that it was not alleged on behalf of Salamat Rai that the debt was ever as much as Rs. 30,000. What he said on 15th April 1936 was that he had spent about Rs. 30,000 as manager of the joint Hindu family. It was, however, stated on his behalf by his counsel on 12th March 1936 that he had paid about Rs. 16,000 towards the debts of Raghpat Rai. In a statement dated 2nd January 1937 his counsel reduced this amount to Rs. 10,000 while as his own witness on 7th May 1938 Salamat Rai said the total amount of the debts left by Raghpat Rai was only Rs. 7000.

The trial Court has found that the actual amount paid by Salamat Rai to liquidate the family debts as proved by the evidence, consists of four items totalling Rs. 7498.

Actually the amount thus proved is Rs. 450 more, since the receipt, exhibit D. W. 54/2 of a payment to Pheru Mal is for Rs. 2650 and not Rs. 2200 as recorded in the lower Court's judgment. It is established, therefore, that Salamat Rai paid to the creditors of the joint Hindu family Rs. 7948. Mr. Achhru Ram, counsel, in appeal accepts this figure. As regards realizations by Salamat Rai, the learned Senior Subordinate Judge has referred to mutations which show that Salamat Rai has realized in all Rs. 8270 by alienations of the family property. The learned Senior Subordinate Judge has observed that these alienations relate not merely to Salamat Rai's own share but to property belonging to all shareholders in the joint Hindu family. It has been admitted by Mr. Achhru Ram in appeal that Salamat Rai did in fact sell large portions of the joint Hindu family property (beyond his own share) in order to realize cash. In this connexion, however, counsel urges that at the time of the partition of his agricultural land a corresponding deduction was made from his share. There is, however, absolutely no proof on the record of this assertion.

Reference has already been made to the fact that during the time of Salamat Rai's management Mt. Parmeshri Devi was compelled to sue in order to obtain her share of the produce, and decrees were passed against Salamat Rai on this account. In order to pay Mt. Parmeshri Devi, Salamat Rai states that he had to borrow Rs. 1600 from his father-in-law, Ishar Das. The learned Senior Subordinate Judge is not correct in saying that there is no proof that Salamat Rai borrowed this sum of Rs. 1600 by alienating his own one-third share. On the contrary it is established by the relevant documentary evidence printed at pp. 46, 51 and 64 of Vol. II of the paper book that Salamat Rai did raise this money on the security of his one-third share only.

Nevertheless, this fact did not improve Salamat Rai's position. The money was raised in order to pay Mt. Parmeshri Devi's share of the produce which was due to her and which Salamat Rai is proved to have appropriated to himself. Salamat Rai cannot, therefore, take advantage of this loan for establishing his contention that he borrowed money to pay the debts of the family. While it is established that he did pay debts left by Raghpat Rai, it seems clear that to a large extent the money was realized by alienating the joint family pro-

perty and not merely his own share thereof. It may be that Salamat Rai did on some occasions raise money on his own share, but having regard to the fact that he was the manager of the family in complete control of income and expenditure, it was his duty to substantiate his allegation by cogent evidence such as the production of accounts. No such accounts have been produced. The evidence does not establish that such payments as may have been made by Salamat Rai from his own share, if any, are large enough to affect the distribution of shares among the shareholders inter se, on partition. I am, therefore, in agreement with the decision of the learned Senior Subordinate Judge that Salamat Rai is not entitled to any consideration on this account.

I now turn to Mt. Parmeshri Devi's case. The learned Senior Subordinate Judge has rightly pointed out that according to Hindu law, by which the parties in this case are governed, Mt. Parmeshri Devi, as the widow of a pre-deceased son, is entitled only to maintenance out of the joint family fund and not to a share in the property. Raghpat Rai, during his lifetime, was clearly anxious regarding this lady's maintenance and in his will, made in 1902, he directed that inter alia she should be given five shops situated in Alawalpur "for purposes of her maintenance." We do not know what has become of these five shops. After Raghpat Rai's death in 1917, the agricultural land was, as already mentioned, mutated by the revenue authorities, one-third to Mt. Parmeshri Devi, one-third to Salamat Rai and one-third to Mokand Lal. The rights of Mt. Shiv Devi appear to have been ignored. Attempts were made by Salamat Rai to dispute this allocation, but, as already stated, they were not pressed. The result has been that ever since the death of Raghpat Rai Mt. Parmeshri Devi has been in possession of one-third of the landed property, while according to the mutation printed at page 55 of Vol. II of the paper book she has also been shown in possession of a one-third share in the house property situated at Jullundur.

We are not, in this case, concerned with Mt. Parmeshri Devi's share in the agricultural land. So far as her share in the house property at Jullundur is concerned, there is no evidence to show that she has ever been in possession thereof. Counsel has not attempted to support Mt. Parmeshri Devi's title to the property in question but has attempted to establish her claim by refer-

ence to alleged admissions by Salamat Rai and Mokand Lal and by the statement of Mt. Parmeshri Devi's so-called Mukhtar, Ali Mohammad, D. 4, W. 1, printed on page 86, Vol. 1 of the paper book. The evidence of Ali Mohammad has been adversely criticized by the trial Judge and he certainly does not prove that Mt. Parmeshri Devi was ever in possession of the house in Jullundur. He has to admit that so far as he knows Mt. Parmeshri Devi never lived in the house in Jullundur which is in possession of tenants attorning to the owners jointly. Ali Mohammad's evidence does not therefore help Mt. Parmeshri Devi. Mokand Lal, in his statement on p. 94 of Vol. I, does appear to make some admissions in regard to Mt. Parmeshri Devi's title to the agricultural land, but he never made any admission that she was entitled to a share in the house property. In his judgment the learned Senior Subordinate Judge says that in making a gift of his third share of the kothi in favour of his wife Mt. Chanan Devi, Salamat Rai accepted and admitted Mt. Parmeshri Devi as owner of a third share. This statement is incorrect. A reference to the mutation in question printed at p. 55 of Vol. II of the paper book shows that Salamat Rai never made any such admission. The only admission made by Salamat Rai is in a compromise printed at page 35 of Vol. II, according to which Salamat Rai withdrew his original suit challenging the rights of Mt. Parmeshri Devi in the agricultural land. In this compromise Salamat Rai admitted that "Parmeshri Devi is owner of one-third share of the entire landed, and house property left by Lala Raghpat Rai."

Now, the suit which ended in this compromise did not relate to the house property but only to the landed property: and counsel for Mt. Parmeshri Devi concedes that this document, in so far as it relates to the house property, is inadmissible for want of registration, unless it can be shown that the house is included in the landed property. This is not clear, since the house property is in Jullundur and would not therefore normally be the subject of a mutation by the revenue authorities. In any case, however, this admission by Salamat Rai was gratuitous, and therefore cannot give Mt. Parmeshri Devi any claim to the property, which should fall to the share of Mt. Shiv Devi and Mokand Lal. The only basis of Mt. Parmeshri Devi's claim to a third share in this house, is the admitted

fact that in the Abadi Register relating to Jullundur she has been shown as a holder of a 1/3rd share in the house since the death of Raghpai Rai. But as already pointed out, there is no reliable evidence to show that she has ever been in possession, and on the death of Raghpai Rai she certainly had no right to succeed to this share. A mere entry in the mutation register would not give her any title. The learned Senior Subordinate Judge, while recognizing that she has no title, appears to think that she had acquired some right to the share by the admissions of Salamat Rai. It has been shown that there are no such admissions as would give Mt. Parmeshri any rights against the present appellants. The learned Senior Subordinate Judge then concludes that "it will not be equitable to disturb her right in the kothi after the expiry of about 21 years." It is clear, however, that Mt. Parmeshri Devi has not, and never had, any right in the kothi and I would therefore set aside the decision of the learned Senior Subordinate Judge granting Mt. Parmeshri Devi a third share in this kothi.

To this extent therefore I would accept the appeal of Salamat Rai. The third share which the learned Senior Subordinate Judge had allotted to Mt. Parmeshri Devi will go to Mt. Shiv Devi whom the Senior Subordinate Judge has found entitled to a third share in the remainder of the property. For the rest the appeal of Salamat Rai fails and is dismissed. It remains to consider the cross-objections as to costs instituted by Mokand Lal. The learned Senior Subordinate Judge, although rejecting Salamat Rai's case in toto, directed that the parties should bear their own costs in view of "the near relationship of the parties and to avoid future heart burning." But Salamat Rai's contentions have failed throughout; and since it was owing to Salamat Rai's objections that the plaintiff has been forced to come into Court, there is no reason in my view why the ordinary rule as regards costs should not apply in this case. I would therefore accept the cross-objections and direct that Mokand Lal and Mt. Shiv Devi will be entitled to their costs in the lower Court. As regards this appeal, inasmuch as Salamat Rai has succeeded as against Mt. Parmeshri Devi, I would leave parties to bear their own costs.

Dalip Singh J. — I agree.

D.S./R.K. *Appeal partly allowed.*

*** A. I. R. 1940 Lahore 425**

TEK CHAND J.

Firm Nand Gopal-Om Parkash through Banarsi Das — Plaintiff — Appellant.

v.

Firm Mehnga Mal-Kishori Lal —

Defendants — Respondents.

Second Appeal No. 1724 of 1938, Decided on 2nd April 1940, from decree of Senior Sub-Judge, Amritsar, D/- 14th October 1938.

*** (a) Civil P. C. (1908), O. 30, R. 1, Expl. (Punjab) — O. 30, R. 1 is enabling provision — Joint Hindu family firm can sue in its name or jointly in name of all members or in name of manager as karta.**

Order 30, R. 1 read with the "Explanation," is an enabling provision. Under that Rule an alternative form has been provided in which suits by, or against joint Hindu family trading concerns, may be brought. In the Punjab, therefore a joint Hindu family firm may sue either (1) in its "firm-name," if it has any; or (2) all the members may sue jointly in their individual names; or (3) in certain circumstances, e. g., when a contract had been entered into with the manager of the family firm, he, as the karta, may sue in his own name alone: *A I R 1938 Lah 563, Expl.; A I R 1940 Lah 256, Rel. on.* [P 427 C 1]

(b) Partnership Act (1932), S. 68 — Joint Hindu family firm — Registration per se does not destroy its character.

The mere fact that a joint Hindu family trading firm gets itself registered under the Act, by itself and without more, does not destroy its character as such. [P 427 C 2]

Shamair Chand and Qabul Chand —

for Appellant.

Bakhshi Bhagat Ram — *for Respondents.*

Judgment.—The plaintiff-appellant described as "firm Nand Gopal-Om Parkash through Banarsi Das, one of the proprietors of the firm of Amritsar, Guru Bazar" instituted a suit against the defendant "firm Mehnga Mal-Kishori Lal through Jangi Mal, proprietor", for recovery of Rs. 888-9-9, alleged to be due on a bahi account. The defendant pleaded that the suit was not maintainable as the plaintiff firm had not been registered under the Partnership Act. The defendant also denied the plaintiff's claim on the merits. In the replication it was averred that the plaintiff was a joint Hindu family trading firm and therefore its registration was not necessary. The defendant's pleas on the merits were traversed. The trial Judge framed seven issues, of which the first was in the following terms: 1. Is the plaintiff firm a joint Hindu family firm and its registration is not necessary?

The other six issues related to the merits. He found issue 1 in favour of the plaintiff,

holding that the plaintiff firm was a joint Hindu family firm, that there was no stranger partner in it and therefore the suit was maintainable in the form in which it had been brought. The issues on the merits were also decided in favour of the plaintiff firm and, in the result, the suit was decreed for the full sum claimed with costs and future interest. The defendant firm appealed to the Senior Subordinate Judge, who came to the conclusion that the evidence on the record was insufficient to prove that the plaintiff was a joint Hindu family firm. He held therefore that registration was necessary and as no certificate from the Registrar of firms had been produced the suit was not maintainable. He also held that, even if the plaintiff-firm was a joint Hindu family firm, the suit could not be instituted in the "firm name" but should have been brought in the name of all the members and, for this reason also, the suit should have been dismissed. He accordingly, accepted the appeal, set aside the decree of the trial Court, and dismissed the suit, without going into the merits.

On second appeal, it was contended that in holding that the plaintiff firm was not a joint Hindu family firm, the learned Senior Subordinate Judge had ignored material evidence on the record and had also misread important evidence. It was also urged that the trial Court had erroneously refused an opportunity to the plaintiff to produce its account books from Calcutta to corroborate the oral testimony that it was a joint family concern and that the Senior Subordinate Judge has erred in drawing a presumption adverse to the plaintiff firm from its supposed failure to produce the books. An application under O. 41, R. 27, Civil P. C., was also presented, in which it was stated that "firm Nand Gopal-Om Parkash" had, in fact, been registered under the Partnership Act at Calcutta and a copy of a certificate by the Registrar of Firms, Bengal was presented showing that the firm had been so registered on 18th June 1934.

After hearing counsel for the respondent, I found that there was force in the contention that the trial Court had erroneously refused an adjournment to enable the appellant-firm to produce one of its partners with the account books from Calcutta. Instead of remanding the case, I, with the concurrence of counsel for both parties, recorded the evidence myself. Narain Das and Charan Das of the plaintiff-firm appeared with their books and were examined and

cross-examined at length. The defendant-respondent also examined two witnesses in rebuttal. This evidence read with that produced at the trial conclusively establishes that "firm Nand Gopal-Om Parkash" is an undivided Hindu family trading firm, which is owned by the descendants of Hari Ram. The name of the coparceners and their relationship with each other appear from the pedigree table (Ex. H.C/1) produced by Narain Das. The family has three firms, all owned exclusively by the descendants of Hari Ram. Originally, the family had one firm only, called Hari Ram-Dina Nath. Two firms were subsequently started, known as (1) Narain Das-Om Parkash and (2) Nand Gopal-Om Parkash, with funds taken from the parent firm. The last named firm has its head office at Calcutta and a branch at Amritsar. The coparceners live in commensality; they have a common mess and residence, though they occupy separate blocks of the same building. The entire family properties are owned by them jointly and marriage expenses of the children of the various branches of the family have been defrayed from the common fund. The income-tax on the three firms is assessed and paid out of the joint funds. An attempt was made by the respondent to show that some immovable properties had been acquired in the name of individual members and not of the joint family as such of the karta. It was admitted by the plaintiff that the title deeds of some properties were in the name of its members, but it has been shown from the account books (which are regularly kept and in which no defect was pointed out, though the respondent's counsel had ample opportunity to inspect them), that the purchase price was paid from the joint family funds and that when some of the properties were sold the sale proceeds were credited to joint account. The respondent also sent for the municipal records to show that water-tax of the houses in Amritsar had been assessed separately, but the entries relating to ownership in these registers have been shown to be inaccurate in several particulars and it has been proved that water-tax assessed on the houses occupied by different members of this family has been paid out of the joint funds.

Against this overwhelming evidence the defendant has not brought forward anything substantial in rebuttal. Indeed at the conclusion of his argument, Mr. Bhagat Ram Anand, the learned counsel for the respondent, did not seriously press his oppo-

sition on the point. I therefore hold that "firm Nand Gopal-Om Parkash" is a joint Hindu family trading firm.

The next question is whether a joint Hindu family firm can sue in its firm name. It is provided in R. 1 of O. 30, Civil P. C., that a firm may sue or be sued in its firm name. In 1909 the Chief Court, Punjab, acting under its rule-making power, added an "Explanation" to this rule making it applicable to a "joint Hindu family trading partnership." In the Punjab therefore a joint Hindu family firm can sue and be sued in its "firm name" like any other contractual partnership.

For the contrary proposition, the learned Senior Subordinate Judge has relied upon A I R 1938 Lah 563¹ which was decided by me sitting in Single Bench. Owing to some typing mistakes and omission of words in that judgment, certain sentences convey a very different meaning from what was intended though these sentences, as printed, do not affect the ultimate decision of that case. The exact significance of that decision has been explained at length in F. A. 25 of 1939,² recently decided by a Division Bench and it is not necessary to repeat all that I have said there. It will be sufficient to say, as explained in that ruling that O. 30, R. 1 read with the "Explanation" is an enabling provision. Under that rule an alternative form has been provided in which suits by or against joint Hindu family trading concerns may be brought. In the Punjab therefore a joint Hindu family firm may sue either (1) in its "firm name" if it has any; or (2) all the members may sue jointly in their individual names; or (3) in certain circumstances, e. g., when a contract had been entered into with the manager of the family firm he as the karta may sue in his own name alone. In the case before us, the joint Hindu family business was carried on in the name of firm "Nand Gopal-Om Parkash" and therefore the suit had been properly brought in that name. It was urged that Benarsi Das was not the karta and he should not have been specifically mentioned in the heading of the plaint. This however makes no difference. His name appears to have been mentioned as he was the person who was actually working at Amritsar at the time.

Though the plaintiff firm is a joint Hindu

family firm, it seems that in 1934 soon after S. 69, Partnership Act, had come into force the members of the family got the firms "Hari Ram-Dina Nath" and "Nand Gopal-Om Parkash" registered in Calcutta under the Act. As will appear from the certificate filed with the memorandum of appeal the date of the registration is 18th June 1934 and the partners in the firm were stated to be Nand Gopal and Om Parkash only; the names of the other members of the joint Hindu family were not mentioned. The learned counsel for the respondent argued in reference to S. 68, Partnership Act, that these statements are conclusive as against the persons by whom or on whose behalf they were made before the Registrar. It was contended that the plaintiff firm must be considered to be owned by Nand Gopal and Om Parkash only and it is not open to them or the other coparceners to urge that the firm is a joint Hindu family concern. I do not think that the mere fact that a joint Hindu family trading firm gets itself registered under the Act, by itself and without more destroys its character as such. The registration appears to have been effected *ex majore cautela* without any intention to change the coparcenary status. But even if this were so, the plaintiff firm treated as a contractual partnership between the two persons named in the certificate, can maintain the suit in its name, as provided in O. 30, R. 1, Civil P. C. In that event in the heading of the plaint the words "through Benarsi Das, one of its proprietors" should be treated as a surplusage and deleted. In either view of the case therefore the suit was maintainable and the ground on which the learned Senior Subordinate Judge has dismissed it cannot be sustained. For the foregoing reasons, I accept this appeal, set aside the order of the learned Senior Subordinate Judge and remand the case to him for disposal of the remaining issues on the merits. Court-fee on the appeal shall be refunded; other costs will be costs in the cause. The cross-objections necessarily fail and are dismissed. Both counsel have been directed to cause their clients to appear before the Senior Subordinate Judge at Amritsar on 22nd April 1940 when a date for further proceedings shall be fixed.

G.N./R.K.

Appeal accepted.

1. *Debi Sahai v. Gillu Mall*, (1938) 25 AIR Lah 563=177 IC 918=40 P L R 456.

2. *Atma Ram v. Mian Umar Ali*, Reported in (1940) 27 A I R Lah 256=42 P L R 278.

A. I. R. 1940 Lahore 428

BHIDE AND DIN MOHAMMAD JJ.

Mian Dost Mohammad and another —
Plaintiffs — Appellants.
 v.

Habib Sultan and others — Defendants
— Respondents.

First Appeal No. 211 of 1939, Decided on 15th April 1940, from decree of Senior Sub-Judge, Jhang, D/- 28th February 1939.

(a) Punjab Land Revenue Act (17 of 1887), Ss. 115 and 158 — Collector disallowing partition in exercise of discretion under S. 115— Civil Court has no jurisdiction to go into the matter.

Where the Collector has chosen to disallow partition in the exercise of his discretion under S. 115, a Civil Court has no jurisdiction to go into the question whether partition of the land in dispute was rightly disallowed by the Collector under that Section: *A I R 1930 Lah 513, Expl.*

[P 430 C 2; P 431 C 1]

(b) Punjab Land Revenue Act (17 of 1887), S. 115 — Revenue Officer can disallow partition of part of land which is included in application for partition.

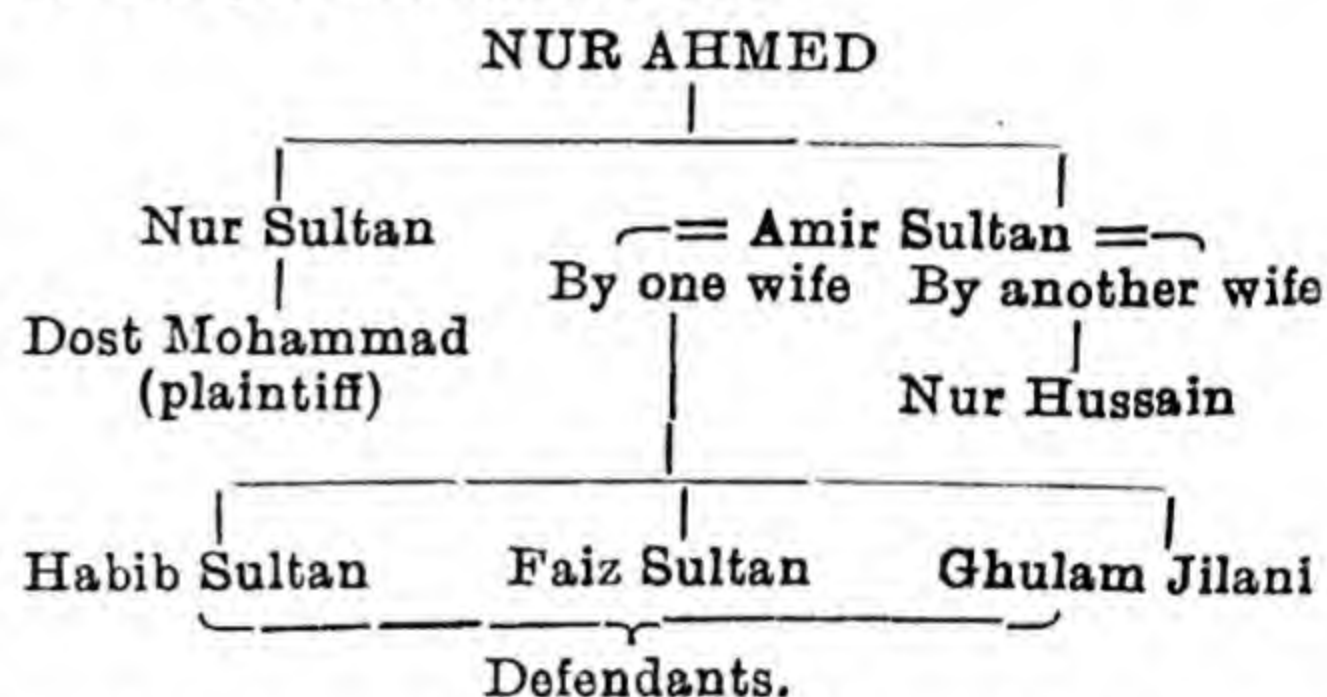
As S. 115, authorizes a Revenue Officer to disallow partition even of the whole of the land included in an application for partition, there is no bar to his disallowing partition of a part of it, if he finds a 'good and sufficient' cause for doing so: *150 P R 1890, Rel. on.* [P 431 C 2]

J. N. Aggarwal and Yashpal Gandhi —
for Appellants.

Mehr Chand, J. L. Kapur and Ghulam Mustafa — *for Respondents.*

Bhide J. — This is a declaratory suit arising out of partition proceedings relating to land. The revenue authorities refused to allow partition of an area comprising 134 kanals, 4 marlas out of the land in khata No. 10 of which partition was sought, on the ground that it was required for the purposes of a Mahomedan shrine known as Khanqah Hazrat Sultan Bahu. The plaintiff Dost Mohammad, being dissatisfied with this decision, instituted the present suit to establish his right to have this area partitioned, excluding the land which is under the Khanqah or buildings attached to it. The area under the Khanqah and appurtenant buildings is stated to be 62 kanals 17 marlas and the plaintiff's claim in the present appeal is confined to the remaining area of 71 kanals 7 marlas which is under cultivation. The revenue authorities have held that this latter area is cultivated only for the purposes of fodder for the requirements of pilgrims visiting the shrine and that it was also needed for the extension of the Khanqah and the grave-

yard attached to it. The plaintiff contends that he is an absolute owner of 1/4th of this area and as such has a right to get this area partitioned. He denies that the area is necessary for the purposes of the Khanqah or that he is bound to keep it joint for the said purposes. The trial Court found the issues against the plaintiff and dismissed his suit with respect to the aforesaid area of 134 kanals, 4 marlas. From this decision plaintiff has preferred this appeal. The pedigree table showing the relationship of the parties is as below :



Nur Ahmed was a Sajjadanashin of the Khanqah Hazrat Sultan Babu. His son Nur Sultan, who was the father of the present plaintiff, died during the lifetime of Nur Ahmed and Nur Ahmed was succeeded by his second son Amir Sultan as Sajjadanashin. Amir Sultan nominated his eldest son Habib Sultan (defendant 1) as his successor and the latter accordingly succeeded him and is at present the Sajjadanashin of the Khanqah. It appears that the present plaintiff instituted a suit against Amir Sultan, alleging that he was entitled to succeed as a Sajjadanashin, but the matter was settled by arbitration and a decree was passed in accordance with the arbitrator's award, granting plaintiff and his male descendants an annuity of Rs. 1200 out of the income of the Khanqah (*vide pp. 79-80, Vol. II of the printed record.*)

It seems from the written statements and the will of Amir Sultan, marked as Exs. P-8 and P-9, that no property was attached to the Khanqah and the Sajjadanashins have been treating the landed property in their possession as their personal property. Plaintiff claims that the land in dispute was gifted to him by his grandfather Nur Ahmed and is his absolute property. It is admittedly entered in the name of the plaintiff and defendants as joint owners, plaintiff's share being one-fourth. There is no documentary evidence to show that this land was ever dedicated to the Khanqah. The defendants relied

chiefly on the fact that the land is situated inside the bund which was erected some ten years ago to protect the Khanqah from floods and that it was being utilized for the purposes of the Khanqah. But this fact alone cannot obviously be held to be sufficient to prove any dedication. The defendants apparently realized the weakness of their position in this respect; for, although before the revenue authorities they had raised the plea that the land in dispute was 'wakf', this position was abandoned in the present suit. In para. 1 of the jawabdawa of the defendants it was stated that the mosque and the Khanqah were 'wakf', but as regards the rest of the land, it was admitted that it was certainly the joint property of the parties and that plaintiff had one-fourth share in it. In para. 2 it was said that the defendants never challenged plaintiff's ownership or right of partition. In para. 5 it was admitted that 'there was no question of any condition or restriction whatever on the plaintiff's rights of ownership,' and it was stated that:

The question is whether or not the area excluded by the Revenue Officers from partition should remain excluded from partition.

The defendants accordingly contended that there was no question of title involved in the present suit and the decision of the Revenue Officers disallowing partition of the land in dispute could not be challenged in a Civil Court in view of the provisions of S. 158, Punjab Land Revenue Act. On the merits also, they resisted the plaintiff's claim on the grounds which they had put forward before the Revenue Officers and also raised certain other pleas—such as estoppel, acquiescence, etc. The plaintiff had alienated one-half of his share in the land in dispute to one Talib Hussain and he was accordingly joined as a co-plaintiff. He took up the same pleas as the plaintiff Dost Mohammad. The learned trial Judge has, however, held that the alienation in favour of Talib Hussain was void as the land was used for religious purposes. The two main issues in the case were:

(1) Whether the suit was cognizable by a Civil Court, and if so, (2) whether the plaintiff was entitled to have the property in dispute partitioned.

The first point is the most important one in the present case; for, if a Civil Court has no jurisdiction to question the decision of the revenue authorities disallowing partition, the other issue will not arise. As regards the question of jurisdiction, the learned Judge of the trial Court has held that the suit was cognizable by a Civil

Court. The learned Judge pointed out that the revenue authorities had found that the land in dispute was needed for the upkeep of the khanqah and has held that this finding can certainly be challenged in a Civil Court. The first point for decision, therefore, is whether the above view of the trial Court is correct. The decision of this point turns on the interpretation of the orders passed by the Revenue Officers and of the provisions of Ss. 111 to 117 and S. 158, Punjab Land Revenue Act.

The plaintiff's application for partition was first sent to the Naib Tahsildar for report, and he reported that the land in dispute was a 'place of worship' within the meaning of S. 112, Punjab Land Revenue Act, and was therefore not subject to partition. S. Dhian Singh, Assistant Collector, First Grade, before whom the application came for disposal, also came to the conclusion that partition of the land in question should not be allowed, but he based his decision on different grounds. He found that the land was needed for the use of the visitors to the khanqah and for its future extension and therefore held that it should not be treated as the personal property of the joint owners in whose names it was recorded. He also considered that the application was not a bona fide one, that the real object of the plaintiff was to build a bungalow within the area in dispute and that this was likely to aggravate the existing disputes between the plaintiff and the sajjadanashin. The Assistant Collector was willing to allow partition of the remaining area in the joint khata, but the plaintiff did not want partition of the rest of the khata, if he was not given his share in the area of 134 kanals 4 marlas within the bund referred to above. The application for partition was accordingly dismissed. From this decision an appeal was preferred to the Collector. The Collector did not think it necessary to decide the question whether the land in dispute was 'wakf,' but he was of opinion that the land situated within the bund was certainly necessary for purposes appertaining to the shrine. He considered that as the plaintiff was also receiving a sum of Rs. 1200 out of the income of the shrine, both parties were interested in its upkeep and therefore the area jointly owned by the parties which was needed for the purposes of the khanqah should not be partitioned. He accordingly upheld the order of the Assistant Collector under Sec. 112 read with S. 115, Punjab Land

Revenue Act and dismissed the appeal (*vide* order dated 25th January 1935, pp. 89-90, Vol. II of the printed record).

The plaintiff is said to have gone up to the Commissioner in revision, but his petition is said to have been dismissed. It is said that the Commissioner directed the appellant to get the question of his title settled by a Civil Court. But no copy of the Commissioner's order has been produced, and it is not known what the Commissioner exactly said on the point. In any case, the Commissioner having admittedly dismissed the petition for revision the Collector's order dated 25th January 1935 referred to above must, in law, be treated as the final order passed by the Revenue Officers on the application for partition under the Punjab Land Revenue Act. The question of jurisdiction of Civil Courts must therefore be decided on the basis of that order and the alleged direction (if any) by the Commissioner to the plaintiff to get his title settled by a Civil Court cannot confer jurisdiction on Civil Courts.

As stated above, the Collector upheld the Assistant Collector's order dismissing the application, under S. 112 read with S. 115, Punjab Land Revenue Act. The reference to S. 112 seems to be merely due to the fact that part of the area of 134 kanals, 4 marlas was under the khankah and a mosque which are admittedly "wakf" properties. The Collector has distinctly stated that he was not going into the question whether the remaining area about which there was a dispute was "wakf." He refused the application for partition of that area merely on the ground that the area was needed for the purposes of the khankah. This order was therefore clearly passed under S. 115, Punjab Land Revenue Act, which gives discretion to a Revenue Officer to disallow partition for any "good and sufficient cause," quite apart from any questions of title, which may need examination under S. 116, Punjab Land Revenue Act, if partition is to be allowed. The Collector recognized that the plaintiff was a joint owner of the land, but was of opinion that as he was receiving Rs. 1200 out of the income of the khankah, he too was interested in its upkeep and therefore it was justifiable to disallow partition of the area which was necessary and was being used for the requirements of the shrine. It has been urged for the appellant that the sum of Rs. 1200 per annum was granted to the appellant out of the income of the khankah in settle-

ment of his claim to the office of Sajjada-nashin of the khankah and that he is in no way responsible for its upkeep and is not bound to provide land out of his share for the requirements of the khankah.

There is force in this contention; but whether the reasons given by the Collector in support of his order are sound or not, the question is whether the Collector having chosen to disallow partition in the exercise of his discretion under S. 115, Punjab Land Revenue Act, a Civil Court has any jurisdiction to go into the matter. The learned counsel for the appellant has referred to a Full Bench decision of this Court reported in 11 Lah 449,¹ but that decision does not seem to help the appellant. In that case, the Revenue Officer had allowed partition in spite of an agreement recorded in the *wajib-ul-arz* to the effect that the land set apart for pasture should continue to be joint and impartible. It was held that the question whether the land could be partitioned in spite of the agreement recorded in the *wajib-ul-arz* was a question of title. In the present instance, there is no question of any such agreement involved. The defendants have, indeed, produced some evidence in the present suit to the effect that the plaintiff had agreed to the land in dispute being reserved for the purposes of the khankah, at the time when the bund was built. But the decision of the Collector is not based on the alleged agreement. He has merely refused partition in the exercise of the discretion vested in him under S. 115, Punjab Land Revenue Act. The question therefore is whether in these circumstances in view of the provisions of S. 158, Punjab Land Revenue Act a Civil Court has jurisdiction to grant plaintiff the declaration sought by him. S. 158 of that Act provides that

Except as provided by this Act

(1) A Civil Court shall not have jurisdiction in any matter which the Local Government or a Revenue Officer is empowered by this Act to dispose of, or take cognizance of the manner in which the Local Government or any Revenue Officer exercises any powers vested in it or him by or under this Act; and in particular

(2) a Civil Court shall not exercise jurisdiction over any of the following matters, namely :

(xvii) any claim for partition of an estate, holding or tenancy, or any question connected with, or arising out of, proceedings for partition, not being a question as to title in any of the property of which partition is sought.

According to sub-s. (1) of S. 158, a Civil Court has no jurisdiction in any matter

1. Sheo Nath v. Giani, (1930) 17 AIR Lah 513 = 128 IC 529 = 11 Lah 449 = 31 PLR 484 (F B).

which a Revenue Officer is empowered to dispose of under the Act. Under S. 115, the Collector had the discretion to disallow partition and he has done so. It would therefore appear that a Civil Court has no jurisdiction to go into the question whether partition of the land in dispute was rightly disallowed by the Collector under that Section. No question of title really arises in the present case. Questions of title have to be considered under S. 116, if partition is allowed. But that stage was not even reached as partition was disallowed under S. 115. It must be noted that the Collector did not disallow partition in this case on the ground that the appellant had no right to get the land partitioned. As a cosharer, he had of course that right, which is inherent in the right of ownership. But the Punjab Land Revenue Act gives the Revenue Officers discretion to disallow partition in spite of this right 'for good and sufficient cause' and the Collector disallowed partition in the exercise of this discretion. The question whether the Collector was right in holding that there was 'good and sufficient cause' in the present case for disallowing partition could be agitated before higher Revenue Officers having appellate or revisional jurisdiction, but in view of the provisions of sub-s. (1) of S. 158, a Civil Court is debarred from going into the matter.

It is true that the Revenue Officers only disallowed partition of a portion of the joint Khata No. 10, of which partition was sought; but the appellant stated before the Revenue Officers that he did not want partition of the remaining area, if the area of 134 kanals 4 marlas within the bund was not to be partitioned. It is therefore clear that the appellant's application for partition was in reality for the partition of this area only and the application was therefore rightly dismissed. I may however add that as S. 115, Punjab Land Revenue Act, authorizes a Revenue Officer to disallow partition even of the whole of the land included in an application for partition, there seems to be no bar to his disallowing partition of a part of it, if he finds a 'good and sufficient' cause for doing so. This seems to be also the interpretation placed on the Section in 150 P R 1890² (see p. 489). For reasons given above, I would hold that a Civil Court has no jurisdiction to grant the appellant the declaration sought by him. In the circumstances, it is unnecessary to consider any of the other issues raised in the present case. I would accordingly dismiss the appeal, but in view of all the circumstances leave the parties to bear their costs.

Din Mohammad J.—I agree.

D.S./R.K.

Appeal dismissed.

2. Radhu v. Mt. Nando, (1890) 150 P R 1890.

A. I. R. 1940 Lahore 431

TEK CHAND AND BECKETT JJ.

Diwan Chand and others—Plaintiffs—
Appellants.

v.

Beli Ram and others — Defendants —
Respondents.

First Appeal No. 448 of 1938, Decided on 11th June 1940.

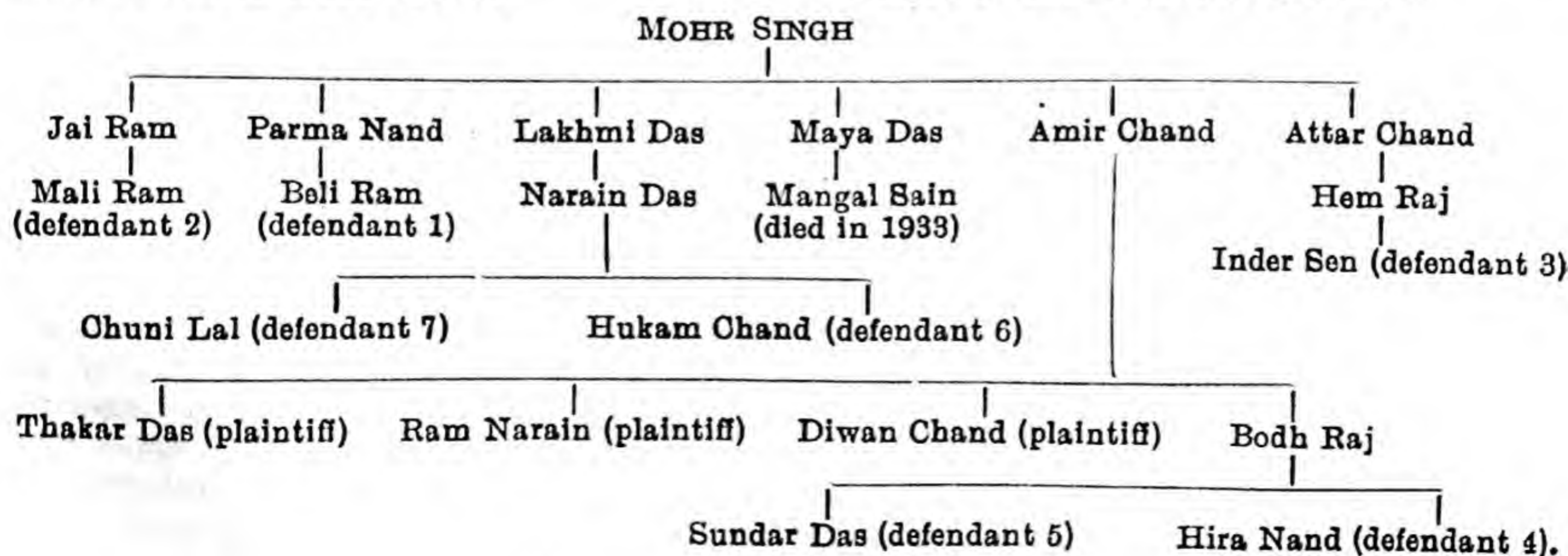
Custom (Punjab) — Succession — Khatri of Rawalpindi — Right of representation is recognized in collateral succession.

Among Khatri of Rawalpindi, as among Hindus generally in the Punjab, strict Hindu law has been modified by custom according to which the right of representation is recognized in collateral succession : *Case law referred.* [P 432 C 1; P 433 C 2]

J. L. Kapur and Dev Raj Sawhney —
for Appellants.

Mehr Chand Mahajan and Amolak Ram Kapur—*for Respondents 1, 3, 6 and 7.*

Tek Chand J.—The parties to this litigation are Khatri of Rawalpindi and are related to each other as follows :



The property in dispute is a part of the estate of Mangal Sain, who died childless on 6th February 1933. It will appear from the pedigree-table that Mangal Sain's father Maya Das had five brothers, Attar Chand, Amir Chand, Lakhmi Das, Parma Nand and Jai Ram. They all had died many years ago and of his first cousins, Narain Das and Hem Raj had predeceased Mangal Sain. Chuni Lal and Hukam Chand (defendants 6 and 7) are the sons of Narain Das, and Inder Sen (defendant 3) the son of Hem Raj. Bodh Raj, one of the sons of Amir Chand, also had died in the lifetime of Mangal Sain, and Hira Nand and Sundar Das (defendants 4 and 5) are his sons. About four years after Mangal Sain's death the present suit was instituted by Thakar Das, Ram Narain and Diwan Chand, sons of Amir Chand, for a declaration that they are the owners of three-fifth of Mangal Sain's share in certain shops situate in Raja Bazar, Rawalpindi, and in a shop and agricultural land in mauza Saidpur. They alleged that Mangal Sain's heirs are the plaintiffs and Beli Ram and Mali Ram (defendants 1 and 2), that they share the inheritance *per capita*, and that defendants 3 to 7, being one degree further removed, are not entitled to succeed, as Hindu law does not recognize the right of representation in collateral succession.

The suit was contested by defendants 1, 3, 6 and 7, who pleaded that among Khatri of Rawalpindi, as among Hindus generally in this province, strict Hindu law has been modified by custom according to which the right of representation is recognized in collateral succession and therefore the surviving members of the five uncles of Mangal Sain are entitled to succeed to his property *per stirpes*. It was also pleaded that a large part of the property of Mangal Sain (other than that in suit) had already been divided among the plaintiffs and defendants in this way, with the consent of the plaintiffs. The trial Judge has found in favour of the defendants and has dismissed the suit. The plaintiffs appeal. It appears that besides the property now in dispute, Mangal Sain owned other properties of large value. On Mangal Sain's death his brother-in-law, Hari Chand set up a claim to those properties, alleging that Mangal Sain had devised them to him under an oral will. This claim was contested by the present plaintiffs and defendants jointly, who denied the alleged oral will set up by Hari Chand and averred that the rightful heirs of Mangal

Sain were the descendants of each of his five uncles, in equal shares. To settle this dispute Hari Chand and the present plaintiffs and defendants appointed one Bhagat Kishan Chand as the sole arbitrator on 25th February 1933, and they all executed an agreement to this effect (Ex. D-2/1). The agreement (Ex. D-2/1) is signed by the present plaintiffs and defendants and in it their joint claim is stated as follows :

We claim that we alone are entitled to partition the said property amongst us according to the pedigree-table.

It was mentioned in the agreement that besides the property then in dispute with Hari Chand, there was other property in Raja Bazar (the reference being to the shops now in dispute) and it was specifically stated that

the arbitrator shall not make any settlement with regard to it, but it shall be considered as belonging to the collaterals of the deceased according to the pedigree-table.

The arbitrator gave his award on 20th March 1933 (Ex. D-1). After making provision for certain female relations of Mangal Sain, the property then in dispute was divided in seven equal shares. One share was given in charity; one to Hari Chand; and with regard to the remainder the award declared that the

descendants of Chaudhri Mohar Singh, the common ancestor of Mangal Sain and the collaterals of Mangal Sain, have rightly admitted that with due regard to relationship all the survivors should be declared representatives of the sons of the descendants of Mohar Singh. In other words, the descendants of Attar Das, Jai Ram, Lakhmi Das, Amir Chand and Parma Nand may be declared as entitled to the partition and the descendants of each of the five persons aforesaid be given equal shares. The sons and grandsons of the sons of Chaudhri Mohar Singh shall divide the property amongst them, it having been inherited by them from their father.

It was stated in para. 13 of the award that it was announced to the parties and that all the claimants of their own accord had accepted it and put their signatures in token of their consent. The award bears, among others, the signatures of the plaintiffs. On an application made by Mali Ram (defendant 2), this award was filed in Court and a decree passed in accordance with its terms. It is common ground that effect was duly given to this decree and the parties, including the plaintiffs, took possession of the properties allotted to them. In view of the admissions of the plaintiffs contained in the agreement (Ex. D. 2/1) referred to above, the onus, which initially lay on the

defendants to show that the right of representation in collateral succession is recognized among the Khatri of Rawalpindi and the strict rule of the Mitakshara is not followed, was very light indeed. This onus is amply discharged by the circumstance that the bulk of Mangal Sain's property has already been divided between the plaintiffs and the defendants, practically by consent, according to ancestral shares, the shares of the predeceased collaterals being taken by their descendants.

In addition to this, the defendants have proved two clear instances of succession among Khatri of Rawalpindi, in which sons of pre-deceased brothers of the last male owner succeeded equally with his surviving brothers. Diwan Chand, a Kohli Khatri, died sonless and his three surviving brothers, Des Raj, Karam Chand, Ganda Mal, as well as the sons of his pre-deceased brother Lachhman Das, succeeded in equal shares to his property : see the evidence of Jai Singh (D. W. 2), Des Raj (D. W. 3) and the mutation (Ex. D. 3). Similarly, on the death of Deviditta, an Anand Khatri, his surviving brothers, Tek Chand, Charan Das and Raman, and the sons of his pre-deceased brother Tulsi Das each got an equal share in his property. This is proved by oral evidence on the record. As against this, the plaintiffs have not proved a single instance among the Khatri, where strict Hindu law was followed. That the right of representation in collateral succession is recognized generally among high caste Hindus of the Punjab has been held established in a long series of cases decided by the Chief Court and this Court. The earliest case is 81 P R 1874.¹ The next reported case is 71 P R 1882² in which Sir Meredyth Plowden remarked that

there have been many instances in this Court within the recollection of the Judges in which the right of representation has been admitted, without dispute, to extend to sons of a collateral relative who would have succeeded if he had survived.

In 39 P R 1884³ it was observed that the custom recognizing the right of representation prevails all over the Punjab to such an extent that it may be considered to be a part of the general common law of the province. The parties to these three cases were Aggarwal banias of Ambala Division. 44

1. *Devi Sahai v. Mangal Sein*, (1874) 81 P R 1874 (F B).

2. *Ajudhia Prasad v. Dwarka Das*, (1882) 71 P R 1882.

3. *Kanhya Lal v. Kishna*, (1884) 39 P R 1884.
1940 L/55 & 56

P R 1884⁴ and 61 P R 1916⁵ are cases of Khatri of Lahore and Amritsar districts respectively, and 148 P R 1890⁶ of Aroras of Dera Ismail Khan, in which the same rule was found to prevail. Reference may also be made to the observations of Lal Chand J. in 140 P R 1908⁷ that the customary rule of representation has been found by judicial inquiry as well as experience to prevail generally throughout the province among agriculturists as well as non-agriculturists whenever the matter was disputed, and not a single case to the contrary is traceable or was quoted.

See also A I R 1937 Lah 710,⁸ the parties to which were Aggarwal Mahajans of the Rohtak District and the right of representation was found to prevail. The learned counsel for the appellants has relied upon 6 Lah 124.⁹ But that case is distinguishable as there no question of collateral succession arose. The point involved in that case was whether the son of a predeceased daughter would succeed equally with the surviving daughters. I agree with the lower Court in holding that the contesting defendants have succeeded in proving that the descendants of the five uncles of Mangal Sain are entitled to succeed to the property in dispute in equal shares. The share of the plaintiffs is therefore 3/20th and not 3/5th, as claimed by them. The lower Court however, apparently by an oversight, has dismissed the suit altogether. It should have granted the plaintiffs a declaration that they are entitled to 3/20th share in the property. I would accordingly accept the appeal and in lieu of the decree of the lower Court grant the plaintiffs a decree declaring that they are entitled to a 3/20th and not 3/5th share in the property described in para. 2 of the plaint. As the plaintiffs' right to the share decreed was never denied by the defendants, they shall get their costs in both Courts.

Beckett J. — I agree.

D.S./R.K.

Appeal allowed.

4. *Abnashi Ram v. Mul Chand*, (1884) 44 P R 1884.

5. *Shib Dial v. Mathra Das*, (1916) 3 A I R Lah 68=35 I O 561=61 P R 1916=5 P L R 1917.

6. *Pitamber v. Ganesha Ram*, (1890) 148 P R 1890.

7. *Mehtabuddin v. Abdullah*, (1908) 140 P R 1908=68 P W R 1907.

8. *Kahni Ram v. Molar*, (1937) 24 A I R Lah 710=175 I O 542=39 P L R 912.

9. *Mt. Lorandi v. Mt. Nihal Devi*, (1925) 12 A I R Lah 403=95 I O 701=6 Lah 124=26 P L R 759

A. I. R. 1940 Lahore 434

TEK CHAND AND DIN MOHAMMAD JJ.

Haji Mohammad Ali — Petitioner.

v.

Kuckereja, Ltd., Sialkot, through Lala Tarlok Nath, Decree-holder, and others, Judgment-debtors and another — Respondents.

Civil Revn. Petn. No. 926 of 1939, Decided on 18th March 1940, referred by Din Mohammad J., D/- 22nd January 1940.

Lahore High Court Rules and Orders, Chap. 12-L, Vol. I, R. 12 — Sale set aside at instance of judgment-debtor and in spite of opposition of decree-holder — Liability for auctioneer's commission is on judgment-debtor and not on decree-holder.

Where attachment and sale are set aside in spite of the opposition of decree-holder and merely at the instance of the judgment-debtor and for his benefit, it would be unjust to mulct the decree-holder in the amount of the auctioneer's commission. The judgment-debtor on whose application the order of setting aside the sale was made should be held liable for the payment of auctioneer's commission. This order can be executed against him as a decree and if it is not found possible to recover this amount from him otherwise, this amount should be declared as a first charge on his property which would be sold in the execution of the decree against him. [P 436 C 1,2]

Yashpal Gandhi — *for Petitioner.*Malik Mohammad Amin — *for Respondent (Mohammad Hussain).*Shamair Chand — *for Decree-holder (Plaintiff).***ORDER OF REFERENCE**

Din Mohammad J.—On 21st February 1938, Messrs. Kuckereja Limited obtained a decree against the Civil and Military Sports Works, the principal debtors, and their surety, Said Alam. On 22nd February the decree-holders started execution proceedings mainly against the surety alone. On 10th February 1939, the property attached was sold to the present petitioner, Haji Mohammad Ali. On 16th March 1939, the District Judge modified the original decree of 21st February. On 14th June 1939, the plaintiffs' appeal to this Court against the order of the District Judge was admitted by a Division Bench. In addition, an order staying release of the house of Said Alam, respondent, pending decision of the appeal was made and a notice to the respondent was issued. This matter came before Ram Lall J. on 5th July 1939 and the learned Judge on an undertaking being given by the surety that he will not effect any alienation of the property under attachment vacated the order. This inevitably led to the setting

aside of the sale that had been held on 10th February. The Senior Subordinate Judge therefore set aside the sale and while ordering refund of the purchase money to the auction-purchaser deducted the auctioneer's commission out of the amount deposited by him. It is against that order that the present petition has been put in.

Under R. 12 of Chap. XII-L of the High Court Rules and Orders, Vol. I, it is provided that when a sale is set aside and the purchase money has to be refunded to the auction-purchaser, the sum credited to Government as commission on the sale should not be debited to the amount which has to be refunded to the auction-purchaser who is clearly entitled to receive back his money in full. It is further laid down that the question whether the decree-holder should refund the amount which he received in the first instance and Government should refund the commission, or whether Government should retain the commission and the decree-holder should refund the full purchase price for repayment to the auction-purchaser should be decided by the Court according to the particular facts of each case as it arises, leaving it to any party who considers himself aggrieved by the order to seek such remedy as he thinks fit. This rule was enacted when no commission was permissible to any officer of the Court who conducted the sales and the commission deducted at the rates fixed by R. 19 was to be credited to Government after deducting expenses incurred in the conduct of sales. Even later, when Correction Slip No. 3, dated 24th February 1931, was issued, no difficulty arose inasmuch as the Court-auctioneers, whether public firms or Official Receivers, were debarred from receiving any remuneration for conducting a sale which was ultimately set aside. In 1939 however a circular letter, No. 5898-R/XI-C. 1, was issued by this Court, by which the Courts below were directed to allow full commission to Court-auctioneers in all sales which were set aside, except those which were set aside on account of an illegality or a material irregularity committed in publishing or conducting the sale. It was not considered at the time that the amendment of the rules to that effect will necessitate an amendment of R. 12 also, which contemplates only commission received by Government and not the remuneration earned by the auctioneer. The spirit of the rule no doubt holds the decree-holder liable for this amount, inasmuch as the

commission originally earned by Government is now earned by the auctioneer, but the rule as it stands does not cover the auctioneer's commission.

Further, it is contended on behalf of the decree-holder that the rule now propounded by means of the circular letter is unconscionable and is likely to work great hardship to the decree-holder, especially when it is possible that a sale may be set aside more than once on a mere technicality of law. In suits of small value, it may not matter if a decree-holder is required to pay the auctioneer's commission when sale is set aside, but in suits where the property sold is of considerable value, it would no doubt be unjust to a decree-holder to be called upon to pay the auctioneer a heavy amount of commission every time that the sale is set aside on grounds other than an illegality or a material irregularity in publishing or conducting the sale, although he himself may not receive a single pie in his own decree. I consider it advisable therefore to refer the matter to the Hon'ble Chief Justice with the following recommendations: (1) that the new rule allowing full commission to auctioneers when a sale is set aside on any ground other than an illegality or a material irregularity in publishing or conducting the sale be reconsidered in the light of the remarks made above; (2) that if the new rule is allowed to stand as it is, R. 12 may be so amended as to provide for the refund of the auctioneer's commission; and (3) that so long as the existing rule operates in its present form, an authoritative pronouncement may be obtained from a larger Bench as to how a case like the present should be dealt with.

Judgment of the Division Bench

Din Mohammad J.—This petition was referred to the Division Bench in the following circumstances: In execution of a decree obtained by Messrs. Kuckereja Ltd., against Said Alam and others, a house belonging to Said Alam was sold on 10th February 1939. On 16th March 1939, an appeal against the original decree was disposed of by the District Judge. A further appeal against his order was preferred by Messrs. Kuckereja Ltd., which was admitted by a Division Bench of this Court on 14th June 1939. The learned Judges while admitting the appeal issued an interim order staying the release of the house of Said Alam, respondent, pending decision of the appeal and issued notice to him in that

connexion. This matter came before Ram Lall J. on 6th July 1939, in the presence of Mr. Shamair Chand for Messrs. Kuckereja Ltd., and Mr. Mukand Lal Puri for Said Alam. Mr. Puri gave an undertaking not to alienate the house in any manner till the decision of the appeal and on this undertaking being given, the order attaching the property was vacated by the learned Judge. By this order the sale was automatically set aside and the Senior Subordinate Judge consequently ordered the refund of the purchase money to the auction-purchaser, but while making this order deducted the auctioneer's commission out of the amount deposited by him. A petition against that order was presented to this Court which was heard by me sitting alone and I came to the conclusion that there was a lacuna in the rules relating to the matter in controversy before me. I accordingly made a recommendation to the Hon'ble Chief Justice to lay this case before a larger Bench.

The matter of commission payable on sales is dealt with in Chap. 12-L, Vol. I of the Rules and Orders of the High Court, the last edition of which was issued in 1930. R. 12, as then framed, provided that when a sale was set aside and the purchase money had to be refunded to the auction-purchaser, the sum credited to Government as commission on the sale could not be debited to the amount which had to be refunded to the auction-purchaser as he was clearly entitled to the refund of the full amount deposited by him. It further laid down that the question whether the decree-holder should refund the amount which he had received in the first instance and Government should refund the commission, or whether Government should retain the commission and the decree-holder should refund the full purchase price for repayment to the auction-purchaser would be decided by the Court according to the particular facts of each case as it arose. The deductions to be made were provided for in R. 19. By sub-r. (i), the percentage of deductions was fixed. By sub-r. (ii), it was laid down that all expenses incurred in the conduct of sales would be paid out of such deductions and the balance would be credited to Government. By sub-r. (iii) it was expressly provided that no commission on the proceeds of sales conducted under these rules would be paid to any officer of the Court. By R. 20, certain officers of the Court were specified for conducting the sales. It is obvious therefore that if a sale

was set aside, no difficulty arose under the rules as then in force, inasmuch as no question of any commission on sales arose.

In 1931, an amendment was made to R. 20, which contemplated Court auctioneers, but it was provided that even they, whether public firms or Official Receivers, would not be entitled to any remuneration for conducting the sale which was ultimately set aside. The decree-holder, however, was held responsible for the expenses actually incurred by them in conducting the sale. Even then, no conflict arose between R. 12 and R. 20. In 1939, however, a further amendment was made in these rules and was notified to all the Courts concerned. It was to the effect that full commission should be allowed to Court auctioneers in all sales which were set aside, except those which were set aside on account of an illegality or a material irregularity committed in publishing or conducting the sale. Unfortunately, at that time, no heed was paid to the matter whether any consequential amendment would be required in any other rule relating to the subject. The result was that, while auctioneers were held entitled to their full commission, it was not made clear as to the party on whom the burden would fall. As stated before, R. 12 did not contemplate the case of auctioneers and could not in terms apply to them. It, however, clearly stated that the auction-purchaser would be entitled to the refund of the full amount deposited by him, and in the case before us the Senior Subordinate Judge was entirely wrong in burdening him with the auctioneer's commission.

The question still remains on whom should this burden fall in the absence of the auction-purchaser. R. 12 no doubt contemplates that the matter lies between the Government and the decree-holder, but, in my view, a decree-holder, who is not to blame in any manner for the setting aside of the sale, cannot be made liable for that amount. The present case affords an apt illustration of the injustice which will be perpetrated if a decree-holder is burdened with this amount. Here, a request was obviously made on behalf of the judgment-debtor for vacating the order of attachment and it was opposed by the decree-holder. In spite of this opposition, and merely at the instance of the judgment-debtor and for his benefit that order of attachment was vacated and, in these circumstances, it appears to me to be unjust to mulct the

decree-holder in the amount of the auctioneer's commission. The rule, no doubt, is silent but it is in such cases that equitable considerations come in and equity requires that he should pay who earns the benefit. I would, accordingly, hold that the judgment-debtor on whose application the order of setting aside the sale was made should be held liable for the payment of the auctioneer's commission. This order can be executed against him as a decree and if it is not found possible to recover this amount from him otherwise, this amount should be declared as a first charge on his property which would be sold in the execution of the decree of Messrs. Kuckereja Ltd. In the circumstances of the case, I would leave the parties to bear their own costs in all the Courts. The question of amending the rule issued by this Court in the light of this decision may be taken in hand separately.

Tek Chand J. — I agree.

D.S./R.K.

Order accordingly.

A. I. R. 1940 Lahore 436

TEK CHAND AND BECKETT JJ.

Labh — Plaintiff — Appellant.

v.

Mt. Fateh Bibi and others—Defendants
— Respondents.

Second Appeal No. 471 of 1939, Decided on 24th June 1940, from decree of Addl. Dist. Judge, Lyallpur Division at Sheikhpura, D/- 20th July 1938.

Custom (Punjab) — Succession—Gujjars of Shakargarh Tehsil, District Gurdaspur—Self-acquired property — Daughters exclude collaterals.

According to custom prevalent among the Gujjars of Shakargarh Tehsil, District Gurdaspur in the Punjab, daughters exclude collaterals in succession to the self-acquired property of their father; *A I R 1936 Lah 493, Rel. on; Case law referred.*

[P 438 C 1, 2]

M. A. Majid — for Appellant.

Harbans Singh—for Respondents 1 to 3.

Tek Chand J.—One Nazar Din, a Gujjar of mauza Melo Selo, Shakargarh Tehsil, Gurdaspur District, migrated to Chak No. 167, G. B., in the Lyallpur District, where he was granted a square of land. After fulfilling the conditions of the grant, Nazar Din acquired proprietary rights in the square. He died sonless in 1922 leaving him surviving two widows, Mt. Gauhar Bibi and Mt. Karam Bibi, and two daughters by Mt. Gauhar Bibi, named Fateh Bibi and Barket Bibi. On the death of Nazar

Din, the square was mutated in the names of his two widows in equal shares. In 1935 Mt. Gauhar Bibi gifted her half-share in the square to her daughters and the revenue authorities sanctioned the mutation in their favour. The plaintiff Labh, who is a brother of Nazar Din, instituted the present suit for a declaration that the gift by Mt. Gauhar Bibi in favour of the daughters was invalid by custom and that it would not affect his reversionary rights after the death of Mt. Gauhar Bibi. There is another brother of Nazar Din, named Shahab Din. He did not join in the suit but was impleaded as defendant 4. The suit was resisted by Mt. Gauhar Bibi and the donees, who pleaded that the land being non-ancestral the daughters were entitled to succeed after the death of Mt. Gauhar Bibi, that, therefore the gift was in the nature of acceleration of succession and the plaintiff had no right to sue. The only issue framed was whether the plaintiff was entitled to succeed to the land in dispute as heir and reversioner of Nazar Din, deceased, in preference to his daughters, defendants 1 and 2, under custom. The trial Court found that the plaintiff had failed to establish that by custom he was preferential heir and dismissed the suit. On appeal, the Additional District Judge has affirmed this decision. He has however granted a certificate under S. 41 (3), Punjab Courts Act for a second appeal to this Court on the question of custom involved, whether among Gujjars of Shakargarh Tehsil, District Gurdaspur, collaterals exclude daughters in matters of succession to self-acquired property.

Before us, Mr. Majid for the plaintiff-appellant has contended that in view of the entries in the *riwaj-i-am* of the Gurdaspur District prepared by the Settlement Officer Mr. (afterwards Sir Louis) Dane in 1893 the onus is shifted to the daughters to prove that they have a right to succeed to the self-acquired property of their father in preference to near collaterals. In this *riwaj-i-am*, it was stated in answer to question 16 that in the presence of male kindred, daughters and their descendants did not succeed. In answer to question 17 it was stated that there was no distinction as to the right of a daughter to inherit immovable or ancestral and moveable or acquired property of their father. No special reference to the Gujjars of Shakargarh Tehsil or to any other tribe was made in the answers in the *riwaj-i-am* as printed. In the next settlement completed in 1913, Mr. Kenaway, the Settlement Officer, compiled

another Manual of Customary law of the Gurdaspur District, and there a more detailed inquiry appears to have been made and the answers are recorded with reference to the tribes separately. In answer to question 16 it was stated that there was a difference of opinion among the Gujjars of the Shakargarh Tehsil whether in the absence of male issue, daughters succeeded to their father.

In answer to question 17 it was stated that the difference of opinion among the Gujjars of Shakargarh Tehsil referred to in the answer to the previous question is confined only to ancestral property. As regards self-acquired property all of them agreed that in the absence of male issue, daughters should get their share according to Mahomedan law. The remaining tribes recognize no distinction as to the rights of daughters to inherit immovable or ancestral and moveable or self-acquired property of their father.

Mr. Majid contends that the prevailing custom in the Shakargarh Tehsil is correctly entered in the *riwaj-i-am* of 1893 and that the answer to question 17 in the later *Riwaj-i-am* of 1913 merely records a desire on the part of Gujjars of that Tehsil to introduce rules of Mahomedan law in succession to property of a sonless proprietor, and that it does not record an actually existing custom in the tribe. There is however no warrant for this suggestion. There are several cases judicially decided between 1893 and 1913, in which on enquiry the prevailing custom among Gujjars of this Tehsil was found to be contrary to the entry in the *riwaj-i-am* of 1893, so far as succession to non-ancestral property of a sonless proprietor was concerned. It therefore appears that in the next settlement, held 20 years later, the answer of the Gujjars of this Tehsil, as recorded, was in accordance with the actually existing rule of succession in the tribe. In view of this entry the onus of the issue was rightly laid upon the plaintiff.

The question, whether in succession to the property of a sonless Gujjar of Shakargarh Tehsil daughters are excluded by collaterals, has been the subject of several judicial decisions. The parties in AIR 1936 Lah 493¹ were, as in the case before us, Gujjars of Shakargarh Tehsil who had migrated to Lyallpur and the question there arose in somewhat similar circumstances. After a full inquiry it was held that daughters excluded collaterals in succession to non-ancestral property of their father. In addition to this, two other judicial instances have been proved in the present case.

1. *Najju v. Mt. Amna Bibi*, (1936) 23 AIR Lah 493=160 IC 584.

Ex. D.2 is the judgment of Sh. Abdul Haq, Sub-Judge, Gurdaspur, dated 1st October 1933, in which after a lengthy inquiry the daughters were held to have a preferential right of succession. It is important to note that in that case reference was made to four earlier cases judicially decided among the Gujjars of this Tehsil in 1900, 1902, and 1909, in which after inquiry it had been found that collaterals did not exclude daughters from succession to non-ancestral property. These cases are of importance as they had been decided before the *riwaj-i-am* of 1913 had been prepared. Ex. D.3 is a judgment in a case decided by Mr. J. D. Anderson, District Judge of Gurdaspur, on 10th January 1928, where also after a lengthy inquiry the decision was given in favour of the daughters. The parties to that case were Gujjars of Shakargarh. That daughters are favoured in this tribe also appears from Exs. D.4 and D.5 which are mutations of gifts of ancestral land made by sonless Gujjars of Shakargarh in favour of their daughters. One of them is of 1887 and the other of 1929. It has not been shown that the collaterals contested the mutations by civil suit. In addition to these Gujjar instances, there is a large number of decided cases in which the custom actually found to exist was not in accordance with the *riwaj-i-am* of 1893, even among other agricultural tribes of Gurdaspur: *see, inter alia*, 60 P R 1889,² 5 Lah 364,³ A I R 1935 Lah 288,⁴ A I R 1935 Lah 617,⁵ A I R 1935 Lah 696⁶ and A I R 1937 Lah 90.⁷ In All these cases, after lengthy enquiry, it was found that collaterals do not exclude daughters in succession to non-ancestral property. It is also significant that in the Appendix to Mr. Kennaway's printed *riwaj-i-am* about ninety instances of daughters' succession among various tribes in the district are given.

As against this overwhelming evidence, the plaintiff has not been able to prove even a single instance in which collaterals excluded daughters in succession to non-ancestral property. They relied upon three

mutation entries, Exs. P.4, P.6 and P.7. The lands, to which these mutations related, were situate in the Lyallpur district and were owned by Gujjars. But it has not been shown that they had migrated from Shakargarh Tehsil to the colony. Further, it is not clear from the mutations that the lands were non-ancestral qua the collaterals. These mutations therefore are of no value in determining the question of custom involved in this case. No judicial instance, decided by this Court or a Subordinate Court has been cited. It must therefore be held that the lower Courts came to a correct conclusion in deciding that the plaintiff has failed to prove that he has a preferential right to succeed to the land in dispute, and his suit has been rightly dismissed. The appeal fails and is dismissed with costs.

G.N./R.K.

Appeal dismissed.

* A. I. R. 1940 Lahore 438

TEK CHAND AND DALIP SINGH JJ.

Lala Khazanchi Shah — Decree-holder — Appellant.

v.

Haji Niaz Ali — Judgment-debtor — Respondent.

Letters Patent Appeal No. 179 of 1939, Decided on 15th April 1940, from judgment of Bhide J., *Reported in A I R 1940 Lah 126.*

(a) Punjab Alienation of Land Act (13 of 1900), S. 2 (3) — Onus to prove that land is agricultural is on judgment-debtor.

The onus of the issue as to whether the land in dispute fell within the definition of 'land' as given in S. 2 (3) of the Act is on the judgment-debtor.

[P 440 C 1]

(b) Punjab Alienation of Land Act (13 of 1900), S. 2 (3)—Land situated near abadi within municipal limits — Adjacent land used for building sites — Land not cultivated for long time — Presumption is that land has ceased to be agricultural.

The question whether land is agricultural is not to be determined on description in the revenue papers though these are, no doubt, valuable as throwing light on how much the land has actually been used for a certain number of years. All the facts and the circumstances must be taken together in determining whether land is or is not agricultural land within the meaning of the definition. The mere fact that a judgment-debtor, as a last and desperate resort, proceeds to cultivate a few patches of land which has never been used for agriculture would not make the land agricultural land; nor would the fact that the land had lain fallow for one or two or more years necessarily make the land cease to be agricultural land. The fact that for a long time the land has not been cultivated and the fact that the land is situate near the abadi within municipal limits and the

2. Ramzan Shah v. Sohna, (1889) 60 P R 1889.

3. Gurdit Singh v. Malan, (1925) 12 A I R Lah 35=84 I C 171=5 Lah 364.

4. Bawa Singh v. Partap Kaur, (1935) 22 A I R Lah 288=159 I C 347=16 Lah 998=37 P L R 266.

5. Jagat Singh v. Jiwan, (1935) 22 A I R Lah 617=156 I C 215=37 P L R 203.

6. Kesar Singh v. Gurnam Singh, (1935) 22 A I R Lah 696=160 I C 414.

7. Gurdit Singh v. Man Kaur, (1937) 24 A I R Lah 90=171 I C 683=39 P L R 228.

fact that adjacent land is either a part of the abadi or is being used for building sites would tend to show that the land had ceased to be agricultural land unless the judgment-debtor rebutted the presumption arising from all these circumstances by showing some circumstance which would tend to rebut the inference deducible from these circumstances. [P 440 C 1]

*** (c) Civil P. C. (1908), O. 41, R. 22—There can be cross-objections in Letters Patent Appeal from first appeal.**

Order 41 would apply to Letters Patent Appeals and in general there is no difference between the procedure in Letters Patent Appeals and ordinary appeals so far as the Civil Procedure Code is concerned. Cross-objections can be taken in Letters Patent Appeal from a first appeal: *A I R 1921 PC 80; A I R 1931 All 244 (F B) and A I R 1926 Mad 316 (F B), Rel. on.* [P 441 C 1]

Achhru Ram and Indar Dev Dua —
for Appellant.

Barkat Ali and Madan Mohan Lal —
for Respondent.

Dalip Singh J.—On 9th December 1926, one Niaz Ali mortgaged to the appellant one shop and a house situate in Sialkot, together with certain land situated as follows: 26 kanals 3 marlas in Pur Hiran; 42 kanals 7 marlas in village Agowali; 3 kanals 9 marlas in village Rangpura, which is said to be a suburb of Sialkot; 59 kanals 11 marlas in Mohal Usman, a suburb of Sambarial. The total mortgage amount was Rs. 17,500. On 1st December 1934 the mortgagee brought a suit for Rs. 33,880 recoverable by sale of the mortgaged property. On 19th December 1934 the parties compromised the suit. It was agreed that Rs. 28,500, with interest at 1 per cent. per mensem, should be paid in one year. If there was default in the payment, then the total sum due would be Rs. 32,000 out of which sum interest on Rs. 28,500 would be reckoned at 1 per cent. per mensem for one year and at the end of the first year interest would be reckoned on the entire sum of Rs. 32,000 at eight-annas per cent. per mensem. The property was held charged for the amount under the terms and conditions stated above. A decree was drawn up in terms of the above compromise on 19th December 1934. On 24th August 1935, the Kakezais to which tribe the mortgagor belonged were declared an agricultural tribe.

On 11th December 1937, the decree-holder took out execution for sale of the property in default of payment. The judgment-debtor filed various objections which do not concern us. The house and the shop in Sialkot were held to be saleable but *qua* the land it was held that as the Kakezais had been declared to be an agricultural

tribe under S. 16, Land Alienation Act, agricultural land could not be sold in execution of the decree. The question then arose how much of the land mortgaged was agricultural "land." 42 kanals 7 marlas in village Agowali was admitted by the decree-holder to be agricultural land. The Senior Subordinate Judge held that 9 kanals 15 marlas of land, khasra No. 169 in Pur Hiran, and 44 kanals 13 marlas of land in Mohal Usman were not agricultural land within the meaning of the definition in the Land Alienation Act, S. 2 (3). The rest of the land was held to be agricultural, and as he held that S. 16, Punjab Land Alienation Act, applied, it was not saleable. An appeal was taken to this Court and the learned Judge, sitting in Single Bench, held that S. 16 was applicable. He held that 4 kanals 7 marlas of land in Pur Hiran, in addition to the 9 kanals 15 marlas held to be non-agricultural by the Senior Subordinate Judge, were also non-agricultural, and against the finding that 44 kanals 13 marlas of land in Usman Mohal were non-agricultural, he held that this land was also agricultural and therefore not saleable. He gave no finding as to 3 kanals 13 marlas of land situated in Rangpura. He thus partially accepted the appeal of the decree-holder and also accepted the cross-objections of the judgment-debtor and passed a decree accordingly. From that judgment the decree-holder has come in Letters Patent Appeal and the judgment-debtor has filed cross-objections.

As regards the land in Rangpura, it was omitted by inadvertence from the judgment of the learned Judge in Single Bench. It is clear that in 1913-14 the land is described as banjar qadim and the learned counsel for the appellant contends that the onus of the issue as to whether the land in dispute fell within the definition of "land" as given in S. 2 (3), Land Alienation Act, was placed on the judgment-debtor, and there was no evidence that this land had been occupied or let for agricultural purposes or purposes subservient to agriculture or pasture. The land itself is situate within municipal limits. There are no actual houses built on the land, but it is situate close to the abadi. It has been banjar for nearly 40 years and there are building sites near the land in dispute. The land is not assessed to land revenue. He therefore contended that on the same lines as the learned Judge in Single Bench held that the Pur Hiran land was non-agricultural, this land should also be held not to be agricultural land. Qua

this portion of the land, in reply the learned counsel for the judgment-debtor could only urge that the mere fact that the land was not assessed for land revenue or that it was situate close to the abadi or that it had remained banjar qadim for a large number of years would not show that the land had ceased to be agricultural land within the meaning of the definition. His contention was that the description of the land as banjar qadim showed that the land was culturable and that if it had not been culturable, it would have been described in the revenue papers as ghair mumkin.

His contention then was that if land is culturable then the presumption should be that it is occupied or let for purposes of agriculture or for purposes subservient to agriculture or pasture. I do not agree with this contention. It appears to me that the question is not to be determined on description in the revenue papers though these are no doubt valuable as throwing light on how much the land has actually been used for a certain number of years. All the facts and the circumstances must be taken together in determining whether land is or is not agricultural land within the meaning of the definition. The mere fact that a judgment-debtor as a last and desperate resort proceeds to cultivate a few patches of land which has never been used for agriculture would not make the land agricultural land; nor would the fact that the land had lain fallow for one or two or more years necessarily make the land cease to be agricultural land. In considering in this particular case the circumstances, it appears to me that the very long lapse of time from 1913-14 onwards during which the land has not been cultivated, and the fact that the land is situate near the abadi within municipal limits, and the fact that adjacent land is either a part of the abadi or is being used for building sites, would tend to show that the land had ceased to be agricultural land unless the judgment-debtor rebutted the presumption arising from all these circumstances by showing some circumstance which would tend to rebut the inference deducible from these circumstances. It must not be forgotten that the onus is on the judgment-debtor and in the absence of any circumstances tending to rebut the inference deducible from these circumstances I would hold that it is not proved that this land, 3 kanals 13 marlas in village Rangpura, is agricultural land.

I now come to deal with the land situate

in Usman Mahal. The area of this land is 59 kanals 13 marlas and in 1914-15 the area was shown as follows : 58 kanals 13 marlas as bhatta ghair mumkin; 1 kanal as ghair mumkin ahata chah ghair jari. In 1918-19 20 kanals are shown as ghair mumkin bhatta and 39 kanals 13 marlas as maira chahi. In 1923-24 jamabandi the same entry is repeated. In the jamabandi of 1927-28 20 kanals are shown as ghair mumkin bhatta, 4 kanals as banjar jadid, 34 kanals as maira chahi and 1 kanal ahata chah ghair jari. In the jamabandi of 1931-32 58 kanals 13 marlas are shown as banjar kadim and 1 kanal as ahata chah ghair jari. In 1935-36 44 kanals 13 marlas are shown as banjar kadim, 14 kanals are shown as maira barani and 1 kanal as ahata chah ghair jari. The dispute in this appeal is only about the 44 kanals 13 marlas of land shown as banjar kadim. Now, this portion can be divided into two portions: one of 20 kanals ghair mumkin bhatta and one of 24 kanals 13 marlas. So far as the 20 kanals are concerned, it appears that from 1914-15 onwards it has been established as ghair mumkin bhatta or from 1931-32 onwards as banjar kadim. It is thus clear that for a space of nearly over 20 years the land has never been cultivated at all and for some time at any rate it was also unculturable land. There can be little doubt that in such a case it would be difficult to hold that the land is now to be considered occupied for agricultural purposes or purposes subservient to agriculture.

As regards the other land the matter is more doubtful. It is true that originally it formed part of ghair mumkin bhatta but from 1918-19 onwards to 1927-28 it appears that all this land together with some more land was actually cultivated. After 1927-28 it appears to have not been cultivated at all. The question is whether at the time when the land is being put to sale this land should be considered to be agricultural land. The matter is not entirely free from difficulty, but on the whole, it seems to me that the onus lay on the judgment-debtor to explain the six or eight years' absence of cultivation and I would therefore hold that the judgment-debtor has not discharged the obligation of the issue and therefore this land also is not proved to be agricultural land. This finishes the land involved in the appeal of the appellant for the appellant has conceded that S. 16, Punjab Land Alienation Act, applies in the circumstances of the case.

I now come to deal with the cross-objections of the judgment-debtor, and the first point that arises is whether there can be cross-objections in the Letters Patent appeal. On this point, there might have been originally some conflict of authority, but the matter appears to be set at rest by a Privy Council judgment reported in 48 Cal 481,¹ where it was held that O. 41 of the Code would apply to Letters Patent appeals and that in general there was no difference between the procedure in Letters Patent appeals and ordinary appeals so far as the Civil Procedure Code was concerned. Similarly, in A I R 1931 All 244,² a Full Bench of that Court appears to have overruled certain earlier rulings where similar points were held not to apply in Letters Patent appeals. In 49 Mad 291³ a Full Bench came to the decision that in a Letters Patent appeal from an original order from a single Judge, cross-objections could be taken in Letters Patent appeal. The matter might be different in the case of a second appeal, for, a Letters Patent appeal in such a case is only permissible with the certificate of the Judge who heard the case in single Bench. Therefore the question of cross-objections in such a case might raise a question of jurisdiction as distinct from a matter of procedure. But it is unnecessary to decide that point because in this case the Letters Patent appeal is from a first appeal and lies without any certificate. In such a case, it appears to me that the question whether appeals should be taken or cross-objections should be allowed is merely a matter of procedure and does not raise any question of jurisdiction. I would therefore hold that the judgment-debtor is entitled to put in cross-objections to the appeal.

The learned counsel for the judgment-debtor has confined his cross-objections to the Pur Hiran land which was given by the learned Judge in single Bench in addition to what had been allowed by the Senior Subordinate Judge. The khasra numbers of this land, as given in the judgment, are 384, 591/378, 592/378, 379 and 593/378. Nothing has been said about 593/378 as it was not included in the cross-objections. As

regards the other numbers, Nos. 591/378, 592/378 and 379 can be disposed of shortly. It appears that all of them have been banjar kadim for a long time, at least since 1914-15, and there is nothing to show that they have been used for any purpose subservient to agriculture or for pasture. I see no reason to interfere with the decision of the learned Judge in single Bench *qua* these numbers. As regards No. 384, the matter is a little more doubtful. No. 384 is described as a chhappar and it is contended by the learned counsel for the judgment-debtor with some force that at any rate the water of this chhappar would in all probability be used for agricultural purposes or purposes subservient to agriculture, e. g., by way of watering cattle. He has relied on the fact that a number which appears contiguous, 383, is described in the jamabandi as *abi*, irrigated by a jhalar and he contends that the jhalar is in all probability put in the chhappar and used to draw water from the chhappar for the purpose of irrigating the land in 383. This may be possible, but in the absence of all evidence on the subject which the judgment-debtor could easily have led, it is difficult in the Letters Patent appeal to hold that this land under the chhappar or the chhappar itself is proved to be used for purposes subservient to agriculture or for purposes of agriculture. I would therefore hold that the judgment-debtor has not discharged the onus of the issue which admittedly lay on him as regards this number also.

The result is that I would accept the appeal of the decree-holder and hold that 3 kanals 13 marlas of land in Rangpura, 44 kanals 13 marlas of land in Usman Mohal and 9 kanals 15 marlas of land in Pur Hiran, khasra No. 169, and a further area of khasra Nos. 384, 591/378, 592/378, 379 and 493/378 are not proved to be agricultural land and are therefore saleable in execution of the decree. I would therefore accept the appeal to the extent indicated above, and would dismiss the cross-objections. The appellant will get his costs in this appeal. The parties will bear their own costs in cross-objections.

Tek Chand J.—I agree in the conclusion reached by my learned brother.

D.S./R.K.

Appeal partly allowed.

1. *Mt. Sabitri Thakurain v. Savi*, (1921) 8 A I R PC 80=60 IC 274=48 IA 76=48 Cal 481 (PO).

2. *Mt. Abhilakhi v. Sada Nand*, (1931) 18 A I R All 244=132 IC 24=53 All 535=1931 A L J 187 (F B).

3. *Venkateshan Chetty v. Moti Chand Gulab Chand*, (1926) 13 A I R Mad 316=93 IC 293=49 Mad 291=50 M L J 190 (F B).

* A. I. R. 1940 Lahore 442

TEK CHAND J.

Kesar Singh — Plaintiff — Petitioner.
v.*Wazir Singh — Defendant —*
Respondent.

Civil Revn. No. 559 of 1938, Decided on 14th June 1940, for revision of decree of Sub-Judge, Third Class, Batala, D/- 20th April 1938.

* Limitation Act (1908), S. 20—*A* borrowing certain sum as loan from *B* — Entry regarding loan made in *B*'s bahi and thumb-marked by *A* — Entry silent regarding interest — Before expiry of three years *A* paying certain sum to *B* — Endorsement recording payment made in *B*'s bahi thumb-marked by *A* without stating whether it was towards interest or part payment of principal — Payment held must be taken to have been made in part payment of principal and was covered by S. 20.

A borrowed certain amount as loan from *B*. An entry to this effect was made in *B*'s bahi which was thumb-marked by *A*. The entry was silent on the point of interest. Before the expiry of three years from the date of loan *A* paid certain sum to *B* and an endorsement recording the fact of payment was made in *B*'s bahi below the entry relating to the original loan. This endorsement was also thumb-marked by *A* but it did not state whether the payment was towards interest or in part payment of principal. It merely stated that the payment had been made "in the above account."

Held that as the loan bore no interest the payment must necessarily be taken to have been made in part payment of the principal. The fact of the part payment having been entered in the bahi and the entry thumb-marked by *A*, the case was clearly covered by S. 20 : *A I R 1937 Lah 820*, held overruled by *A I R 1940 P C 63*. [P 446 C 1]

Nand Lal Bhalla — *for Petitioner.*Kharak Singh — *for Respondent.*

ORDER OF REFERENCE

Tek Chand J.—This is a petition under S. 25 of Act 9 of 1887 for revision of the decree of the Judge, Small Cause Court, Batala, dismissing as barred by limitation the plaintiff-petitioner's suit for recovery of a certain sum of money. The amount sued for is small, but the questions of law involved are of considerable difficulty on which there is a serious conflict of judicial opinion. The facts found are that on 23rd January 1932, Wazir Singh, defendant, borrowed Rs. 60 from Kesar Singh, plaintiff, when an entry was made in the plaintiff's bahi, and was thumb-marked by the defendant. Before the expiry of three years from the date of the loan, on 14th January 1935, the defendant paid Rs. 10 to the plaintiff, and an endorsement recording the fact of payment was made in the plaintiff's bahi, below the entry relating to the original

advance. This endorsement was written by one Nathu and was thumb-marked by the defendant, Wazir Singh. The endorsement however did not state whether the payment was towards interest or in part payment of the principal. It merely stated that Rs. 10 had been paid "in the above account." On 14th January 1938, the plaintiff instituted a suit against the defendant for recovery of Rs. 99.8-0 alleged to be due in the account, after charging interest at Re. 1-9-0 per cent. per annum and giving credit for Rs. 10 received on 14th January 1935. In the plaint, it was stated that the suit was within limitation by reason of the aforesaid acknowledgment of the payment of Rs. 10 by the defendant.

The defendant raised various defences, of which the only one now material is that the suit was barred by limitation. He denied having repaid Rs. 10 on 14th January 1935, or having thumb-marked the endorsement, and pleaded in the alternative that the endorsement, even if genuine, did not fulfil the requirements of S. 20, Limitation Act, so as to give the plaintiff a fresh period to sue. The learned Judge has found as a fact that the defendant had paid Rs. 10 in account, and that the endorsement had been thumb-marked by the defendant, but he has held following a Division Bench decision of this Court in *A I R 1937 Lah 820=172 I C 455*¹ that it did not fulfil the requirements of S. 20. He has, accordingly, dismissed the suit. On revision, the findings of fact arrived at by the Court below are accepted by both parties. The only point in dispute is whether the suit was within time. The period of limitation prescribed for such suits is three years from the date of the loan, which was 23rd January 1932. Before the expiry of that period however, the defendant paid Rs. 10 to the plaintiff on 14th January 1935 and thumb-marked an acknowledgment of this payment. If this acknowledgment satisfied the requirements of S. 20, Limitation Act, the plaintiff had a fresh period of three years from that date to sue and the suit is within time: if not, it is clearly statute-barred. S. 20, Limitation Act, as amended by Act 1 of 1927 (which came into force on 1st January 1928) reads as follows :

Where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorized in this behalf, or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the

1. *Lal Chand v. Raman Shah*, (1937) 24 *A I R Lah 820=172 I C 455=39 P L R 622*.

debtor or by his agent duly authorized in this behalf, a fresh period of limitation shall be computed from the time when the payment was made: provided that, save in the case of a payment of interest made before the 1st day of January 1928, an acknowledgment of the payment appears in the handwriting, of, or in a writing signed by, the person making the payment.

Under the Section, as it stood before the amendment of 1927, the proviso was worded differently; it stated:

Provided that in the case of payment of principal of a debt the fact of payment appeared in the handwriting of the person making the same.

It will be seen that before the amendment, the acknowledgment of payment of interest need not have appeared in the handwriting of, or in a writing signed by, the person making the payment. The fact of such payment was required to be in the handwriting of the person making the payment, only when it was made in part payment of the principal. This enabled creditors to plead oral payments of interest and led to many false claims being made on bogus payments of interest, supported by oral evidence. In order to put a stop to such claims, the Legislature made the amendment mentioned above. Under the law, as it now stands, the acknowledgment of payment, if made after 1st January 1928, must appear in the handwriting of, or in a writing signed by, the person making the payment, whether the payment is made towards interest or principal. It may be stated, that under S. 3 (52), General Clauses Act, "sign," with its grammatical variations and cognate expressions, with reference to a person who is unable to write his name, includes a "mark." Therefore, the endorsement in this case satisfies the requirements of the proviso to S. 20. The endorsement, however, does not specify whether the payment was towards interest as such, or was part payment of the principal. It is urged on behalf of the plaintiff-petitioner that as the amount is not stated in the endorsement, or otherwise proved, to have been paid towards interest as such, it must be taken to have been paid in part payment of the principal and therefore the case falls under para. 2 of S. 20 and time is extended. It is also contended that A I R 1937 Lah 820¹ was not correctly decided and that it is in conflict with the decisions of other High Courts. In that case, a sum of Rs. 100 had been paid within three years of the execution of a pro-note and at the time of payment an endorsement to that effect had been made by the debtor and signed by him, but it was not stated whe-

ther the payment was towards interest or part principal. It was held that a general payment, unspecified on account, does not comply with the requirements of S. 20 and does not save limitation, unless it is appropriated by the creditor towards the principal or interest before the expiration of limitation.

As in that case, no such appropriation was found to have been made, the acknowledgment was held to be ineffectual and the suit dismissed. In coming to this conclusion the learned Judges followed, without discussion, the view of the majority (three out of five Judges) of the Full Bench of the Allahabad High Court in 58 All 261.² There Sulaiman C. J. (Niamat Ullah and Rachpal Singh JJ. concurring) laid down that when a payment is made without any specification, it cannot be said that it must either be a payment of interest as such by the debtor, or it must be a part payment of the principal by the debtor within the meaning of S. 20, Limitation Act, (p. 273). Of the dissenting Judges, Thom J. held that an unspecified payment of this kind must be taken to have been made either towards interest, or as part payment of capital, or partly towards interest and partly towards capital, and whichever be the case, a fresh period of limitation will begin to run from the date of payment (p. 278). The other Judge, Bajpai J. also came to the same conclusion, and observed that, if the payment cannot be said to have been made towards interest, it must be presumed to have been made as payment of a part of the principal. Both these learned Judges further held that after the amendment of 1927, payment of interest and part payment of principal are intended to stand on the same footing and the words "as such" have now lost much of their former importance and significance. The view of the minority was in accord with some earlier rulings of the Allahabad High Court. In 52 All 459,³ it had been held that the effect of the first two paragraphs of S. 20 was that, unless the creditor can show that at the time the amount was paid as interest, it will be treated as having been paid towards the principal and, if the conditions laid down in the proviso were fulfilled, limitation would be saved.

The Patna High Court has recently considered the question in two cases, reported

2. Udalpal Singh v. Lakhmi Chand, (1935) 22 A I R All 946=159 I O 387=1935 A L J 1029=58 All 261 (F B).

3. M. B. Singh & Co. v. Sircar & Co., (1930) 17 A I R All 392=127 I O 581=52 All 459=1930 A L J 590.

in 16 Pat 27⁴ and 16 Pat 294,⁵ in both of which the view taken by the majority of the Allahabad High Court in 58 All 261,² has been dissented from, and the opinion of the minority followed. In the latter case it was observed by the learned Chief Justice that

the effect of the amendment of 1927 was to remove the distinction between the two kinds of payments as to all payments made after the first day of January 1928. Therefore as to payments before the first day of January 1928, the words "as such" have some significance, because they make it clear in the case of a payment towards interest, which is not required to be evidenced by writing, it should be clear that the payment was in fact towards interest and not left as a matter of doubt. As to payments made after the first of January 1928, they are now placed on equality.

The question also came up before the Rangoon High Court in 1938 R L R 591,⁶ where Goodman Roberts C. J. and Dunkley J. held that

for the purpose of saving limitation it is immaterial whether a payment, made by a debtor after 1st January 1928, is towards interest or towards principal. In either case, provided the payment is made within the period of limitation and the requirement as to writing is carried out, a fresh period of limitation begins under S. 20, Limitation Act.

The recent decisions of the Madras High Court are also to the same effect. In 58 Mad 418⁷ it was held by Varadachariar and Burn JJ. that

where a part payment is evidenced by a writing which is signed by the person making the payment, it makes no difference whether the payment is held to be for interest or for principal or for both.

See also to the same effect A I R 1938 Mad 601,⁸ affirming on Letters Patent appeal the decision of a Single Bench in A I R 1936 Mad 848.⁹ In Calcutta, the leading case is 44 Cal 567,¹⁰ decided in 1916, where it was laid down that, if a payment is not shown to have been made towards interest as such

then the payment being proved, and there being admittedly a document in the handwriting of the defendant from which the fact of payment appears, the payment must be taken to be a payment on account of principal.

In A I R 1937 Sind 95=168 I C 820,¹¹ a Bench of the Judicial Commissioners, treated an unspecified payment evidenced by a writing signed by the debtor, as payment of part principal and held that it was enough to save limitation under S. 20. In 14 Lah 580,¹² a payment made by cheque (without any forwarding letter as to whether it was towards interest or principal) accepted by the creditor and subsequently honoured by the Bank, was held to amount to a part payment of the principal debt, and was held sufficient to save limitation under S. 20. This ruling has since been followed in 144 I C 641¹³ and other cases decided in this Court, and the view taken therein is in accord with 42 Cal 1043;¹⁴ 9 Pat 851;¹⁵ and 129 I C 909=A I R 1931 Sind 28.¹⁶ It will thus be seen that the view of the majority of the Allahabad Full Bench in 58 All 261² which was followed, without discussion, in A I R 1937 Lah 820,¹ has been expressly dissented from in Patna, Madras, Sind and Rangoon, and does not appear to be in accord with some earlier rulings of this Court and the Calcutta Court. On the other hand a Division Bench of the Bombay High Court has, in a recent case, A I R 1938 Bom 467,¹⁷ accepted the majority decision in 58 All 261² as correct and has dissented from the Patna and Madras cases cited above. In view of this conflict of authority and having regard to the fact that the question is of general importance and is frequently arising, I think it desirable that it be settled authoritatively by a larger Bench.

In the lower Court it was argued, in the alternative, on behalf of the plaintiff-

4. Bhaga Co-operative Society v. Debi Mangal Prasad Sinha, (1937) 24 A I R Pat 410=170 I C 130=16 Pat 27=18 P L T 309.
5. Bankanidhi Santra v. Godipatna Co-operative Society (1938) 25 A I R Pat 183=174 I C 1005=16 Pat 294=18 P L T 563.
6. Khan Sahib v. Uchil Ahmad, (1938) 25 A I R Rang 280 = 176 I C 865 = 1938 R L R 591.
7. Lakshmi Naidu v. Gunnamma, (1935) 22 A I R Mad 101=154 I C 1053=58 Mad 418=68 M L J 470.
8. Kandaswami Mudaliar v. Thevammal, (1938) 25 A I R Mad 601 = 177 I C 743 = I L R (1938) Mad 1090 = (1938) 1 M L J 620.
9. Kandaswami Mudaliar v. Thevammal, (1936) 23 A I R Mad 848 = 165 I C 225 = (1937) 2 M L J 54.
10. Hemchandra v. Purna Chandra, (1918) 5 A I R Cal 891=44 Cal 567=22 C W N 190.

11. Hari Ram Daulat Ram v. Ram Singh Gopal Singh, (1937) 24 A I R Sind 95 = 168 I C 820 = 31 S L R 68.
12. Jagtumul Sadasukh Rai v. Charanji Lal Fakir Chand, (1933) 20 A I R Lah 341=141 I C 611 = 14 Lah 580 = 34 P L R 514.
13. Dial Singh v. Davindar Singh, (1933) 20 A I R Lah 741 = 144 I C 641.
14. Kedar Nath v. Dinobandhu Shaha, (1916) 3 A I R Cal 580=31 I C 626=42 Cal 1043 = 19 C W N 724.
15. Kesarichand Johr Mull v. Mukteswar Trigunait, (1930) 17 A I R Pat 372=126 I C 898 = 9 Pat 851.
16. Chotirmal Tirithdas v. Rupchand Raghunath Das, (1931) 18 A I R Sind 28=129 I C 909 = 25 S L R 360.
17. Bai Havabu v. Isup Musa Patil, (1938) 25 A I R Bom 467=178 I C 844 = 40 Bom L R 968.

petitioner, that if it be held that the endorsement in question did not satisfy the requirements of S. 20, it was, at any rate, a valid acknowledgment of liability under S. 19. But the lower Court overruled this contention without any discussion. The argument has been repeated before me, and it has been urged that an endorsement of this kind, signed by the debtor on the document evidencing the original transaction between the parties, and stating that a sum of money had been paid "in this account," where the sum paid is less than the interest due on that date, is a valid acknowledgment of liability for the balance under S. 19, and gives a fresh starting point of limitation. In support of this contention reliance is placed on 40 Mad 698;¹⁸ A I R 1935 Mad 245 = 157 I C 272;¹⁹ 47 Bom 632;²⁰ 48 Cal 1046;²¹ 91 I C 402;²² 28 I C 15 = A I R 1916 Mad 138²³ and the recent decision of the Rangoon High Court in A I R 1938 Rang 84 = 175 I C 550.²⁴ On the other hand, it has been held by a Full Bench of the Allahabad High Court in 58 All 261,² already cited, that an endorsement of this kind on the back of the bond, without any further specification or details, does not operate as an acknowledgment within the meaning of S. 19 of the Act. On this point all the five Judges composing the Full Bench were unanimous. This question also therefore requires fuller consideration. For the foregoing reasons, I refer this case to a Division Bench. An early date shall be fixed.

(In view of the conflict of judicial opinion on the question of law, the Division Bench before which the case was posted referred it to a Full Bench.)

Order of the Full Bench

Tek Chand, Bhide and Beckett JJ. — The question of law referred to the Full Bench has since been authoritatively settled by their Lordships of the Privy Council in

18. Venkatakrishnaiah v. Subbrayudu, (1917) 4 AIR Mad 805 = 36 I C 240 = 40 Mad 698.

19. Krishnaswami Naicker v. Thiruvangada Mudaliar, (1935) 22 A I R Mad 245 = 157 I C 272 = 68 M L J 63.

20. Ganesh Narhar v. Dattatraya Pandurang, (1923) 10 A I R Bom 239 = 72 I C 249 = 47 Bom 632 = 25 Bom L R 144.

21. Prasanna Kumar v. Niranjan Ray, (1921) 8 A I R Cal 331 = 64 I C 988 = 48 Cal 1046 = 33 C L J 433 = 26 C W N 213.

22. Raghoba v. Gopi, (1926) 13 A I R Nag 252 = 91 I C 402.

23. Ramkrishna Chetty v. Venkatasubblah Chetty, (1916) 8 A I R Mad 138 = 28 I C 15.

24. Kasiviswanathan Chettyar v. Lakshmanan Chettyar, (1938) 25 A I R Rang 84 = 175 I C 550 = 1937 R L R 421.

A I R 1940 P C 63.²⁵ All that remains to be done is to apply the law as laid down by their Lordships to the facts of each case. This can be done more conveniently by a Judge in Single Bench. We accordingly remit these to the Single Bench for disposal. A very early date shall be fixed.

Tek Chand J.—The facts of the case are set out in my Order dated 9th June 1939 by which the case was referred to a Division Bench. The Division Bench in turn sent the case to a Full Bench in order to decide the question of law involved, on which there was a serious conflict of judicial opinion in the Courts in India. Before the hearing of the case by the Full Bench, however, their Lordships of the Privy Council had authoritatively settled the question of law in A I R 1940 P C 63.²⁵ In view of this decision, the Full Bench did not think it necessary to hear the case but remitted it to the Single Bench for disposal in accordance with the principles settled by their Lordships. The case has accordingly come up before me again. Briefly, the facts are that on 23rd January 1932 Wazir Singh, defendant, borrowed Rs. 60 from Kesar Singh, plaintiff. An entry to this effect was made in the plaintiff's bahi, which was thumb marked by the defendant. Before the expiry of three years from the date of the loan the defendant, on 14th January 1935, paid Rs. 10 to the plaintiff and an endorsement, recording the fact of the payment, was made in the plaintiff's bahi below the entry relating to the original loan. This endorsement, also was thumb-marked by the defendant. On 14th January 1938, the plaintiff sued the defendant for recovery of Rs. 99.8.0 alleged to be the amount due in this account. He averred that the loan carried interest at Rs. 1.9.0 per cent. per mensem. Calculating interest at this rate and giving credit for Rs. 10 alleged to have been received on 14th January 1935 the plaintiff sued for recovery of Rs. 99.8.0.

The defendant denied having taken the loan or repaid Rs. 10. He also denied that he had thumb-marked the original entry or the endorsement relating to the payment of Rs. 10. He further pleaded that the suit was barred by limitation. The Judge, Small Cause Court, found that the loan of Rs. 60 had been advanced and the entry thumb-marked by the defendant. He found however that no interest was agreed to be paid.

25. Rama Shah v. Lal Chand, (1940) 27 AIR P C 63 = 187 I C 233 = I L R (1940) Kar 134 (PC).

He gave no finding as to whether the sum of Rs. 10 had been repaid. He held that this payment and the endorsement would not save limitation under S. 20, as the payment, not having been made towards interest as such and not having been appropriated towards principal, it did not save limitation. The finding that Rs. 60 had been advanced as a loan is one of fact and has not been challenged by the learned counsel for the respondent before me. As regards the repayment of Rs. 10 the learned Judge has given no finding, but both counsel asked me that, instead of remanding the case, I should examine the evidence myself and come to a finding on it. I have accordingly examined the evidence bearing on this point and have heard counsel. This evidence, in my opinion, is conclusive in favour of the plaintiff. This entry purports to have been thumb-marked by the defendant. The scribe Nathu (P. W. 1) and the plaintiff have both deposed that the sum of Rs. 10 was actually paid and the entry thumb-marked by the defendant. The defendant did not go into the witness-box nor did he produce any other evidence in rebuttal. It must therefore be held that Rs. 10 was repaid by the defendant to the plaintiff in this account on 14th January 1935 and that the entry relating to the payment was thumb-marked by the defendant.

Though the plaintiff alleged that the loan carried interest at Re. 1-9-0 per cent. per mensem, there is no proof on the record in support of this allegation. The original entry is silent on the point and the oral evidence bearing on it has not been believed by the trial Judge. It must therefore be taken that the loan bore no interest. This being so, the payment of Rs. 10 on 14th January 1935 must necessarily be taken to have been made in part payment of the principal. The fact of the part payment having been entered in the bahi and the entry thumb-marked by the defendant, the case is clearly covered by S. 20, Limitation Act, under which the plaintiff got a fresh period of three years from that date to sue. The suit having been brought within that period is within time. I accordingly accept the petition for revision and grant the plaintiff a decree for Rs. 50 against the defendant. In the circumstances, the parties are left to bear their own costs throughout.

D.S./R.K.

Petition accepted.

* A. I. R. 1940 Lahore 446

YOUNG C. J. AND SALE J.

District Official Receiver, Amritsar

v.

*Firm Sohan Lal Ramji Dass and others.*Civil Revn. Nos. 340 to 346 of 1939,
Decided on 4th July 1940.

* (a) Civil P. C. (1908), O. 7, R. 11 and O. 33, R. 8 — Application to sue in forma pauperis dismissed—O. 7, R. 11 does not apply.

Order 7, R. 11 does not apply to an application for permission to sue in forma pauperis. Such an application is specifically dealt with by O. 33, R. 8, which makes it clear that an application for permission to sue in forma pauperis is only deemed to be a plaint in the suit, when the application is granted. Where the application has never been granted O. 7, R. 11 does not apply. [P 447 C 1]

* (b) Civil P. C. (1908), S. 149 and O. 33—Application to sue in forma pauperis found mala fide—No extension of time under S. 149 should be allowed.

Where an application to sue in forma pauperis is found to be mala fide the Court in the exercise of its discretion is justified in refusing to grant extension of time under S. 149: *AIR 1923 Rang 256; 17 All 526 and 18 All 206, Rel. on.* [P 447 C 1, 2]

Shamair Chand—*for Petitioner.*Dina Nath Bhasin—*for Respondents.*

Young C. J.—The Judge in Chambers has referred this petition in revision to a Division Bench for decision. The point referred is: The Official Receiver of Amritsar had to deal with an insolvent's estate. He filed several suits and applied that he should be allowed to proceed in forma pauperis. These applications were not accepted by the learned Subordinate Judge. After the lapse of some time the Official Receiver applied that he should be allowed to pay the full stamp duty on these plaints and to withdraw his applications that the suits should be treated in forma pauperis. The learned Subordinate Judge, acting under S. 149, Civil P. C., refused to allow the court-fees at that stage to be paid on the ground that the Official Receiver had not made these applications for permission to sue in forma pauperis bona fide. On the matter coming before the learned Judge in Chambers in this Court in revision, reliance was placed on two decisions of this Court reported in 38 P L R 79¹ and 38 P L R 429.² He pointed out that there was no discussion in these rulings dealing with the question of good faith and he was doubtful whether these rulings really

were intended to lay down that even when the applications for permission to sue in forma pauperis are not made in good faith, the applicants are entitled to an extension of time under S. 149, C.P.C.

1. *Dharma Das v. Parbati*, (1936) 38 P L R 79.2. *Sultan v. Kanshi Ram*, (1936) 38 P L R 429.

He also referred to 17 All 526³ and 18 All 206,⁴ and also 1 Rang 196⁵ where it was held that where an application for permission to sue in forma pauperis is not made in good faith, no extension of time under S. 149 should be granted. The first point taken by counsel for the petitioner in reply to an objection from the Bench is that an application for revision lies in that the learned Subordinate Judge has acted in the exercise of his jurisdiction illegally or with material irregularity. He contends that an application for permission to sue in forma pauperis is a plaint coming within O. 7, R. 11, Civil P. C. Therefore, if this be conceded he contends that under O. 7, R. 11 (c) the learned Judge was bound to give time for payment of the fees. He argues that having failed to give time he has acted illegally or with material irregularity. In the first place, O. 7, R. 11, does not apply to an application for permission to sue in forma pauperis. Such an application is specifically dealt with by O. 33, R. 8. This provision of the Civil Procedure Code makes it clear that an application for permission to sue in forma pauperis is only deemed to be a plaint in the suit when the application is granted. The application in this case has never been granted and therefore O. 7, R. 11 does not apply. We therefore hold that no revision lies. It is however necessary to deal with the point raised by the learned referring Judge which involves proper construction of S. 149, Civil P. C. It appears to us that there is no difficulty about this point. S. 149 is as follows:

Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance.

The material words, as far as these applications in revision are concerned are that the Court may, in its discretion, allow the person, by whom such fee is payable, to pay the whole or part of such court-fee.

The statute deliberately gives discretion to the Court. We can imagine no better use of a Court's discretion than that which is used in this case where the Court finds that

there has been an application made mala fide. We agree with the learned Single Judge of the Rangoon High Court in his view reported in 1 Rang 196⁵ on p. 198 where he says:

I must hold that both applications to sue in forma pauperis were fraudulent. S. 149 gives the Court discretion in the matter and in my opinion this is not a case in which that discretion should be exercised.

It was argued that the finding of the learned Subordinate Judge was not based on evidence. There is no force in this argument. The learned Judge dealt with the evidence at some length and we consider there was evidence on which he could find as he did. We therefore dismiss these petitions with costs. No order as to costs in Civil Revision Nos. 342 and 345 of 1939.

G.N./R.K.

Petitions dismissed.

A. I. R. 1940 Lahore 447

TEK CHAND AND BECKETT JJ.

Shankar Das — Defendant—Appellant.

v.

Firm Hindu Joint Family Ladha Ram-

Ganesh Das—Plaintiff—Respondent.

S. A. No. 583 of 1939, D/- 25-6-1940.

Punjab Relief of Indebtedness Act (7 of 1934), Ss. 9 and 26 — Incompetency or otherwise of application under S. 9 does not affect question of extension of limitation under S. 26.

In order to decide whether an application before the Board under S. 9 is or is not competent and whether it comes or does not come within the jurisdiction of the Board, as determined by the provisions of the Act, a proceeding before the Board is necessary. The mere fact that the decision of the Board is that the application is incompetent or otherwise, does not affect the question of the extension of the limitation under S. 26: *A I R 1938 Lah 780, Approved.* [P 448 C 1]

J. L. Kapur — *for Appellant.*

Amar Nath Chopra — *for Respondent.*

Tek Chand J. — The plaintiff firm, Ladha Ram-Ganesh Das, instituted a suit against the defendant-appellant Shankar Das for recovery of Rs. 2300 on foot of a nanwan which the latter had executed in the plaintiff's bahi for Rs. 1926 on 8th November 1933. The trial Court dismissed the suit, but on appeal the learned District Judge has passed a decree for Rs. 1926 with costs in both Courts. The defendant appeals (Regular Second Appeal No. 583 of 1939) praying for the dismissal of the suit in its entirety. The plaintiff has filed a cross-appeal (Regular Second Appeal No. 709 of 1939) asking that the decree be enhanced by Rs. 374 which has been disallowed by the District Judge. Both these appeals will be disposed of in this judgment. The first contention raised by the defen-

3. *Naraini Quar v. Makhan Lal*, (1895) 17 All 526 = 1895 A W N 106.

4. *Abbasi Begum v. Nanhi Begum*, (1896) 18 All 206 = 1896 A W N 33.

5. *Book Lal v. Dal Chand*, (1923) 10 A I R Rang 256 = 74 I O 835 = 1 Rang 196.

dant in his appeal is that the suit is barred by time, the nanwan, on the basis of which the suit was brought having been executed on 8th November 1933 and the suit instituted more than three years after that date on 1st March 1937. It appears that on 7th November 1936 the plaintiff had made an application before the Debt Conciliation Board, Jhang for effecting a settlement between Shankar Das and his creditors, under S. 9, Punjab Relief of Indebtedness Act. This application was dismissed by the Board on 1st March 1937. The plaintiff claims that under S. 26 of the Act he was entitled to deduct the period during which the proceedings remained pending before the Conciliation Board and that, if this period is excluded, the suit is within time. The learned District Judge, following a single Bench decision of this Court in A I R 1938 Lah 780,¹ has upheld the plaintiff's contention and has found the suit to be within time.

Mr. J. L. Kapur on behalf of the defendant challenges the correctness of this ruling and urges that under S. 26 the plaintiff is not entitled to deduct the period during which the proceedings remained pending before the Conciliation Board. His contention is that the defendant Shankar Das is not a "debtor" as defined in S. 7 (2) of the Act and therefore the application made by Ladha Ram before the Board under S. 9 did not lie. In my opinion, this contention is without force and, if I may say so with all respect, the law was correctly laid down by Dalip Singh J. in the ruling cited. In order to decide whether an application before the Board is or is not competent and whether it comes or does not come within the jurisdiction of the Board, as determined by the provisions of the Act, a proceeding before the Board is necessary. The mere fact that the decision of the Board is that the application is incompetent or otherwise, does not affect the question of the extension of the limitation under S. 26. I, accordingly, uphold the decision of the learned District Judge that the suit is within time. (The Court then discussed the point about the recovery of the amount decreed, dismissed the defendant's appeal and proceeded.) The plaintiff, in his appeal, claims interest on Rs. 1926. The nanwan however does not contain any stipulation to pay interest. Admittedly no notice under the Interest Act was sent, nor has it been shown

how the plaintiff is otherwise entitled to claim interest. The District Judge was therefore right in disallowing this part of the plaintiff's claim. His appeal is without substance and is dismissed. In the peculiar circumstances of the case the parties are left to bear their own costs throughout.

D.S./R.K.

*Appeal dismissed.***A. I. R. 1940 Lahore 448**

MONROE J.

Mt. Mariam v. Fazal Karim.

S. A. No. 1046 of 1939, D/-22-1-1940.

Dissolution of Muslim Marriages Act (1939), S. 4—S. 4 is not retrospective.

Section 4 is not retrospective and consequently in the case of a Muslim husband and wife apostasy of either party prior to the coming into force of the Dissolution of Muslim Marriages Act dissolves the marriage. [P 448 C 2]

R. C. Manchanda — *for Appellant.*Malik Mohammad Amin—*for Respdt.*

Judgment.—The trial Judge granted to the appellant a decree for dissolution of her marriage, which was in effect a declaration that her marriage, she being a Muslim married to a Muslim, had been dissolved by her apostasy. The learned Sessions Judge set aside the decree and dismissed the suit. The appellant became a Christian on 21st August 1938 by baptism. Act No. 8 of 1939 came into force in March 1939. Till the passing of that Act, the law was clear: in many cases, it had been held that apostasy of a Muslim dissolved marriage: there was no decision to the contrary. Unless the Act was retrospective it could not affect the present case. It has been argued that the act is a declaratory Act, but the phraseology of S. 4, the Section with which I am concerned, is not so expressed. I therefore differ from the opinion of the learned District Judge on this point. The learned Judge has also held that the appellant was a Christian when she was married, on the basis of a statement made by her—her evidence contains no reference to this. It was not the case of either party that she became a Christian before her marriage. The statement recorded by the Judge must have either been made inadvertently or misinterpreted by the Judge. The appellant was married at 14 and there is nothing to indicate that she had heard of Christianity then, except the solitary statement to which I have referred. I hold that the marriage was dissolved by apostasy. I allow the appeal and restore the decree of the trial Judge. The respondent will pay the appellant's costs throughout.

G.N./R.K.

Appeal allowed.

1. Waryam Singh v. Pheru, (1938) 25 A I R Lah 780=179 I C 468.

* A. I. R. 1940 Lahore 449

YOUNG C. J. AND RAM LALL J.

Charan Das — Petitioner.

v.

Mt. Surasti Bai — Respondent.

Criminal Revn. No. 1262 of 1939, Decided on 28th February 1940.

* Criminal P. C. (1898), S. 488 (8) — Word 'reside' connotes some sort of permanent intention to stay at particular place — Mere casual visit to place other than fixed home will not be sufficient : *A I R 1928 Lah 853=110 I C 239*, Overruled.

In the case of persons who have a fixed residence, a visit to another place for however long a period, so long as it is casual, will not confer jurisdiction. A person who works and has a permanent home in one place cannot by his visits to another place during period of casual leave, confer jurisdiction on the Courts of latter place. Where, however, the parties have no home of any sort and are moving about from place to place, each place where they so live, would be their home for the time being. The sole test on the question of residence is whether a party has *animus manendi*, or an intention to stay for an indefinite period, at one place; and if he has such an intention, then alone can he be said to "reside" there : *A I R 1928 Lah 853=110 I C 239*, Overruled; *A I R 1930 Lah 916*; *32 All 203 (F B)* and *AIR 1933 All 39*, Applied; *AIR 1927 All 291*; *36 Cal 964* and *AIR 1934 Cal 570*, Disting. [P 451 C 2]

Durga Das Jain — for Petitioner.

Ganga Ram — for Respondent.

ORDER OF REFERENCE

Dalip Singh J. — The petition in this case involves a question of law of some difficulty. The question is, what is the meaning of the words "where he last resided with his wife" in sub-s. 8 of S. 488, Criminal P. C. In the present case, the Courts below have followed the ruling in *A I R 1928 Lah 853¹* by Jai Lal J. If that ruling lays down the law correctly, then I would not have interfered in revision. But there are several other rulings where this point has been considered cited by counsel for the petitioner, namely, *A I R 1933 All 39*,² *32 All 203*,³ *49 All 479*,⁴ *A I R 1937 Bom 35⁵* and *A I R 1929 Bom 410⁶*. The real ques-

tion is, what is the meaning to be attached to the word 'resides' and whether the words 'resided with his wife' should be construed as implying permanent residence with his wife or should mean the place where the husband and wife last resided together as such in the ordinary sense of locality alone. The point is of importance as it might make a great difference to a woman (say hypothetically deserted at a certain place by her husband) as to whether she could bring a petition for maintenance in that place or would have to go back to the last permanent or temporary residence in the stricter sense of the word in order to bring her petition. I think the point should be decided authoritatively and I, therefore, refer this case to a Division Bench.

Judgment of the Division Bench

Ram Lall J. — *Mt. Surasti Bai* alias *Sohag Wanti* made an application on 27th February 1939 for an order for maintenance against her husband *Charan Das* in the Court of a Magistrate at Sargodha. *Charan Das* is Trains Clerk at Mughalpura and has been living for over three years at Lahore since his transfer from Jullundur. His wife left him some time ago and went to live with her mother at Sargodha. While she was at Sargodha, *Charan Das* went there on two or three occasions apparently with the intention of persuading his wife to return, but he was not successful. It is admitted by her counsel that the duration of such visits did not exceed two or three days and that on such occasions *Charan Das* obtained casual leave to visit Sargodha, his official duties requiring him to live at Lahore. The Magistrate at Sargodha held that he had jurisdiction to deal with the case on the ground that *Charan Das* "lived at Sargodha" within the meaning of Section 488 (8), Criminal P. C., on the occasion of his visits to that place. He relied mainly on a decision of a Single Judge of this Court reported in *A I R 1928 Lah 853¹*. *Charan Das* put in a revision petition against this order of the Magistrate holding that he had jurisdiction and the learned Additional Sessions Judge, Shahpur, rejected this petition. A further petition has been made to this Court, which was first placed for disposal before a Single Judge who has referred it to a Division Bench for disposal. S. 488 (8), Criminal P. C., is as follows :

Proceedings under this Section may be taken against any person in any district where he resides or is, or where he last resided with his wife, or, as

1. *Allah Ditta v. Mt. Sakina Bibi*, (1928) 15 *A I R Lah 853=110 I C 239=29 Cr L J 687*.

2. *Mr. J. W. Carol v. Mrs. J. W. Carol*, (1933) 20 *A I R All 39=144 I C 136=1933 A L J 8*.

3. *Flowers v. Flowers*, (1910) 32 *All 203=5 I C 871=7 A L J 193 (F B)*.

4. *Sher Singh v. Amir Kuer*, (1927) 14 *A I R All 291=101 I C 670=28 Cr L J 494=49 All 479=25 A L J 437*.

5. *Bai Ganga v. Amritlal*, (1937) 24 *AIR Bom 35=166 IC 574=38 Cr L J 248=38 Bom LR 1107*.

6. *In re Khairunnissa*, (1929) 16 *AIR Bom 410=122 I C 59=31 Cr L J 331=31 Bom L R 931=58 Bom 781*.

the case may be, the mother of the illegitimate child.

The question of difficulty in this case is what is the meaning of the words "where he last resided with his wife." On the plain construction of these words, it appears to us that the word "reside" must connote some sort of permanent intention to stay at a particular place and a mere casual visit to a place other than the one where a person has a fixed home will not be sufficient. Language similar to that of S. 488 (8), Criminal P. C., is used in S. 3 (3), Divorce Act, which runs as follows :

'District Court' means, in the case of any petition under this Act, the Court of a District Judge within the local limits of whose ordinary jurisdiction, or of whose jurisdiction under this Act, the husband and wife reside or last resided together.

It appears to us that the construction of these words in decisions under the Divorce Act would be equally applicable under S. 488 (8), Criminal P. C. Turning to the judicial decisions where these words have been construed, the first that we proceed to consider is the Single Bench decision of this Court reported in A I R 1928 Lah 853,¹ on which the two lower Courts have relied. There a husband paid some visits to his wife in her parents' house and this was held to be sufficient to give jurisdiction to the Courts of the district in which the parents resided. The visits in this case were casual and made by a person who had a regular home somewhere else. The only apparent reason for these visits was that the wife happened to be there. If we accepted the principle of this decision we would have to hold that a visit to any place, however, casual and for however short a period, would give the Courts at that place jurisdiction to entertain petitions not only for maintenance but, because the language employed in the Divorce Act is similar, also for divorce. We are of opinion that the decision in A I R 1928 Lah 853,¹ which gives no reasons, is not sound in law and we therefore overrule it. In A I R 1930 Lah 916⁷ Tek Chand J. in delivering the judgment of a Division Bench laid down, after a review of the authorities, that a person who had an abode elsewhere, but who came to a place for a short period and with a fixed purpose of being within the jurisdiction of a Court, could not be said to "reside" there. This decision appears to us to lay down the rule of law correctly.

In the Allahabad High Court the leading decision on the subject is 32 All 203,³ where a Full Bench held that a mere temporary sojourn in a place, there being no intention of remaining there, was not sufficient to confer jurisdiction. A similar view was taken in A I R 1933 All 39,² a decision by one of us. There a railway employee, as in the present case, lived at G, where his official duties required him to live. He visited Allahabad on several occasions on business and stayed there for a couple of days on each occasion. It was held that the residence was at G, and that he did not "reside" at Allahabad and therefore the Allahabad Courts had no jurisdiction. All three of these decisions were under the Divorce Act but we cannot see any difference in principle and consider that they are equally applicable to a petition under S. 488, Criminal P. C. In 49 All 479⁴ a Single Bench of the Allahabad High Court held, in dealing with a petition under S. 488, Criminal P. C., that this Section included a temporary residence also. In this case the respondent had stayed for two months at a place other than the one where he had permanent residence. The learned Judge while remarking that a flying visit to a particular place to attend to business was not sufficient to found jurisdiction, held that a person could have two residences, one temporary and one permanent, and though it was difficult to define the length of stay when it becomes capable of being held to be "residence," a stay of two months at one place was sufficiently long for holding a person to "reside" there. Though we consider the decision in this case to be open to doubt, even on the principle laid down here a casual visit to Sargodha for a day or so was not sufficient. And thus the decision is clearly distinguishable. The correct rule was laid down by the Calcutta Court in 3 C W N 250,⁸ in the following terms :

It (residence) must be taken to have been used in the ordinary acceptation in which it conveys the idea, if not of permanence, at any rate of some degree of continuance The degree of continuance is not capable of precise definition, but the residence which the Act points must be something more than occupation during the occasional and casual visits within the local limits of the Court, more especially where there is a residence outside those limits marked with a considerable measure of continuance.

In 36 Cal 964,⁹ Fletcher J. arrived at his decision on the basis that that was one of those cases where the actual abode for the

7. T. A. Kershaw v. A. C. Kershaw, (1930) 17 AIR Lah 916 = 129 I C 113 = 12 Lah 214 = 32 P L R 971.

8. Jogendra Nath Banerjee v. Elizabeth Banerjee, (1899) 3 C W N 250.

9. Bright v. Bright, (1909) 36 Cal 964 = 4 I C 419.

time being of persons, who never had a permanent residence, was their only residence. Whether the rule was properly applied in this case or not, the decision will not cover the present case as the husband in the present case had a permanent residence for over three years in a place where his duties required him to stay. A similar decision was arrived at by Ameer Ali J. in a case reported in A I R 1934 Cal 570,¹⁰ where it was held that a railway employee, who had no fixed home and had come to Calcutta to spend a month's leave with his wife's parents, did "reside" in Calcutta so as to give jurisdiction to the Courts there on the ground of residence. Here too, we consider that the case is entirely distinguishable from the case before us. The distinction between people who have permanent residences and who have no homes was sought to be brought out in 53 Bom 781,⁶ where the law was laid down as follows:

It would follow from these decisions that where the husband and wife had a fixed place of abode or a permanent place of residence, a casual or temporary residence in any other place would not confer jurisdiction on the Court situate at that place. In the present case it appears that the husband and wife had no fixed place of abode and no permanent residence, and the husband came to Bombay and stayed with the complainant and her father for about eight days, and had the intention of remaining there as he told the complainant's father that he would try and find employment in Bombay but left after eight days. The husband did not appear before the Magistrate and has not given any evidence as to his usual place of residence. On the evidence before us, we hold that the husband has no fixed place of abode or permanent residence. I think, therefore, that there was sufficient 'residence together' of the husband and wife in Bombay so as to give jurisdiction to the Magistrate under sub-s. (8), S. 488, Criminal P. C.

In 54 Bom 548¹¹ the residence was for a period of two months and was that of a 'resident son-in-law.' It was held there that such residence was sufficient to confer jurisdiction. In A I R 1937 Bom 35,⁵ where a man lived and worked at V, and had hired a house at N his native place, for storing his kit, it was held that the Courts at N could not entertain a petition under S. 488, Criminal P. C. In A I R 1932 Nag 85¹² Subhedar A. J. C. decided on the weight of authority that a temporary residence, if it extended to a period of two months or so, was sufficient to confer jurisdiction, though

10. G. G. Ritchson v. W. L. D. Ritchson, (1934) 21 A I R Cal 570=152 I C 32=38 C W N 347.

11. In re Sama Jetha, (1930) 17 A I R Bom 348=127 I C 179=31 Cr L J 1157=54 Bom 548=32 Bom L R 764.

12. Ramrao v. Emperor, (1932) 19 A I R Nag 85=137 I C 904=33 Cr L J 558.

a casual visit would not do so. In A I R 1926 Oudh 268¹³ a casual visit to a place, coupled with no intention of remaining there, from outside the jurisdiction, was held not to be sufficient. The principle deducible from these authorities appears to be that in the case of persons who have a fixed residence, a visit to another place for however long a period, so long as it is casual, will not confer jurisdiction. A person who works and has a permanent home in Lahore cannot, by his visits during period of casual leave, confer jurisdiction on the Sargodha Courts. Where, however, the parties have no home of any sort and are moving about from place to place, each place where they so live, would be their home for the time being. The sole test on the question of residence appears to us to be, whether a party has *animus manendi*, or an intention to stay for an indefinite period, at one place; and if he has such an intention, then alone can he be said to 'reside' there. In this view of the matter, we hold that the Courts at Sargodha has no jurisdiction to entertain the application of the wife and we accordingly accept this revision petition and set aside the order of the Magistrate at Sargodha holding that he had jurisdiction.

D.S./R.K.

Revision accepted.

13. Ramdei v. Jhunni Lal, (1926) 13 A I R Oudh 268=95 I C 596=27 Cr L J 820=1 Luck 343=3 O W N 231.

A. I. R. 1940 Lahore 451

DIN MUHAMMAD J.

Mohammad Shafi — Plaintiff —
Appellant.

v.

Sialkot Municipality and another —
Defendants — Respondents.

Second Appeal No. 601 of 1939, Decided on 10th July 1940, from decree of Dist. Judge, Sialkot, D/- 22nd March 1939.

(a) Jurisdiction—Civil Court—Suit for injunction restraining municipality from demolishing building on ground that land under building is plaintiff's land and not that of municipality — Civil Court's jurisdiction is not barred.

A suit by a person for an injunction restraining municipality from demolishing building on the ground that the land under the building belongs to that person and not to the municipality involves a controversy of title and hence Civil Court has jurisdiction to entertain such suit. Further, if the municipality does an unauthorised act it cannot claim immunity from the ordinary law of the land : A I R 1940 Lah 377 (F B), Rel. on.

[P 454 C 1]

(b) Punjab Municipal Act, (3 of 1911), S. 49 — Sanction to build given by municipality sus-

pendent after supersession of municipality under S. 238, Punjab Municipal Act — Notice of suit by owner addressed to Secretary of State for India in Council through Deputy Commissioner held valid.

Sanction to build certain building was granted to a person by the municipality. The municipality was subsequently superseded under S. 238, Punjab Municipal Act, and the sanction was suspended. The owner of the building served a notice to the Secretary of State for India in Council through the Deputy Commissioner. It was described as a notice under S. 80, Civil P. C., and S. 49, Punjab Municipal Act. The Deputy Commissioner occupied a dual capacity. He was the Collector of the District as well as the Administrator of the Municipal Committee :

Held that the notice served on the Deputy Commissioner was valid and proper. [P 454 C 2]

(c) Civil P. C. (1908), O. 27, R. 1 — Suit against Provincial Government through Deputy Commissioner — Process against Province duly served and Province duly represented — Defect in frame of suit held condonable.

In a suit against the Provincial Government the defendant was described as "Government, Punjab Province through the Deputy Commissioner." The process issued against the Province was duly served and the Province was duly represented in Court :

Held that the defect in the frame of the suit was condonable. [P 454 C 2]

(d) Punjab Municipal Act (3 of 1911), S. 232 — Once resolution or order of Committee is acted upon, it cannot be subsequently suspended.

Under S. 232 the Commissioner or the Deputy Commissioner is authorised to suspend the execution of any resolution or the order of a Committee and not the resolution or the order itself. The distinction is important. If once a resolution or order of a Committee has been acted upon, it cannot be suspended. In other words, the order of suspension should be made before the resolution or order is executed and not after : *A I R 1936 Lah 689 and A I R 1937 Lah 84, Rel. on.* [P 455 C 1]

Qabul Chand Mittal — *for Appellant.*

N. D. Murad and Malik Mohammad Amin — *for Respondents.*

Judgment. — This appeal has arisen in the following circumstances. On 16th October 1935, the appellant Mohammad Shafi, gave a notice in writing to the Sialkot Municipal Committee of his intention to erect a building within the limits of the Municipality. On 30th October 1935, the Municipal Engineer recommended that the requisite sanction be refused on the ground that the land on which the building was to be erected was part of a public street. On 31st October an order was made 'rejecting' the application, which amounted to a refusal of the necessary sanction. On 1st November the appellant was notified that his application had been rejected. On 5th Novem-

ber the appellant once more submitted an application addressed to the Executive Officer of the Municipal Committee. He stated therein that his previous application had been rejected under some misapprehension, that the land on which he intended to put up a structure belonged to him and had been in his possession for a long time and that, if necessary, the spot might be inspected by the officer concerned. On 11th November the Executive Officer inspected the spot. He came to the conclusion that the land did not belong to the Municipal Committee, and that, on the other hand, it had been in possession of the plaintiff's ancestors for a long time and that the Committee had already abandoned its claim to the shamilat land in this mohalla and had sanctioned similar structures in other cases, and he, accordingly, recommended to the Committee that sanction be given as prayed. On 11th December a resolution was passed by the Committee in accordance with the recommendation of the Executive Officer, and on 17th December information to this effect was conveyed to the appellant.

On 2nd January 1937 that is after the lapse of more than a year, the Deputy Commissioner, Sialkot, suspended the resolution and, on 4th January, the appellant was informed of it. It may be remarked that prior to that date the Provincial Government had under S. 238, Punjab Municipal Act, declared the Sialkot Municipal Committee to be superseded. On 12th January the appellant sent a notice through his lawyer to the Secretary of State for India in Council through the Deputy Commissioner, Sialkot. It was described as a notice under S. 80, Civil P. C., and S. 49, Punjab Municipal Act. It stated that the lawyer had been instructed by his client Mohammad Shafi to inform the addressee that he had built a house with the sanction of the Municipal Committee granted to him by Resolution No. 1169, dated 11th December 1935, that it was incorrect that the house had been built on a portion of a public street, that a sanction once given could not be revoked, that the sanction was absolute and that, in these circumstances, he would kindly reconsider the legal position. It was added that in case the addressee persisted in enforcing the order of suspension, a civil suit would be instituted against the Municipal Committee in a Court of law. This notice appears to have been despatched on 12th January 1937. A reply thereto was sent by the then Executive Officer on

10th March 1937, informing the lawyer concerned that his client had no actionable claim and in case a suit was instituted, it would be resisted. On 6th November 1937, a notice under S. 175, Municipal Act, purporting to have been written on 27th August 1937 was sent to the appellant calling upon him to remove the house erected by him on a part of the street and at the same time sending him a sum of Rs. 16-6-0 as compensation for the removal of the structure. On 23rd December 1937, the appellant sent a reply by registered post through a lawyer, Mr. Anant Ram, of which the acknowledgment is on the record.

On 10th January 1938 the appellant instituted the present suit impleading as defendants the Sialkot Municipal Committee through the Deputy Commissioner as Administrator of the said Municipal Committee and "Government Punjab Province through the Deputy Commissioner of the Sialkot District." It was for a perpetual injunction to restrain the defendants from demolishing his building marked A B C D on the plan attached to the plaint, or from issuing any order for its demolition or from interfering with his possession in any manner. The suit was resisted by the defendants on various grounds. It was contended that the land under the building belonged to the Municipal Committee being a part of a thoroughfare, that the superseded Committee had transgressed its powers in granting sanction to the plaintiff to erect the building on Municipal land, that notice under S. 175, Municipal Act, was valid, that the orders issued by the administrator could not be challenged in a Civil Court and that the resolution had been properly suspended under the provisions of the Municipal Act. It was further added that the notice that was given by the plaintiff was defective and that the description Punjab Province through the Deputy Commissioner, Sialkot District, was wrong. The trial Court framed the following issues in the case :

1. Should the plaintiff have sued the Punjab Province through Collector and not the Deputy Commissioner ?

2. Is the notice under S. 80 valid? If not, what is its effect ?

3. Does the property in question belong to the plaintiff ?

4. Was the Deputy Commissioner competent to revoke the sanction granted to the plaintiff on 11th December 1935 ?

5. Was the compensation offered by the defendant committee under S. 175, Municipal Act, inadequate ?

6. Has not the Civil Court jurisdiction to try this suit ?

7. To what relief is the plaintiff entitled ?

On issue 1 it was observed that the Punjab Province through Collector, Sialkot, was a necessary party to the suit and inasmuch as no amendment had been made by the plaintiff, the issue was decided against him. On issue 2 it was held that the notice was bad in law and was invalid. Issue 3 was decided against the plaintiff on the ground that the land under the building belonged not to him but to his father, Pir Bakhsh. Issue 4 as to the competency of the Deputy Commissioner and the Commissioner to suspend the resolution of the Municipal Committee was decided in favour of the defendants. Issues 5 and 6 were decided against the plaintiff and, consequently, the plaintiff's suit was dismissed with costs. The plaintiff preferred an appeal against this order to the District Judge who disposed of the appeal on the grounds that proper parties had not been impleaded by the plaintiff, that no notice under S. 80, Civil P. C., had been sent to the Collector and that the Civil Court was not competent to try the suit in view of the provisions of S. 225, Punjab Municipal Act.

The plaintiff came to this Court on second appeal and the appeal was heard by me on 23rd November 1939. Without going into the merits of the case, I came to the conclusion that before the case could be finally decided it was necessary to determine (1) whether the building in dispute was constructed before or after the suspension of the execution of the resolution under S. 232, Municipal Act, and (2) whether the property in dispute vested in the Municipal Committee. I accordingly remanded the case under O. 41, R. 25, Civil P. C., and directed the trial Court to take the additional evidence required and submit to this Court his findings thereon and the reasons therefor. In compliance with that order the trial Court has disposed of the issues framed by me. It has held that the building was completed before the order suspending the operation of the resolution was made and that the site under the building did not vest in the Municipal Committee. The questions that fall for determination in this case are: (1) whether the notice served by the plaintiff was proper, (2) whether the suit has been properly instituted, (3) whether the Deputy Commissioner or for that matter, the Commissioner could suspend the resolution of the

committee granting sanction to the plaintiff (4) whether the building was constructed before the execution of the resolution was suspended by the Deputy Commissioner and (5) whether the site under the building belongs to the plaintiff. I may remark that in the Court below it was also urged that the Civil Court had no jurisdiction in this matter, but this point has not been argued before me on behalf of the respondents. In my view, the case involves a controversy of title between the plaintiff and the respondents and a Civil Court has consequently jurisdiction to entertain it. The bar pleaded in the lower Courts was based on S. 225, Municipal Act, but I fail to appreciate how that Section helps the respondents in any manner. Further as laid down by a recent Full Bench judgment of this Court in Regular Second Appeal No. 90 of 1939¹ if a committee does an unauthorized act, it cannot claim immunity from the ordinary law of the land.

On the first question whether the notice was proper, it is urged on behalf of the respondents that no notice was sent to the Collector of the District as required by S. 80, Civil P. C., and that the notice sent by the plaintiff was really one under Section 49, Municipal Act. A notice to the Collector is said to be necessary inasmuch as the committee having been superseded under S. 238, Municipal Act, all property, which was vested in the Committee became vested in His Majesty. I, however, consider that the notice does not suffer from any defect at all. The plaintiff, although faced with a complicated situation on account of the supersession of the committee did serve a notice on the Secretary of State for India in Council through the Deputy Commissioner, Sialkot, and further made it clear that the notice was both under S. 80, Civil P. C., and S. 49, Punjab Municipal Act. The Deputy Commissioner occupied a dual capacity then: he was the Collector of the District as well as the administrator of the Municipal Committee. Notice having gone to him in the capacity of Deputy Commissioner, it cannot be urged that the Collector had not been informed of the intention of the plaintiff to institute a suit against the Secretary of State for India in Council, if he was not listened to. It is significant that the Executive Officer laboured under no misapprehension as re-

gards the authority who had been notified, inasmuch as in his reply while referring to the notice, he described it as a notice addressed to the Secretary of State through the Collector, Sialkot. Moreover, this is a highly technical matter and in a place like the Punjab where people are not used to hair-splitting, such technicalities should not be allowed to defeat justice. It is further doubtful whether a notice was at all necessary under S. 49, Municipal Act, in the circumstances of the case. On the grounds stated above, I have no hesitation in holding that the notice served on the Deputy Commissioner was valid and proper.

Coming now to the question whether the suit had been properly instituted, all that is contended on behalf of the respondents is that the description of defendant 2 as "Government Punjab Province through the Deputy Commissioner, Sialkot," is legally wrong, inasmuch as the Government of the province should have been sued through the Collector and not the Deputy Commissioner. Apart from the fact that the objection is not supported by any law on the subject, it is a highly technical objection and the defect, if any, is condonable in view of the fact that the amendments introduced by the Government of India Act are not clear on the subject. Originally, the Secretary of State for India in Council was sued through the Collector and under the present Government of India Act all that is necessary to be mentioned is the 'province.' The amendment of O. 27, Civil P. C., merely lays down that the Crown pleader in any Court shall be the agent of the Crown for the purposes of receiving processes against the Crown issued by such Court and it is not disputed that processes issued against the Punjab Province were duly served and that the Province was duly represented in the Courts below. The addition therefore of the words "through Deputy Commissioner" did not in any manner affect the institution of the suit or cause any prejudice to the defendants. I accordingly overrule this objection.

The third question is whether the Deputy Commissioner or, for that matter, the Commissioner could suspend the resolution of the committee granting sanction to the plaintiff. A perusal of S. 232, Punjab Municipal Act, leaves no room for doubt that the Commissioner or the Deputy Commissioner is authorized to suspend the execution of any resolution or the order of a committee and not the resolution or the

1. *Municipal Committee Montgomery v. Sant Singh*, Reported in (1940) 27 A I R Lah 377 = 42 P L R 573 (F B).

order itself. The distinction is important. If once a resolution or order of a committee has been acted upon, it cannot be suspended. In other words, the order of suspension should be made before the resolution or order is executed and not after. The order of the Deputy Commissioner of 2nd January 1937, suspending Resolution No. 1169, therefore was clearly illegal. It was this order that was supported by the Commissioner and the Commissioner's illegal support of an invalid order of the Deputy Commissioner could not improve matters. No authority is needed for this simple proposition as the language of the Section itself is quite clear, but I may refer to A I R 1936 Lah 689,² where Coldstream J. also interpreted the Section in the same manner and to A I R 1937 Lah 84,³ where Jai Lal J. approvingly referred to the decision of Coldstream J. This evidently takes us to the next question whether the building was constructed before or after the suspension of the resolution by the Deputy Commissioner. As stated above, if the building had been completed prior to the order made by the Deputy Commissioner, the order would not in any way prejudicially affect its construction. This question was remanded by me to the trial Court and I have no hesitation in agreeing with its conclusion that the building had been completed long before the order of the Deputy Commissioner was made. Consequently, it is impossible to hold that the building was constructed in teeth of the order suspending the resolution of the committee.

The only other question that falls for determination is whether the site under the building was owned by the plaintiff. Here, too, both the Subordinate Judge who tried the case in the first instance and the Subordinate Judge who disposed of this question on remand have concurrently found that the site under the building did not vest in the Municipal Committee. Counsel for the respondents has referred me to the reports made by the Municipal Officers from time to time and also to the plans which relate to the lane in front of the house in question. I am not, however, prepared to differ at this stage from the findings arrived at by the trial Judges. Holding therefore that the building had been com-

pleted in accordance with the resolution of the committee, that the site under the building belonged to the plaintiff and that the action of the Deputy Commissioner suspending the resolution was illegal, I allow this appeal, set aside the order of the Courts below and grant the plaintiff a decree in terms of the relief prayed for. The respondents will pay the costs of the appellant in all the Courts.

D.S./R.K.

Appeal allowed.

A. I. R. 1940 Lahore 455

TEK CHAND AND SKEMP JJ.

Thakar Das — Plaintiff — Appellant.

v.

Tulsi Ram and others, Defendants, and another, Plaintiff — Respondents.

Letters Patent Appeal No. 64 of 1939, Decided on 1st July 1940, from order of Bhide J., in S. A. No. 60 of 1939, D/- 10th February 1939.

Civil P. C. (1908), Ss. 79 and 80 — Suit against Secretary of State — Notice on Collector served prior to coming into force of Government of India (Adaptation of Indian Laws) Order—Suit lodged after aforesaid Order came into force — Suit is saved by paras. 9 and 11 of Preamble to aforesaid Order.

Where for the purpose of instituting a suit against the Secretary of State a notice has been served on the Collector under S. 80 prior to the coming into force of the Government of India (Adaptation of Indian Laws) Order but the suit is lodged after the aforesaid order came into force, the suit is saved by virtue of paras. 9 and 11 of the Preamble to the Government of India (Adaptation of Indian Laws) Order for as a result of the notice to the Collector the plaintiff acquires a right to sue and the Secretary of State incurs a liability to be sued: *A I R 1939 Lah 279*; *1905 A C 369* and *A I R 1928 Lah 627 (F B)*, *Rel. on.*

[P 456 O 2]

Mehr Chand Sud — for Appellant.

Ghulam Rasul Khan for Advocate-General, and V. N. Sethi—for Respondents 31 to 34, and 18 to 21 respectively.

Skemp J.—This Letters Patent Appeal has arisen because the plaint was rejected, notice having been addressed to the Secretary of State in Council. The suit concerned a muafi in District Kangra. The plaintiffs sought a declaration that they were entitled to a certain sum, despite the reduction of the amount by a mutation dated 27th March 1930. The defendants were the Secretary of State in Council and a number of others. Before coming to Court the plaintiffs had obtained a certificate from the Collector under the Pensions Act, dated 30th July 1935. They served a notice on

2. *Mahomed Hussain v. Municipal Committee, Slalkot*, (1936) 23 A I R Lah 689 = 165 I C 856 = 38 P L R 897.

3. *Anant Ram v. Small Town Committee, Pundri*, (1937) 24 A I R Lah 84 = 171 I C 616.

the Collector of Kangra under S. 80, Civil P. C., that they proposed to institute a suit against the Secretary of State in Council; this notice was left at the office of the Collector on 27th October 1935. This suit was lodged on 31st August 1937. In the meantime Part 3 of the present Government of India Act had come into force on 1st April 1937, and with it the Government of India (Adaptation of Indian Laws) Order 1937. This re-enacts S. 79, Civil P. C.; the old S. 79 provided that suits by or against the Government should be instituted by or against the Secretary of State for India in Council. The present S. 79 as far as is relevant, provides that in suits against the Crown the authority to be named as defendant shall be

(b) in the case of a suit against a Provincial Government the Province, and (c) in the case of a suit against the Crown representative, the Secretary of State.

Section 80 alters the manner in which notices may be served. It lays down that notice shall be delivered to, or left at the office of, . . . (d) in the case of a suit against the Secretary of State, a Secretary to the Central Government, the Political Secretary and a Secretary to the Provincial Government of the Province where the suit is instituted.

In their suit the plaintiffs, as they were entitled, substituted the "Secretary of State" for "the Secretary of State for India in Council" as defendant 29. The Government Pleader objected that as the suit was lodged after the coming into force of Part 3, Government of India Act, notice ought to have been served under the new S. 80, Civil P. C. This contention was accepted by the Senior Sub-Judge who dismissed the suit. An appeal to the District Judge was dismissed, the learned District Judge, however, noting that the plaint should have been rejected under O. 7, R. 11, Civil P. C. A second appeal to this Court was dismissed in limine by a learned Judge, who, however, subsequently gave a certificate for Letters Patent Appeal. Mr. Mehr Chand Sud urges that the suit is saved by paras. 9 and 11 of the Preamble to the Government of India (Adaptation of Indian Laws) Order. Para. 9 lays down:

The provisions of this order which adapt or modify Indian laws so as to alter the manner in which, the authority by which, or the law under or in accordance with which, any powers are exercisable, shall not render invalid . . . anything duly done before the commencement of this order.

Paragraph 11 runs:

Nothing in this order shall affect the previous operation of or anything duly done, or suffered,

under any Indian law, or any right, privilege, obligation or liability already acquired, accrued or incurred under any such law. . . .

We are of opinion that these provisions are conclusive. The notice served on the Collector on 27th October 1935 was something duly done before the commencement of the Order of 1937; and as a result of the notice to the Collector the plaintiffs acquired a right to sue and the Secretary of State incurred a liability to be sued. The previous notice is correct and the suit is saved. This is clear enough from the wording of the Order but it is also supported by authority: see A I R 1939 Lah 279¹ where a Division Bench of this Court held that an order appointing a certain person to prosecute and defend all suits on behalf of the Kashmir State made in 1935, not having been revoked, was valid in view of para. 9, Government of India (Adaptation of Indian Laws) Order, 1937. In the arguments, reference was also made to the well known Privy Council case reported in 1905 A C 369² in which their Lordships held that a suitor in a pending action could not be deprived of a right to appeal to a superior tribunal by means of an Act passed pending the action. A case well known in this Province, 10 Lah 165³ followed the same principle and held that the Sikh Gurdwaras Act could not deprive parties of a right of appeal existing when the Act came into force. The present case is stronger than those, because it involves a right to sue and not a right of appeal.

In my opinion, the matter is settled conclusively by paras. 9 and 11 of the Preamble to the Government of India (Adaptation of Indian Laws) Order, 1937; but the two leading cases which have been cited illumine the same principle. This appeal must be accepted; stamp on appeal to be refunded; other costs to be costs in the cause. The parties have been told that they should appear in the Court of the Senior Subordinate Judge, Dharamsala, on 5th August 1940, for a date. The learned Senior Subordinate Judge is to proceed in accordance with law.

Tek Chand J.—I agree.

G.N./R.K.

Appeal accepted.

1. Maharaja of Jammu & Kashmir v. Sialkot Municipality, (1939) 26 A I R Lah 279=184 I C 488=42 P L R 228.
2. Colonial Sugar Refining Co. Ltd. v. Irving, (1905) A C 369=74 L J P C 77=92 L T 738=21 T L R 513.
3. Kirpa Singh v. Ajaipal Singh, (1928) 15 A I R Lah 627=113 I C 529=10 Lah 165 (F B).

* A. I. R. 1940 Lahore 457

YOUNG C. J. AND SKEMP J.

Nandia and others — Convicts
Appellants

v.

Emperor.

Criminal Appeal No. 629 of 1940, Decided on 8th July 1940, from order of Sess. Judge, Ferozepore, D/- 30th April 1940.

* (a) Criminal Trial—Evidence—Implication of innocent man in murder is, in absence of convincing evidence against other murderers, reason for acquitting them all.

Where the falsehood is merely an embroidery to a story, that would not be enough to discredit the whole of the witness's evidence. But if the falsehood is on a major point in the case, or if one of the essential circumstances of the story told is clearly unfounded, this is enough to discredit the witness altogether. Hence the implication of a man in a murder in which he could not possibly have taken part is, in the absence of convincing circumstantial evidence against the other murderers, a reason for acquitting them all.

[P 459 C 1, 2]

(b) Criminal Trial — Murder — Absence of reliable evidence — It cannot even be said that murder was probably committed by anyone (Per Young C. J.)

Where, there is no evidence upon which the Court can rely, it is not possible to come to a conclusion even that the murder was probably committed by anyone.

[P 459 C 2]

Dr. Tasadduque Hussain —

for Appellants.

R. C. Soni for Advocate-General —

for the Crown.

Skemp J.—Shiv Lal, Nandia and Hetia have been convicted under S. 302 read with S. 34, I. P. C. and sentenced, Nandia to death and the other two to transportation for life. They have appealed through Dr. Tasadduque Hussain while the Crown has been represented by Mr. R. C. Soni. The accused are grandfather, father and grandson—three generations—and their ages are given on the record and in the judgment of the learned Sessions Judge as Shiv Lal about 80, Nandia about 35 and Hetia about 15. The case for the prosecution is that owing to enmity with Mangal Singh son of Kaku Singh about turns for water the three accused assaulted Mangal Singh and killed him. The murder took place a little before sunset on 27th September 1939 and was reported at the police station, distant 12 miles, at 1 A. M. on 28th September 1939. The first information report contains the prosecution case in a nutshell and is fully corroborated by the evidence subsequently produced in Court. The reporter was Dial Singh son of Chattar Singh landlord of the

murdered man. It appears that Shiv Lal son of Poman, the oldest of the accused, had mortgaged land to Baghel Singh and Baghel Singh had transferred his mortgage rights to Chattar Singh about 15 years before. Out of the land belonging to Shiv Lal, now mortgaged to Chattar Singh, about five bighas were let to Mangal Singh deceased and another man.

About 15 days before the murder there was a quarrel between Mangal Singh and Nandia about turns of water. The evidence of Dial Singh is that his father's land was entitled to one and a half pahars and Nandia thought that the area did not justify so long a time. He said so and there was a quarrel between Nandia and Mangal Singh in the presence of Dial Singh, Jagga and Ismail who testify to this quarrel and to threats uttered by Nandia. Mangal Singh left the village that very day (possibly in consequence of the threats although it is not so said) and only returned on the day of the occurrence. Now begins the main case for the prosecution. Dial Singh and Mangal Singh started for their fields from the village, having to pass in front of the house of the accused. There they saw all the three accused sitting in their doorway, Nandia with a sela, Shiv Lal with a dang and Hetia with a takwa. Seeing them they at once got up and attacked Mangal Singh. Mangal Singh ran into the nauhra of Ganeshi Lal, which is tenanted by Hukman (P. W. 4). The three accused pursued him and Shiv Lal and Hetia struck him with their weapons. After he had entered Hukman's kotha, Nandia gave him two thrusts with his sela, killing him. Nandia then dragged Mangal Singh's body into the deorhi. The witnesses to this are Dial Singh and to the murderous assault in the kotha in the nauhra Hukman, Sajjan Singh and Bogha Singh. As previously stated the story is corroborated by the first information report.

The medical evidence is that deceased had injuries under 13 heads. There were three wounds which appear to have been caused by a spear, one of which pierced the heart and was fatal. There was also a small wound scalp deep on the forehead and an incised wound on one of the fingers of the right hand, the finger being broken. The other injuries were a contusion on the left elbow, small contusions on both knees and five large abrasions on various parts of the body. These contusions and abrasions undoubtedly indicate that the body had been

dragged. Two of the accused, Nandia and his son Hetia, had slight injuries. Nandia had a scabbed bruise $\frac{1}{4}$ " \times $\frac{1}{8}$ " on the left forearm and a healed up bruise $\frac{1}{8}$ " \times $\frac{1}{8}$ " on the bridge of the nose. Hetia alias Het Ram had three bruises, one $\frac{1}{4}$ " \times $\frac{1}{4}$ " on the left hand, the second a scabbed bruise $\frac{1}{4}$ " \times $\frac{1}{16}$ " on the left hand and the third a scabbed bruise $\frac{1}{4}$ " \times $\frac{1}{8}$ " on the right hand. They were medically examined at midday on 30th September 1939 and the doctor said the duration was about 4 days. Nandia's injuries could be 3 or also 5 days' duration; Hetia's 4 days' but more than 3 days. The prosecution theory is that these injuries were caused in the fight. By an omission, the two accused were not asked to explain these injuries.

Hukman swears that Mangal Singh picked up a phaura which was lying in the nauhra and used it to defend himself striking Nandia but the handle broke. Sajjan Singh states that he saw the broken phaura lying on the spot immediately after the murder. The police took possession of it on 28th September 1939, and it has been produced in Court. The police also took possession of two kacha bricks from the door sill of Hukman's house, which were found on chemical examination to be bloodstained. One of the bricks was stained with human blood and the stains on the other brick were disintegrated when serologically examined. But none of the weapons said to have been used by the accused have been recovered. The accused gave no evidence in defence. One of the assessors gave his opinion that the accused were guilty, another that the case was proved only against Nandia but not against the other two accused, the third that the whole case seemed fabricated, and the fourth that the evidence was not satisfactory and that the case was not proved. The learned Sessions Judge believed the evidence of the prosecution and convicted and sentenced the accused as stated above. At the instance of the learned counsel for the defence, Shiv Lal the grandfather and Hetia the grandson were produced before us. Shiv Lal is a feeble bent old man and Hetia a boy of 16 and we had them medically examined by Col. Khan, I. M. S. Superintendent of the Jail. Col. Khan stated about Shiv Lal :

He is 70 years of age. All his muscles are flabby and he has got a bent attitude because of old age and loss of tone of muscles. The spine is ankylosed.

He continued that Shiv Lal could not possibly maintain an upright position but

that his bent condition was permanent, and he stated that in his opinion it was impossible for Shiv Lal to pursue the deceased, who was running, for a distance of about 80 yards from the door of his house to Hukman's nauhra and take part in the assault. In Col. Khan's opinion Hetia was about 16 years of age, that is 15 at the time of the murder. Shiv Lal is also developing cataract and his vision is handicapped by about 75 per cent. but this might have taken place since the murder. His condition otherwise is as it was at the time of the murder. Now this bent old man and young boy appeared for two days before the learned Sessions Judge. He has mentioned their ages in his judgment and yet his judgment is entirely silent as to the possibility of Shiv Lal's taking part in the murder, although to us it seems the most striking feature in the case. From the medical opinion of Col. Khan supported by the evidence of my own eyes, I do not believe that Shiv Lal could possibly have taken part in the murder as described by the prosecution witnesses. What is the effect of this on the case? There is another detail in the prosecution evidence of some importance which is difficult to accept. It is stated that after a quarrel 15 days previously Mangal Singh left the village and only returned on the day of the occurrence and that he was attacked when he and Dial Singh were going to his land. How did all the three accused know that he was going to pass their door and why they were sitting ready?

I think that the murder was probably committed by Nandia assisted by his son : his father either had no part or was a spectator. There are numerous grounds for this conclusion. The prosecution story has been told consistently from the beginning ; it is supported by the first information report which was made without loss of time and by some corroborative evidence. The Sessions Judge did not believe the eyewitness Bogha who was only produced before the police on the third day, but there are still Dial Singh, Hukman and Jagga. There is some circumstantial evidence in support of the oral evidence, namely the broken phaura, the bloodstained bricks, the marks of dragging on Mangal Singh's body and the fact that both Nandia and Hetia had slight injuries. These injuries however are very slight and are correspondingly slight as circumstantial evidence. The motive was quite adequate in the Punjab, where water is the life-blood of the soil.

especially as it was sharpened by the fact that the land now cultivated by the stranger Mangal Singh, was formerly that of Nandia's father and was mortgaged by him. On the facts I think it is impossible to maintain the conviction of Shiv Lal and the boy should also receive the benefit of the doubt. The question is whether we can maintain the conviction of Nandia. In the course of a discussion of the common admixture of false and true evidence in India, in the introduction to his law of evidence, Mr. Field says (para. 53 of Edn. 8):

In connexion with the same subject, but more especially with reference to the testimony of individual witnesses, Mr. Norton well observes thus: 'There is a maxim — *falsus in uno, falsus in omnibus* — false in one particular, false in all. I need hardly say that this is everywhere a somewhat dangerous maxim, but especially in India; for, if a whole body of testimony were to be rejected, because the witness was evidently speaking untruth in one or more particulars, it is to be feared that witnesses might be dispensed with; for, in the great majority of cases, the evidence of a native witness will be found tainted with falsehood. There is almost always a fringe or embroidery to a story, however true in the main. The falsehood should be considered in weighing the evidence; and it may be so glaring as utterly to destroy confidence in the witness altogether. But when there is reason to believe that the main part of the deposition is true, it should not be arbitrarily rejected because of a want of veracity on perhaps some very minor point.' The case will, however, be different if one of the essential circumstances in the story be clearly unfounded. This, to use a felicitous expression of Mr. Hallam's 'is to pull a stone out of an arch: the whole fabric must fall to the ground.'

Applying this rule to the present evidence the implication of a man in a murder in which he could not possibly have taken part is, in the absence of convincing circumstantial evidence against the other murderers, a reason for acquitting them all. These appeals must be accepted and the appellants acquitted and set at liberty.

Young C. J.—I agree with the conclusions to which my learned brother has come. I see no reason to disagree with the extract which he quotes from the Law of Evidence by Mr. Field. I have often expressed myself on the question of what is to be done when a witness has deliberately perjured himself to the extent of falsely implicating an innocent person in a murder case. It is not really a question of *falsus in uno, falsus in omnibus*; it is a question whether the Court can under the circumstances believe the witness who so perjures himself on such a vital matter. The extract from Mr. Field's work is in agreement with what I have said. I agree that where the falsehood is merely an embroidery to a

story, that would not be enough to discredit the whole of the witness's evidence. But Mr. Field says, and I entirely agree with him, that if the falsehood is on a major point in the case, or if one of the essential circumstances of the story told is clearly unfounded, this is enough to discredit the witness altogether. I cannot go as far as my learned brother in saying that the murder was probably committed by Nandia assisted by his son. Where, as in this case, there is no evidence upon which the Court can rely, I would say that it is not possible to come to a conclusion even that the murder was probably committed by anyone.

D.S./R.K.

Appeals allowed

*** A. I. R. 1940 Lahore 459**

SALE J.

Chanan Singh — Convict — Petitioner
v.

Emperor.

Criminal Revn. No. 1817 of 1939, Decided on 19th April 1940, from order of Sess. Judge, Hoshiarpur, D/- 9th November 1939.

*** Criminal P. C. (1898), S. 144 (6) — Order under S. 144 already expired — Local Government has no power to resuscitate it by extension.**

Section 144 does not permit the Local Government to resuscitate an order under Section 144 by extending it when it has already expired and is no longer in force. [P 460 C 1]

V. N. Sethi — *for Petitioner.*

S. C. Manchanda for Advocate-General
— *for the Crown.*

Order. — This is a petition preferred by Chanan Singh against an order of the learned Sessions Judge of Hoshiarpur maintaining on appeal his conviction under S. 117, I. P. C., read with S. 188, I. P. C., but reducing the sentence to six months' rigorous imprisonment. The material facts are that Chanan Singh delivered a speech on 13th July 1939 at village Hariana in the Hoshiarpur district in which he is alleged to have called upon his audience, consisting of about 100 or 150 persons, to defy an order passed under S. 144, Criminal P. C., at Lahore, forbidding persons to collect for the purpose of marching towards the Punjab Legislative Assembly Hall, Lahore, and to demonstrate for this purpose a certain area specified within the local limits of Lahore. The order in question was first promulgated by the District Magistrate of Lahore under S. 144, Criminal P. C., on 26th April 1939 and it was specified in this order that it shall remain in force from 26th

April to 1st May 1939. On 22nd May 1939 a notification issued under the signature of the Chief Secretary to Government, Punjab, No. 3324-P.B, purporting to extend the order of the District Magistrate for a period of six months from midnight on 22nd/23rd May 1939. Thus the speech, which the petitioner is alleged to have made on 13th July 1939 related to the order as extended by the Local Government.

The first point urged in this petition is that on the material day, that is, 13th July 1939 there was no valid order in force, the disobedience of which the petitioner could be said to have abetted. In my view, this objection is well-founded. Sub-section (6), of S. 144, Criminal P. C., provides that no order passed by the District Magistrate under S. 144 shall remain in force for more than two months from the making thereof unless in certain cases therein specified the Local Government by notification in the official Gazette otherwise directs. In other words, the Local Government has power under sub-s. (6) of S. 144 to extend an order already in force. In this case, however, the evidence led shows that the Local Government in issuing the notification of 22nd May which purported to extend an order already in force did not in fact extend any order in force, but resuscitated an order which had expired three weeks previously. In my view, S. 144, Criminal P. C., does not permit the Local Government to resuscitate in this way an order which is no longer in force. It was open to the Local Government to extend the order of the District Magistrate before it expired on 1st May or it was open to the District Magistrate to promulgate another order under S. 144 on 22nd May. But once the order of the District Magistrate had expired on 1st May, I am of opinion that the notification by the Local Government purporting to extend as from 22nd May, an order which was no longer in force, is invalid.

It cannot be said therefore that in abetting the defiance of this order on 13th July the petitioner has committed any offence. For this reason alone, this petition must succeed. In the circumstances it is unnecessary to consider the second point urged in this petition, *viz.*, that the conviction of abetment under S. 117 is bad in law because S. 188, I. P. C., does not render punishable the mere disobedience of an order under S. 144, Cr. P. C., but only a disobedience from which certain consequ-

ences, specified in S. 188 are proved to flow. I accept the petition, set aside the conviction and sentence and acquit the petitioner. The petitioner is already on bail and his bail bond will be cancelled.

G.N./R.K.

Petition accepted.

* * A. I. R. 1940 Lahore 460

DIN MUHAMMAD AND RAM LALL JJ.

Narain Singh and another
Petitioners

v.

Panna Lal — Respondent.

Criminal Revns. Nos. 456 and 914 of 1939, Decided on 11th June 1940, case reported by Sess. Judge, Gurdaspur, D/- 15th March 1939.

* * Criminal P. C. (1898), S. 522 — S. 522 contemplates force to human being only — Dispossession of complainant's house in his absence — Order under S. 522 cannot be made; 40 P L R 923 = A I R 1938 Lah 839 = 180 I C 501, Overruled.

The only force that is contemplated by S. 522 is force as applied to a human body — the use of force as mentioned in Ss. 349 and 350, I. P. C. Hence, where the complainant was dispossessed of his house in his absence, no criminal force can be said to have been used to any person. No order can therefore be made under S. 522 : 40 P L R 923 = A I R 1938 Lah 839 = 180 I C 501, Overruled; A I R 1939 Lah 184, Approved; Case law referred. [P 461 C 2; P 462 C 1]

M. Sleem, Advocate-General —

*for the Crown.*Shambu Lal Puri — *for Petitioners.*Hemraj Mahajan — *for Respondent.*

ORDER OF REFERENCE

Abdul Rashid J. — Din Muhammad J. has held in 41 P L R 63¹ that S. 522, Criminal P. C., comes into play only when the offence is attended by criminal force or show of force or by criminal intimidation and when any person is dispossessed of any immovable property by such force or show of force or criminal intimidation and not otherwise. In a case where the complainant himself alleges that the house was locked when the unlawful entry was effected it cannot be said that the offence of criminal trespass was attended by criminal force or show of force or criminal intimidation and to such a case S. 522, Criminal P. C., does not apply. On the other hand Skemp J. has held in A I R 1938 Lah 839² that where the accused breaks the lock of a

1. ('39) 26 AIR 1939 Lah 184 = 183 IC 340 = ILR (1939) Lah 513 = 40 CrLJ 781 = 41 P L R 63, Ram Chand v. Emperor.

2. ('38) 25 A I R 1938 Lah 839 = 180 IC 501 = 40 CrLJ 380 = 40 PLR 923, Roda v. Autar Singh.

house in the absence of the person in possession and takes possession of the house he uses criminal force to the lock which he breaks, criminal because it involves the crime of mischief, and therefore an order under S. 522 is competent. Ss. 349 and 350, I. P. C., do not define "force" and "criminal force" as such but define it only as force or criminal force used to any person. In view of the conflict of authority referred to above, it is desirable that the point involved in this reference should be authoritatively decided by a Division Bench. Subject to the orders of the learned Chief Justice I therefore refer this case to a Division Bench for decision.

OPINION

Din Muhammad and Ram Lall JJ. — This order will cover two cases referred to the Division Bench. In one case (Criminal Revision No. 456 of 1939) the relevant facts were that the complainant was dispossessed of his house in his absence and therefore no criminal force could have been used to any person. In the other (Criminal Revision No. 914 of 1939) the accused person took possession of a vacant site belonging to the complainant in his absence and started building operations on it. In both cases it was contended by the accused persons that as the dispossession was not accomplished by the use of criminal force, an order for restoration of possession could not be made under S. 522, Criminal P. C. S. 522 (1), Criminal P. C., is in the following terms :

Whenever a person is convicted of an offence attended by criminal force or show of force or by criminal intimidation and it appears to the Court that by such force or show of force or criminal intimidation any person has been dispossessed of any immovable property, the Court may, if it thinks fit, when convicting such person or at any time within one month from the date of the conviction order the person dispossessed to be restored to the possession of the same.

The learned Advocate-General contends that the term "criminal force" has not been defined either in the Penal Code or in the Criminal Procedure Code. The only Sections in the Penal Code which attempt to give any definition on the subject are Ss. 349 and 350 and the only thing that these Sections state are the circumstances in which criminal force is said to be used to a person, and therefore the use of criminal force to an inanimate object has not been excluded. In other words the argument appears to be that whenever force of any kind is used, and this results in the commission of an offence, criminal force has been used within the meaning of the law. In this view of

the matter, the word "force" would be used as synonymous with physical exertion, and the learned Advocate-General went so far as to urge that if a person lifted the latch of, or pushed open an unbolted door of the house of another and so committed trespass, he was committing an offence attended by criminal force. If physical exertion be equivalent to the use of criminal force in such circumstances, the act of walking on to the land of another and so committing trespass thereon would amount to the use of criminal force. The only decision that supports this somewhat ingenious argument is AIR 1938 Lah 839² where Skemp J. held that the breaking open of a lock amounted to the use of criminal force within the meaning of the Section, for, it could not be said that the act of demolishing the wall of another did not amount to use of criminal force to that wall.

This decision was adversely criticized in I L R (1939) Lah 513¹ and we are of the opinion that it does not lay down correct law. We consider that the only force that is contemplated by the Section is force as applied to a human body, the use of force as mentioned in Ss. 349 and 350, Penal Code. This has been the consistent view of all the High Courts in India and reference in this connexion may be made inter alia to the following decisions: 16 P R 1919 Cr,³ AIR 1927 Lah 830,⁴ 15 Lah 786,⁵ 26 Mad 49,⁶ 27 Cal 174,⁷ 15 Cr L J 175,⁸ 15 Cr L J 720,⁹ 25 All 341¹⁰ and 23 Bom 494.¹¹ We would be very unwilling to depart from this long and consistent course of decision except for some very cogent reasons, but no such reason has been urged before us. Our view is strengthened by the fact that this provision has existed in almost similar if not

3. ('19) 6 A I R 1919 Lah 248 = 51 I C 472 = 16 P R 1919 Cr = 20 Cr L J 488, Hari Chand v. Emperor.
4. ('27) 14 A I R 1927 Lah 830 = 105 I C 676 = 23 Cr L J 964 = 26 P L R 500, Mangi Ram v. Emperor.
5. ('34) 21 A I R 1934 Lah 454 = 152 I C 162 = 36 Cr L J 59 = 15 Lah 786 = 36 P L R 91, Bihari Lal v. Emperor.
6. ('03) 26 Mad 49 = 12 M L J 447 = 2 Weir 675, In re Kottlavadu.
7. (1900) 27 Cal 174 = 4 C W N 307, Ishan Chandra v. Dina Nath.
8. ('14) 1 AIR 1914 Cal 629 = 22 I C 751 = 15 Cr L J 175 = 18 C W N 1146, Biseswar Singh v. Bhola Nath.
9. ('15) 2 A I R 1915 Cal 131 = 26 I C 168 = 15 Cr L J 720 = 18 C W N 1150, Sadasib Mandal v. Emperor.
10. ('03) 25 All 341 = 1903 A W N 59, Churaman v. Ramlal.
11. ('99) 23 Bom 494, Narayan Govind v. Visaji.

identical terms since the Code of 1872 and it has been consistently interpreted to mean that force must be used to a person before the Section comes into play. This Section was amended in 1923 when the words "or show of force or by criminal intimidation" were added after the words "criminal force." If the Legislature had felt any doubt about the interpretation that the Section had received in Courts of law, it would have been very easy to add the words "to a person or other substance" after the words "criminal force" in sub-s. (1). On the other hand, the two phrases added necessarily refer to criminal force as applied to sentient beings for it is impossible to conceive that an inanimate object can be intimidated or be affected by the show of criminal force. We consider therefore that the law has been correctly laid down in I L R (1939) Lah 513¹ and that the decision in A I R 1938 Lah 839² is incorrect. We accordingly hold that the use of criminal force to a human being is necessary before S. 522 comes into operation. Both petitions will be returned to the learned single Judge who made this reference for final disposal.

D.S./R.K. *Reference answered.*

*** A. I. R. 1940 Lahore 462**

TEK CHAND AND DALIP SINGH JJ.

Pohlo Mal — Petitioner.

v.

Firm Basant Ram-Mehr Chand and others — Respondents.

Civil Revn. No. 647 of 1939, Decided on 19th April 1940; case referred by Tek Chand J., D/- 26th March 1940.

*** (a) Provincial Insolvency Act (1920), Ss. 9 and 79, rules under S. 79 framed by Lahore High Court, R. 3 — Joint Hindu trading firm as such cannot be adjudicated insolvent.**

Rule 3 merely prescribes the procedure which is to be followed in proceedings under the Provincial Insolvency Act. It does not lay down any rule of substantive law. The question whether a joint Hindu family, or the business carried on by it, can or cannot be adjudicated insolvent is not a question of mere procedure but is one of substantive law. It is therefore not covered by R. 3 and that rule cannot have the effect of impliedly providing for the adjudication of a joint Hindu family, as such or of its trading business as insolvent. The law in the Punjab on this matter is not different from that in other provinces and a joint Hindu family trading firm, as such, cannot be adjudicated insolvent. In such case, therefore, the petition should be made individually against the persons who are alleged to be proprietors of the firm.

[P 465 C 2]

(b) Provincial Insolvency Act (1920), Ss. 9 and 79, Rules under S. 79 framed by Lahore

High Court, R. 3—Petition for adjudication as insolvent joint Hindu family firm — Names of proprietors given in heading and body of petition — Petition held should be allowed to be amended by correcting heading and prayer.

A petition was filed under S. 9, Provincial Insolvency Act, for adjudication as insolvent a joint Hindu family firm. In the heading and the body of the petition however, the names of the proprietors constituting the firm were given :

Held that the petition should not be dismissed for this defect but should be allowed to be amended by correcting the heading and the prayer. It was merely a case of correcting the misdescription of the persons sought to be adjudicated insolvents by transposing the name of the firm, of which they were alleged to be proprietors, from the beginning of the heading to the end and, similarly altering the prayer so as to ask for their adjudication individually, and not of the firm through them.

[P 465 C 2; P 466 C 1]

Achhru Ram and Chandra Gupta for
Achhru Ram — *for Petitioner.*

Tek Chand — *for Respondents.*

ORDER OF REFERENCE

Tek Chand J. — The petitioner Pohlo Ram presented a petition under S. 9, Provincial Insolvency Act, in the Court of the Insolvency Judge, Hoshiarpur, for adjudication of the "opposite party" as insolvent. The "opposite party" was described as firm Basant Ram-Mehr Chand through Basant Ram, proprietor and karkun of the said firm, Mehr Chand, Jagdish Ram and Amolak Ram, sons of Basant Ram, other proprietors and share-holders of the said firm.

It was stated in the petition that the respondent firm Basant Ram-Mehr Chand was a joint Hindu family firm owned by Basant Ram and his three sons, Mehr Chand, Jagdish Ram and Amolak Ram, and that Basant Ram was the karta. The respondents pleaded, inter alia, that no petition lay to adjudicate a joint Hindu family firm as insolvent as it is not a "firm" within the meaning of the Partnership Act. The Insolvency Judge framed a preliminary issue as to whether the petition could be maintained against the joint Hindu family firm. After hearing the parties he overruled the objection. He held that in view of the "Explanation" added by the Lahore High Court to R. 1 of O. 30, Civil P. C., which is made applicable to insolvency proceedings by S. 5, Provincial Insolvency Act, an insolvency petition can be presented by, or against, a joint Hindu family firm and that the word "firm" in para. 3 of (revised) Chap. 4-A of Vol. II of the Rules and Orders of the High Court (issued under Notification No. 242 R/XV-A-17, dated 25th August 1938) includes a joint Hindu family trading partnership. He observed

however that the adjudication of a joint Hindu family firm would be tantamount to the adjudication of only such coparceners as are personally liable for the debts or who have rendered themselves personally liable by taking an active part in the business of the firm. From this decision firm Basant Ram Mehr Chand through Basant Ram and Mehr Chand appealed to the District Judge. The other two sons of Basant Ram, namely Jagdish Ram and Amolak Ram, did not join in preferring the appeal. The learned Judge held that the "Explanation" to R. 1 of O. 30, was inapplicable, as it related to a "joint Hindu family trading partnership" and not a "joint Hindu family firm." In support of his conclusion, he relied upon a Single Bench decision of this Court in A I R 1938 Lah 563.¹ He accordingly, accepted the appeal, set aside the order of the Insolvency Judge and, holding that the petition for insolvency had not been presented in proper form, dismissed it leaving the creditor to seek such other remedy as might be open to him under the law. The petitioning creditor has come in revision and it is contended on his behalf that the learned District Judge was in error in holding that a petition could not be made for adjudication of a 'joint Hindu family' as insolvent. In the alternative, it is urged that even if the learned District Judge's view of the law is correct, he should not have dismissed the petition straight off, but he should have ordered it to proceed against Basant Ram and his sons personally, as they all had been named as respondents in the petition. Either the description of the joint Hindu family firm in the title of the petition should have been treated as a surplusage, or the petitioner should have been allowed to amend the petition by deletion of the name of the firm. The learned District Judge has misunderstood the single Bench decision in A I R 1938 Lah 563¹ and has misapplied it to this case. It may be stated however, that owing to some typing mistakes and omissions, certain sentences in the judgment of that case, as printed, convey quite a different meaning from what they were intended to do. The correct significance of that decision has been explained in F.A. No. 25 of 1939² decided by a Division Bench on 24th January 1940, and it is not necessary to repeat here what has been said in detail

in the judgment in that case. It will be sufficient to say that the point decided in A I R 1938 Lah 563¹ does not arise in this case at all.

The learned District Judge, in interpreting the 'Explanation' to R. 1 of O. 30, Civil P. C., added by the Punjab Chief Court under its rule-making power, which made R. 1 applicable to a 'joint Hindu family trading partnership,' has assumed that a 'joint Hindu family partnership' referred to in the 'Explanation' is something different from a 'joint Hindu family firm.' He thinks that the word 'partnership' in the 'Explanation' has the same meaning as has been given to it in the Partnership Act of 1930, and he has referred to S. 5 of that Act, where it is made clear that the members of a Hindu undivided family carrying on a family business as such are not partners in the business of a partnership, as defined in S. 4 of the Act. The Partnership Act was enacted in 1932 when Ss. 4 and 5 of the Act replaced S. 239, Contract Act which was in force when the 'Explanation' to R. 1 of O. 30, Civil P. C., was added by the Punjab Chief Court in 1909. The definition of 'partnership' as given in S. 239 was slightly different from that in S. 4, Partnership Act. But it is clear that in S. 239, Contract Act (as in S. 4, Partnership Act) there is no difference between a 'partnership' and a 'firm.' The former is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all; the latter is the name given to such persons collectively. It is hardly necessary to say that a joint Hindu family trading business is not a 'partnership' or a 'firm' in the technical sense in which these words are used in the Contract Act or the Partnership Act. It is therefore, as much a misnomer to call a joint Hindu family trading business a 'partnership,' as it is to call it a 'firm,' as defined in these Acts. The word 'partnership' or 'firm,' as used in connexion with a joint Hindu family trading business, must be taken to have its ordinary or non-technical meaning.

Under the 'Explanation' to R. 1 of O. 30 'a joint Hindu family firm' may sue or be sued in the name of the firm. In view of this 'Explanation,' the contrary view taken by the Calcutta High Court in 38 C W N 914³ (which was followed in 39 C W N 275⁴)

1. ('38) 25 A I R 1938 Lah 563=177 I C 918=40 P L R 456, Debi Sahai v. Gillu Mal.

2. Reported in ('40) 27 A I R 1940 Lah 256=42 P L R 278, Atmaram v. Mian Umar Ali.

3. ('34) 21 A I R 1934 Cal 810=152 I C 991=61 Cal 975=88 C W N 914, Lal Chand Amon Mal v. M. C. Boid & Co.

4. ('35) 39 C W N 275, In re Gobindlal Mohata.

that an undivided Hindu family carrying on business is not entitled to sue as a 'firm' under O. 30, Civil P. C., does not hold good in this Province. There is no provision in the Provincial Insolvency Act (5 of 1920) which expressly lays down that a "firm" may be adjudicated insolvent, as is to be found in the Presidency Towns Insolvency Act (Ss. 11 (d) and 99 of Act 3 of 1909.) Clause (c) of sub-s. (2) of S. 79, Provincial Insolvency Act, however, indicates that the Legislature contemplated adjudication of a "debtor firm" as insolvent under that Act, and it authorized the High Court to frame rules providing (inter alia) for the procedure to be followed in such cases. The (revised) rules framed by the Lahore High Court under S. 79 were published in Notification No. 242, R. 15-A-17, dated 25th August 1938. R. 2 of these rules provides that a

petition for insolvency under the Provincial Insolvency Act may be filed by or against any individual or firm, but not against any association, corporation or company registered under any enactment for the time being in force.

Under the rules framed under S. 79, petitions for adjudication of (contractual) partnerships or firms have frequently been made in this Province; and it has been held that as a "firm" is not a legal entity, nor is it a person, but a firm-name is merely a shorthand form for collectively designating all the partners in a firm, an order of adjudication passed against the firm operates as an order against individual partners who constitute the firm. *See* A I R 1927 Lah 234=100 I C 112.⁵ *See also* A I R 1926 Sind 31=89 I C 493,⁶ 97 I C 446⁷ and 119 I C 735.⁸ In 162 I C 184⁹ a petition under S. 99, Presidency Towns Insolvency Act for adjudication of a joint Hindu family ancestral trading firm as insolvent was made on the Original Side of the Rangoon High Court and an adjudication order was passed against the "firm, other than minor partners, if any." On appeal under the Letters Patent this order was set aside. It was held that the joint Hindu family firm, as such,

could not be adjudicated insolvent but, besides the karta, only those adult members of the family could be adjudged who had rendered themselves personally liable by taking active part in business or otherwise. No adjudication order could be passed against the other members who were not liable personally for the debts, but whose liability was limited to the extent of their share in the joint family property.

In this connexion reference may also be made to 42 Cal 225,¹⁰ where a petition had been made to adjudicate all the partners of the debtor firm, which was a joint Hindu family ancestral business, insolvents. There were five brothers who, on the death of the father, had succeeded to the ancestral business. One of them was a minor and the business was discontinued before he attained majority. It was held that though he had inherited the ancestral business and it was being carried on on his behalf when the debt due to the petitioning creditor was raised, he could not be adjudicated insolvent as under the law he was not personally liable for the debts incurred in such trade, his share therein being alone liable. *See also* 118 I C 494;¹¹ A I R 1936 Mad 64¹² and 49 Mad 217.¹³ It appears that in all these cases the petition was not for the adjudication of the joint Hindu family firm as such, but it was made against individual members thereof. This seems to be the prevailing view in other provinces. It is, however, contended on behalf of the petitioner that the position in the Punjab is different. It is urged, as pointed out by the learned Insolvency Judge, that the combined effect of R. 3 (Chap. IV A, Rules and Orders Vol. II) and the "Explanation" to R. 1, O. 30, Civil P. C., read with S. 5, Provincial Insolvency Act, is that a petition for insolvency may be filed by, or against, a "joint Hindu family trading firm," like any other firm. So far as I have been able to find, there is no ruling directly bearing on the point, though in 15 Lah 9¹⁴ at p. 11 reference was made to a joint Hindu ancestral family

5. ('27) 14 A I R 1927 Lah 234=100 I C 112, *Honde Ram v. Chiman Lal*.

6. ('26) 13 A I R 1926 Sind 31=89 I C 493=20 S L R 209, *Official Receiver v. Narain Das Lotaram*.

7. ('27) 14 A I R 1927 Sind 18=97 I C 446=21 S L R 280, *In re Shaw Wallace & Co.*

8. ('29) 16 A I R 1929 Lah 447=119 I C 735, *Mohamad Umar v. Official Receiver Rawalpindi*.

9. ('36) 23 A I R 1936 Rang 160=162 I C 184=14 Rang 122, *Chidambaram Chettyar v. Mutaya Chettyar*.

10. ('15) 2 A I R 1915 Cal 482=26 I C 836=42 Cal 225, *Sanyasi Charan Mandal v. Asutosh Ghosh*.

11. ('29) 16 A I R 1929 Mad 573=118 I C 494, *Somasundaram Chettiar v. Raja Kannoo Chettiar*.

12. ('36) 23 A I R 1936 Mad 64=160 I C 478, *Krishna Ayyar v. Messrs. Pierce Leslie & Co.*

13. ('26) 13 A I R 1926 Mad 133=92 I C 603=49 Mad 217=49 M L J 697, *Muthu Veerappa Chettiar v. Sivagurunatha Pillai*.

14. ('33) 20 A I R 1933 Lah 901=149 I C 693=15 Lah 9=36 P L R 450, *Champa v. Official Receiver Karachi*.

trading firm having been adjudicated insolvent in Karachi. The question whether a petition for the adjudication of a joint Hindu family trading firm, as such, can be made in the Province, or whether the petition should be made individually, by, or against, such members of the firm, as are personally liable for the debt, is of importance and not free from difficulty, and, I think, it should be decided by a larger Bench. I therefore refer the case to a Division Bench. A very early date shall be fixed. The question whether, in the circumstances of this case, amendment of the petition should have been allowed shall also be decided by the Division Bench.

Tek Chand J. — The facts of this case are set out in detail in the referring order, which shall be read as part of this judgment. The first question for determination is whether a petition for the adjudication of a joint Hindu family trading firm, as such, can be made in this province. As has been pointed out in the referring order there is no specific provision dealing with this matter in the Provincial Insolvency Act or any of the rules framed thereunder. The learned Insolvency Judge took the view that a joint Hindu family trading firm, as such, could be adjudicated insolvent, because of the 'Explanation' added to R. 1 of O. 30, Civil P. C., which applies to insolvency proceedings by virtue of Rr. 2 and 3 of the rules framed by this Court under S. 79, Provincial Insolvency Act, as published in Notification No. 242 R/XV-A-17, dated 25th August 1938. R. 2 provides that a petition for insolvency under the Provincial Insolvency Act may be filed by, or against, any individual or "firm," but not by or against any association, corporation or company registered under any enactment for the time being in force. It is conceded, that "firm" referred to in this rule means a contractual partnership and not a joint Hindu family trading firm, and therefore this rule standing by itself, is of no assistance. R. 3 merely reproduces S. 5, Provincial Insolvency Act, and is in the following terms:

Subject to the special provisions of the Provincial Insolvency Act, 1920, the Insolvency Courts shall follow the same procedure as they do in the exercise of original civil jurisdiction.

It is urged that this rule makes R. 1 of O. 30, Civil P. C., applicable to Insolvency petitions and as the "Explanation" added to that Rule by the Punjab Chief Court lays down that a suit may be instituted by, or against, a joint Hindu family trading part-

nership, it follows that a petition for insolvency may, equally, be filed by, or against, a joint Hindu family trading partnership. In our opinion, this contention is unsound and must be rejected. It will be seen that R. 3 merely prescribes the procedure which is to be followed in proceedings under the Provincial Insolvency Act. It does not lay down any rule of substantive law. Mr. Achhru Ram concedes that the question whether a joint Hindu family, or the business carried on by it, can or cannot be adjudicated insolvent is not a question of mere procedure but is one of substantive law. It is therefore not covered by R. 3, and that Rule cannot have the effect of impliedly providing for the adjudication of a joint Hindu family, as such, or of its trading business as insolvent. A joint Hindu family, as such, consists not only of the coparceners, who acquire by birth an interest in the family property, but also the females, i. e. the wives and the unmarried daughters. Again, all coparceners, though they have an interest in the family business, which is a distinct heritable asset, are not necessarily liable personally for its debts. R. 3, which merely provides the procedure to be followed in hearing petitions in insolvency cannot possibly have the effect of impliedly introducing provisions of such vital importance in the substantive law which affect the rights and status of members of Hindu families. We are therefore unable to accept the reasoning of the learned Insolvency Judge as correct, and hold that the law in the Punjab on this matter is not different from that in other provinces and that a joint Hindu family trading firm, as such, cannot be adjudicated insolvent. In this case therefore the petition should have been made individually against the four persons who were alleged to be proprietors of the firm.

The next question for consideration is whether the petition should have been dismissed for this defect, or whether it should have been allowed to be amended by correcting the heading and the prayer. As stated already, the names of the four persons had been given in the heading and the body of the petition and the proposed amendment would not have altered in any way, the character of the petition or introduced a fresh and a new cause of action. It was merely a case of correcting the misdescription of the persons sought to be adjudicated insolvents by transposing the name of the firm, of which they are alleged

to be proprietors, from the beginning of the heading to the end and, similarly, altering the prayer so as to ask for their adjudication individually, and not of the firm through them. The amendment was purely formal and should have been allowed. The learned District Judge's order to the contrary cannot be maintained. We accept the petition for revision, set aside the order of the learned District Judge and remand the case to the Insolvency Judge with the direction that the heading and the prayer in the petition be allowed to be amended and the petition heard on the merits. In the circumstances, we leave the parties to bear their own costs incurred so far. Counsel have been directed to cause their respective clients to appear before the Insolvency Judge, Hoshiarpur, on 20th May 1940, when a date for further proceedings will be given.

D.S./R.K.

Case remanded.

* A. I. R. 1940 Lahore 466

YOUNG C. J. AND SALE J.

Khair Mohammad Pir Wali Mohammad and others — Convicts — Appellants

v.

Emperor.

Criminal Appeal No. 430 of 1940, Decided on 28th May 1940, from order of Sessions Judge, Montgomery at Lahore, D/- 20th March 1940.

* Criminal Trial — Practice — Cross cases — Cross cases heard by one set of assessors and decided by same judgment — Evidence in one case imported into another case — Procedure is irregular.

The procedure by which two cross cases, tried separately, are heard by the same set of assessors and decided by the same judgment is not illegal; but the danger is that by adopting this method the Courts are liable to mix up the evidence in the two records. If they do so, the procedure is irregular and it is difficult to hold that the irregularity is one that can be condoned by reason of absence of prejudice to the accused. It is almost inevitable that in such cases there must be prejudice to the accused: *A I R 1933 Mad 367 (F B)* and *A I R 1928 Lah 380, Rel. on.* [P 467 C 1]

Ghulam Mohy. ud. Din Khan (for Khair Mohammad) and Nazir Ahmad Khan (for others) — *for Appellants.*

S. N. Bali for Advocate-General and Nand Lal — *for the Crown.*

Sale J. — At about noon on 3rd August 1939 a fight occurred near a shrine in village Sheikh Fazal which resulted in the death of one Mohammad Dadra and injuries to several others. As a result of the police

investigation two cross cases were instituted. On the one side five brothers, viz., Ghulam Rasul, Khair Mohammad, Gulab Ali, Allah Yar and Ahmad Yar (accused 6, Nawab, their nephew is an absconder) were tried under Ss. 148, 323, 324 and 302/149, I.P.C., for the murder of Mohammad Dadra and on the other side eleven persons including Ghulam Nabi and Ghulam Sadiq, who are close relations of the gaddinashin of the shrine, were prosecuted for rioting. The learned Sessions Judge has convicted Khair Mohammad under S. 302 for the murder of Mohammad Dadra and sentenced him to death. He acquitted Ahmad Yar but convicted the other members of this party, viz., Ghulam Rasul, Gulab Ali and Allah Yar under Ss. 148 and 324, 323/149, I. P. C., and sentenced each to three years' rigorous imprisonment. In the cross case he convicted Ghulam Nabi, Ghulam Sadiq, Gullu, Goman and Hassan for rioting armed with deadly weapons under Ss. 148, 323, 324, 325/149 and sentenced each to three years' rigorous imprisonment. The six other persons of this party were acquitted. From these convictions and sentences both sides have appealed and the death sentence passed upon Khair Mohammad is before us for confirmation.

It is unnecessary to detail the facts of this case as in our view this appeal must be accepted and the two cases remanded for retrial. The procedure adopted by the learned Sessions Judge in this case is contrary to the directions of this Court concerning the trial of cross riot cases embodied in Chap. 4 of Vol. 3 of High Court Rules and Orders. It is true that the two cross cases were tried separately by the learned Sessions Judge in so far as separate evidence both for the prosecution and the defence was recorded. But both cases were tried before the same set of assessors. At the close of the evidence the two cases were argued jointly; the assessors apparently were asked to give opinion on both cases simultaneously and one judgment covered both cases. The result in the present instance of this procedure is that evidence in one case has been relied on by the learned Sessions Judge for deciding the other case in which this particular evidence was not given. Three examples of this irregularity may here be quoted. The learned Sessions Judge has found that

in all probability it is correct that the fight took place because the passage of cattle was objected to by Ghulam Nabi and his men.

This finding is based on the statement that Gullu, who belonged to Ghulam Nabi's party, while in service of Ghulam Rasul used to take the latter's cattle past the shrine and via the street of the goldsmiths to be watered. It is true that so far as the murder case is concerned, there is evidence to the effect that the fight was caused by Ghulam Nabi's party objecting to the cattle being taken this way past the shrine. But there is no evidence to this effect in the cross case in which Ghulam Nabi's party have been tried and convicted for rioting. On the contrary, in this case there is a denial by Ghulam Rasul that Gullu was ever in his service. The learned Sessions Judge has contradicted the statement of Gullu accused in defence that he was abused by the other side, by means of his statement made to the police in his capacity as a prosecution witness in the other case. Ghulam Mohammad as (P. W. 3) in the murder case (see his evidence, line 33, p. 28, of the paper book) stated as follows: "There is a way passing near the mangers which leads out of the village." The learned Sessions Judge has used this statement against this accused in the cross case in which Ghulam Nabi's party have been tried for rioting, while ignoring the fact that Ghulam Mohammad went on to say that the accused (that is to say Ghulam Rasul and his men) had never taken their cattle for watering by this way.

The procedure by which two cross cases, tried separately, are heard by the same set of assessors and decided by the same judgment is not illegal; but the danger is that by adopting this method the Courts are liable to mix up the evidence in the two records. If they do so, the procedure is irregular and it is difficult to hold that the irregularity is one that can be condoned by reason of absence of prejudice to the accused. It is almost inevitable that in such cases there must be prejudice to the accused. In the present case it is apparent that the irregularity committed by the Sessions Judge has prejudiced the accused especially the accused belonging to Ghulam Nabi's party. It is for this reason that this Court has laid down the rule in para. 4 of Chap. 4 of the High Court Rules and Orders, Vol. 3, that when both parties are prosecuted not only must the cases be tried separately but judgments in such cases should be written separately and care should be taken to see that the evidence in one case is not imported into the judgment of the other. In

this paragraph a reference is made to the directions given in 4 Lah 376¹ and 8 Lah 193.² It is true that the irregularities pointed out in 4 Lah 376¹ have not been repeated to the same extent in the present case, but we are in agreement with the observations contained in A I R 1933 Mad 367³ and 29 Cr L J 282.⁴ It was laid down by the Full Bench in A I R 1933 Mad 367³ that no hard and fast rule can be laid down as regards the procedure in the trial of case and counter case. There can be nothing irregular in a Judge trying each case to a conclusion before different assessors and afterwards pronouncing judgment in both so long as he tries the one quite independently of the facts in the other. But it is necessary (1) that the trial must be separate, i. e., before different assessors and separate judgments delivered; (2) that the conclusions in each case must be founded on, and only on, the evidence in each case.

In the present case the defect lies in the fact that the learned Sessions Judge tried both cases before the same set of assessors and has imported the evidence given in one case as the basis for the decision of the other case. For these reasons, we hold that the trial of these two cross cases has been irregular and that the irregularity has in fact prejudiced the accused. We must, therefore, accept the appeal, set aside the convictions and sentences and direct that the two cases be retried by the learned Sessions Judge in accordance with the directions given. The appellants in Appeal No. 419 of 1940 are already on bail and may remain on bail till the conclusion of the case. In the murder case (Criminal Appeal No. 430-40) in which Khair Mohammed has been sentenced to death, we allow bail to each of the appellants including Khair Mohammad whom we do not consider *prima facie* to be guilty of an offence so serious as one under S. 302, I. P. C., to the satisfaction of the District Magistrate.

D.S./R.K.

Appeal allowed.

1. ('24) 11 A I R 1924 Lah 104=75 I C 980 = 25 Cr L J 68=4 Lah 376, Allu v. Emperor.
2. ('27) 14 A I R 1927 P C 26=100 I C 126 = 28 Cr L J 254 = 8 Lah 193 (P C), Madat Khan v. Emperor.
3. ('33) 20 A I R 1933 Mad 367=141 I C 539=56 Mad 159=34 Cr L J 175=64 M L J 150 (F B), In re Mounaguruswami Naiker.
4. ('28) 15 A I R 1928 Lah 380 = 107 I C 766 = 29 Cr L J 282, Hayat v. Emperor.

* A. I. R. 1940 Lahore 468

SKEMP J.

Udham Singh — Petitioner.

v.

Emperor.

Criminal Revn. No. 233 of 1940, Decided on 14th May 1940; case reported by Sess. Judge, Lyallpur, D/- 25th January 1940.

* Arms Act (1878), Ss. 4 and 19 (f)—Takwas are not arms.

It is always the purpose for which an implement is primarily used which determines the question whether it does or does not fall within the definition of 'arms'. Implements or articles primarily intended for domestic or agricultural use are not arms under the Act and takwas fall under the former category : *A I R 1927 Lah 162, Rel. on.* [P 469 C 2; P 470 C 1]

Indar Singh — *for Petitioner*.

V. N. Sethi for Advocate-General —
for the Crown.

Facts. — These five revision petitions Nos. 57, 58, 59, 60 and 61 would be disposed of together as the facts in all of them are similar. Each of the petitioners has been convicted under S. 19 (f), Arms Act (11 of 1878), for possession of a takwa and sentenced to Rs. 25 fine or in default two months' rigorous imprisonment. On 5th September 1939, a case under S. 363, I. P. C., was pending in the Court of the learned Magistrate, First Class, who has convicted these petitioners under S. 19 (f), Arms Act, and a great number of men, presumably the supporters of the contesting parties, were present outside the Court-room and some of them were carrying arms like takwas. Sub-Inspector Dalip Singh and Sub-Inspector Ijaz Hussain came to the office of the Prosecuting Deputy Superintendent Police, Rai Sahib Lala Narsing Dass and informed him that in the case *Crown versus Tara Singh* under S. 363, I. P. C., many people of both sides had come with the accused and the complainant party respectively armed with takwas. The Prosecuting Deputy Superintendent, Police came to the Court-room of the Magistrate, First Class, Sardar Balbir Singh where he found some takwas placed under a mango tree outside the Court room and some people sitting close by. As none was holding these takwas, Prosecuting Deputy Superintendent, Police waited till they were taken possession of by their respective owners.

The Prosecuting Deputy Superintendent, Police as a precautionary measure instructed Sub-Inspector Ijaz Hussain to send for armed police. Shortly afterwards, when the armed police arrived, one man took hold of

all these takwas. That man was however detained by Assistant Sub-Inspector, Gulzari Lal. The Prosecuting Deputy Superintendent, Police told Sub-Inspector Ijaz Hussain to bring the men who were owners of those takwas. The Sub-Inspector brought several people to the Prosecuting Deputy Superintendent, Police who found three or four men holding a takwa each in their hands while one or two takwas were still lying against the verandah wall in a vertical position. The Prosecuting Deputy Superintendent, Police hit upon the plan of telling these people to leave the Court premises with their respective weapons. When they had gone a few paces, the Prosecuting Deputy Superintendent, Police stopped them and the five petitioners were found in possession of five takwas, one each, and were accordingly challaned. The Prosecuting Deputy Superintendent, Police admitted in cross-examination that he took no proceedings under S. 107 or S. 151, Criminal P. C., nor any untoward incident happened on that day. Although the accused replied in the affirmative to question 1 which was :

Were you on 5th September found in possession of a takwa P. 1 at Lyallpur kutchery which you were holding for the purpose of offence or defence? Yet in answer to question 3, which was 'Have you anything else to say?' each accused replied that he did not know if it was an offence to carry a takwa. Thus, it cannot be said that any of these accused had pleaded guilty to the charge.

Report.—The sole question for determination is whether 'takwas' like these come within the definition of 'arms' as defined in the Arms Act. The learned counsel for the petitioners has urged that the petitioners' case does not fall within any of the authorities on the point: 32 P R 1918 Cr,¹ 2 Lah 291,² 9 Lah 137³ and A I R 1927 Lah 162.⁴ All the five cases now before me appear to be distinguishable from these authorities. In 32 P R 1918 Cr¹ there was a full size sketch of the instrument on the file which showed that the chhavi blade weighed 1 seer 2½ chhatanks and was removable

1. ('19) 6 AIR 1919 Lah 472=48 I C 486=32 P R 1918 Cr=20 Cr L J 11, *Emperor v. Ralla Singh*.

2. ('22) 9 A I R 1922 Lah 138=64 I C 847=2 Lah 291=22 Cr L J 63, *Mangal Singh v. Emperor*.

3. ('28) 15 A I R 1928 Lah 295=112 I C 49=29 Cr L J 961=9 Lah 137=29 P L R 306, *Emperor v. Puran Singh*.

4. ('27) 14 A I R 1927 Lah 162=99 I C 935=28 Cr L J 199, *Mehr Din v. Emperor*.

from the handle. In that case Rala Singh who was found in possession of the chhavi was tried for the offence under S. 457/511, I. P. C., and was charged under S. 19 (f), Arms Act, in the same trial. It was therefore clear that Rala Singh was in possession of the chhavi for the purpose of offence or defence while attempting to commit house breaking. In 9 Lah 137,³ the instrument consisted of a lathi 6 feet 3 inches having at one end a hollow screw and axe like blade 5 feet \times 4½ inches, the blade having a screw to allow of its being fixed into the long lathi. It was held that the instrument was an arm within the meaning of S. 19, Arms Act. In 2 Lah 291² the weapon was a bamboo dang 5 feet 7 inches which had an iron attachment at the thick end, and hidden in the folds of the appellant's loin cloth was a blade 8 inches long which fitted the end of the dang. It was accordingly held under those circumstances that the weapon was meant for purposes of offence or defence and was therefore an "arm." In the body of the judgment in 2 Lah 291,² Criminal Revision No. 641 of 1916 has been referred to where in the case of a takwa the possessor was given benefit of doubt although the takwa blade was over 6 inches in length. In A I R 1927 Lah 162⁴ it was laid down that it is always the purpose for which an implement is primarily used which determines the question whether it does or does not fall within the definition of "arms" in S. 4 and that the implements of ordinary domestic use such as an axe or knife cannot fall within the definition of arms by the mere fact that they have been in use as weapons of offence or defence on particular occasions.

In the present case none of the blades of these takwas is 6" long but is about 4" or 5" long only. None of them can be screwed on or slipped on to the lathi handle. They appear to be fixed and such like takwas with long lathi handles are ordinarily used for cutting twigs from trees either for making Indian tooth brushes or for cutting the branches of trees to be used as hedges for the fields. The fact that they were being carried openly militates against the view that they were being carried for the purpose of offence or defence or were meant for such purpose. The mere fact that in case of attack they could be used for offence or defence is no ground for holding that these takwas were generally meant for such purpose and not for ordinary domestic or agricultural use. In my opinion all the petitioners should have been given benefit of

doubt. I accordingly refer all these five cases to the Hon'ble High Court for quashing of the convictions of all the petitioners and for refund of fines if realized.

Order of the High Court

Skemp J.—The learned Sessions Judge of Lyallpur has recommended the setting aside of five convictions under the Arms Act. A case was being tried under S. 363, Penal Code, presumably of kidnapping minor girl. A large number of partisans of the contesting parties were present outside the Court room, some of them carrying takwas. Two Sub-Inspectors reported this to the prosecuting Deputy Superintendent by whose orders armed police were brought up. The five petitioners who owned five of the takwas were subsequently prosecuted under the Arms Act, convicted under S. 19 (f) and each fined Rs. 25. The learned Sessions Judge after referring to various authorities has recommended revision because in the present case none of the blades of these takwas is 6" long but is about 4" or 5" long only. None of them can be screwed on or slipped on to the lathi handle. They appear to be fixed and such like takwas with long lathi handles are ordinarily used for cutting twigs from trees either for making Indian tooth brushes or for cutting the branches of trees to be used as hedges for the fields. The fact that they were being carried openly militates against the view that they were being carried for the purpose of offence or defence or were meant for such purpose. The mere fact that in case of attack they could be used for offence or defence is no ground for holding that these takwas were generally meant for such purpose and not for ordinary domestic or agricultural use.

The takwas in question have been produced before me and I agree with the Sessions Judge except on one point. These takwas have small triangular blades mounted on long heavy lathis which might perhaps be more conveniently used as weapons without the blades. They are familiar objects and are undoubtedly used as suggested by the Sessions Judge. I do not, however, agree that they were not meant for the purpose of attack or defence in the present instance. I think from the circumstances and from the fact that the police thought it necessary to bring up armed men these takwas were brought to Court to be used if a fight arose. Mr. Indar Singh for the petitioners referred to A I R 1927 Lah 162⁴ in which Jai Lal J. said with reference to a hatchet and a knife which had been brought apparently to assault the Deputy Commissioner.

It is always the purpose for which an implement is primarily used which determines the

question whether it does or does not fall within the definition of 'arms', and applying this test I have no hesitation in holding that the axe and the knife which have been found to be implements of ordinary domestic use cannot fall within the definition of arms by the mere fact that they have been used as weapons of offence or defence.

Mr. V. N. Sethi for the Crown cited 16 P R 1900 Cr.⁵ A Sessions Judge had reported a case concerning a chhavi which the Punjab Government had directed to be treated as an arm for the purpose of the Arms Act. The Sessions Judge argued that a chhavi did not fall within the definition of arms in S. 4. The Bench did not accept the contention. They said:

Arms are defined in Webster's Dictionary as instruments or weapons of offence or defence and we do not suppose that any more exact description of the term could be given. Where then the circumstances of a case show that a weapon or instrument is carried or possessed for the purpose of offence or defence and not for agricultural purposes or as an article of domestic utility, there is no reason why such a weapon or instrument should not be held to fall within the category of 'arms.'

They went on to hold that chhavis were offensive weapons although occasionally used for agricultural or household purposes. I do not think that there is any conflict between Mr. Justice Jai Lal's ruling and the ruling of the Chief Court considered with reference to the context. In fact there is no conflict even in words if one omits the word 'carried' and simply leaves 'possessed' in the quotation. Lathis, kahis and many other agricultural implements or domestic articles or heavy pieces of wood forming parts thereof are frequently used as weapons of offence or defence; but this does not render them arms under the Arms Act and Mr. Sethi does not make this contention. I agree with Mr. Justice Jai Lal that the true test is the primary object of the implement in question. Implements or articles primarily intended for domestic or agricultural use are not arms under the Arms Act and takwas fall under the former category. I, therefore, agree with the learned Sessions Judge, set aside the convictions and direct that the fines if paid be refunded. The question remains, what is to be done if partisans go to a *cause celebre* carrying lathis or other weapons and ready to fight? It was suggested that they could be arrested under S. 151, Criminal P. C., which provides that a police officer may arrest without a warrant any person designing to commit a cognizable offence. A less drastic measure would be to confiscate the weapons

temporarily, restoring them when danger of a breach of peace had passed.

D.S./R.K. *Convictions set aside.*

*** A. I. R. 1940 Lahore 470**

DIN MOHAMMAD J.

Lorind Singh and another—Petitioners.

v.

Gulab Singh — Respondent.

Civil Revn. No. 906 of 1939, Decided on 29th January 1940, for revision of order of Dist. Judge, Shahpur at Sargodha, D/- 29th June 1939.

*** Provincial Insolvency Act (1920), S. 16 — In absence of finding that petitioning creditor is not proceeding with due diligence order of substitution cannot be made.**

Unless a finding is arrived at by the insolvency Court that the petitioning creditor is not proceeding on his application with due diligence, no order of substitution can be made because that is a condition precedent under S. 16. Further, when once a Court grants leave to the petitioning creditor to withdraw his petition without making an order under S. 16, it can be reasonably urged that the Court was satisfied with the conduct of the petitioning creditor and did not suspect any want of diligence on his part: *A I R 1929 Rang 291* and *A I R 1938 Oudh 206 (F B)*, *Disting.* [P 471 C 1]

Roop Chand — *for Petitioners.*

Mehr Chand Mahajan—*for Respondent.*

Order.—I am not satisfied that the order of the District Judge is not according to law. Under S. 16, Provincial Insolvency Act, an insolvency Court is competent to substitute as petitioner any other creditor to whom the debtor may be indebted in the amount required by the Act, when the petitioning creditor does not proceed with due diligence on his petition; but here substitution was ordered in different circumstances. The Peoples Bank which had originally lodged a petition against the debtor expressed its desire to effect a compromise with the debtor some months before the order was made granting leave to the Bank to withdraw. If the Insolvency Court was of the opinion that the conduct of the Bank amounted to such want of due diligence as is contemplated by S. 16, it should have made an order substituting for the Bank one of the creditors qualified under the Act. This, however, the Court failed to do. On the other hand, it allowed several adjournments to the Bank to enable it to mature the negotiations which were being conducted by the parties in relation to the compromise contemplated by them and eventually gave leave to the Bank to withdraw the petition. Counsel for the petitioner

⁵. (1900) 16 P R 1900 Cr, Crown v. Santa Singh.

relies on A I R 1929 Rang 291¹ and A I R 1938 Oudh 206;² but, in my view, neither of these judgments is in point. In the Rangoon case, the learned Judges observed as follows:

The original petition was validly presented and could not be withdrawn without the leave of the Court. The case was clearly one in which the petitioner did not proceed with due diligence on his petition and was further one in which fraud and collusion were alleged. It was open to the appellants to come in as creditors at any time while the insolvency proceedings were pending and it was open to the Court to substitute them as petitioners for respondent 1.

It is obvious that in that case no leave for withdrawal had been given as contemplated by S. 14 and it was a clear case of want of due diligence. I have already indicated that in such circumstances an Insolvency Court is competent to make an order of substitution even without being moved by any creditor. Similarly, in A I R 1938 Oudh 206,² it was held that where the order passed on the application of creditors for withdrawal was merely "file," it could not be said that those persons had expressly been allowed to withdraw and that without an order of substitution the Insolvency Court could continue proceedings on the application of the creditor applying to be substituted under S. 16. That case too is clearly distinguishable. In my view, unless a finding is arrived at by the Insolvency Court that the petitioning creditor is not proceeding on his application with due diligence, no order of substitution can be made, because that is a condition precedent under S. 16. I am further of the opinion that when once a Court grants leave to the petitioning creditor to withdraw his petition without making an order under S. 16, it can be reasonably urged that the Court was satisfied with the conduct of the petitioning creditor and did not suspect any want of diligence on his part. I accordingly dismiss this petition. In the circumstances of the case, however, I make no order as to costs.

D.S./R.K.

Petition dismissed.

1. ('29) 16 A I R 1929 Rang 291 = 122 I C 285 = 7 Rang 785, Sathappa Chettiar v. A. S. Chettiar Firm.

2. ('38) 25 A I R 1938 Oudh 206 = 177 I C 392 = 1938 O W N 871 = 14 Lah 164 (FB), Raghuraj Singh v. Abdul Rahman.

* A. I. R. 1940 Lahore 471

DIN MOHAMMAD J.

Surjan Singh — Plaintiff — Petitioner.
v.

Lala Nanak Chand and another — Defendants — Respondents.

Civil Revn. No. 990 of 1939, Decided on 5th June 1940, from decree of Senior Sub-Judge, Jhelum, D/- 28th August 1939.

* (a) Contract—Right of stranger to enforce — Bank in liquidation—Official liquidator taking misfeasance proceeding against manager — Compromise between manager and Official Liquidator — Manager thereby undertaking to satisfy claim of depositor of bank—Default by manager—Suit by depositor to enforce terms of compromise held maintainable.

Certain bank went into liquidation and the Official Liquidator took misfeasance proceedings against the manager of the Bank and in the course of those proceedings the manager effected a compromise with the Official Liquidator by which he undertook among other things "to adjust or satisfy any claim" of certain depositor of the Bank among others and to indemnify the Official Liquidator against any such claim. A decree was passed in terms of the compromise. The Manager having made default in satisfying the claim of the depositor he instituted a suit against the manager :

Held that the Official Liquidator who entered into a compromise with the manager was representing all the depositors, creditors and shareholders of the Bank and was in a way acting as their agent. It could not be argued therefore that the depositor was a perfect stranger to the agreement and did not come within the ambit of the well recognized exception based either on the ground that he claimed through a party to the contract or on that of agency, even if it be not possible to hold that an express or implied trust was created in his favour. His suit was therefore maintainable.

[P 473 C 1, 2]

(b) Contract—Compromise—Right of stranger to enforce — Persons giving certain solemn undertakings in Court of law on basis of which certain benefits were gained by them and certain penalties avoided cannot disclaim obligations arising therefrom on ground that obligee was stranger to contract.

Persons giving a solemn undertaking in a Court of law on the basis of which certain benefits were gained by them and certain penalties avoided cannot subsequently disclaim all their obligations arising therefrom by merely raising a technical plea that the obligee was no party to the contract, especially when the contract was entered into with an official who is entrusted by law to safeguard such obligee's interest.

[P 473 C 2]

Harnam Singh — for Petitioner.

S. C. Manchanda — for Respondents.

Order.—This petition raises an interesting question of law. The facts are these. The Indian States Bank, Limited, had two branches at Dhudhial and Chakwal respectively. The defendant Nanak Chand was a director of the Dhudhial Branch and the

defendant Mangal Sen was the Manager at Chakwal. The Bank went into liquidation and the proceedings started in the High Court at Allahabad. The Official Liquidator took misfeasance proceedings against the two defendants and in the course of those proceedings, on 4th February 1935, the defendants effected a compromise with the Official Liquidator by which they undertook among other things "to adjust or satisfy any claim" of one Surjan Singh among others and to indemnify the Official Liquidator against any such claim. They further undertook to file sufficient security in the name of the registrar for due fulfilment of the compromise entered into by them. This compromise was signed by the two defendants as well as their counsel and was sanctioned by the learned Judges of the High Court dealing with the matter. It was accordingly ordered that a decree be passed in terms of the compromise filed by the parties and verified by them in this Court on 4th February 1935.

The defendants having made default in satisfying the claim of Surjan Singh, he instituted a suit out of which this petition has arisen, on 4th February 1938, against the two defendants and the Official Liquidator; but it appears that no relief was claimed against him. Various defences were raised by the two principal defendants. It was contended *inter alia* that they never accepted any liability to discharge the debt of the plaintiff, and that, at any rate, there being no privity of contract between the plaintiff and the defendants, the suit was not competent. Issues were raised on these points. The trial Judge dismissed the suit on the ground that there was no privity of contract between the parties, and the Senior Subordinate Judge maintained that decision on appeal. Hence this petition. Counsel for the petitioner urges that even if it be conceded that as a general rule a stranger to an agreement cannot bring a suit in order to enforce the terms of the agreement, there are certain exceptions to the rule and this case falls under one of the exceptions. He relies in this connexion on 32 All 410,¹ 61 Cal 841,² 60 Bom 954,³ A I R 1939 Nag

20⁴ and A I R 1939 Bom 309⁵ and in my view, the principle deducible from these judgments lends a good deal of support to the contention raised by him. In 32 All 410,¹ a Mahomedan lady had instituted a suit against the defendant, her father-in-law, to recover arrears of certain allowances under the terms of an agreement executed by him prior to and in consideration of her marriage with his son. One of the grounds on which the defendant disclaimed his liability was that the plaintiff was no party to the agreement and was consequently not entitled to maintain the action. Their Lordships of the Privy Council dealing with this aspect of the case discussed the English authority on which the rule was based and observed :

With reference to this it is enough to say that the case relied upon was an action of *assumpsit*, and that the rule of common law on the basis of which it was dismissed is not, in their Lordships' opinion, applicable to the facts and circumstances of the present case. In their Lordships' judgment, although no party to the document, she is clearly entitled to proceed in equity to enforce her claim.

Their Lordships desire to observe that in India and among communities circumstanced as the Muhammadans, among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the common law doctrine was applied to agreements or arrangements entered into in connexion with such contracts.

It would be obvious that their Lordships did not consider that the rule was so rigidly to be enforced in India as not to allow any exceptions to it. In 61 Cal 841,² Lord-Williams J., considered this matter at great length and, in view of the Privy Council authority cited above and some other Calcutta judgments, held that in India a suit by a person although a stranger to an agreement was competent if he was benefited by it. He particularly relied on the remarks made by Jenkins C. J. in an earlier Calcutta case, which were to the following effect:

The breach of contract was charged as deceit and it was only the person deceived who could sue. The bar then in the way of an action by the person, not a direct party to the contract, was probably one of procedure and not of substance. In India we are free from these trammels and are guided in matters of procedure by the rule of justice, equity and good conscience.

In 60 Bom 954³ the Calcutta judgment referred to above was considered by a Divi-

1. ('10) 32 All 410 = 7 I C 237 = 37 I A 152 = 7 A L J 871 (P C), Khwaja Muhammad Khan v. Husaini Begum.

2. ('34) 21 A I R 1934 Cal 682 = 152 I C 351 = 61 Cal 841 = 38 C W N 682, Kshirode Bihari Datta v. Man Gobinda Panda.

3. ('36) 23 A I R 1936 Bom 344 = 165 I C 338 = 60 Bom 954 = 38 Bom L R 610, National Petroleum Co. Ltd. v. Popat Lal Mulji.

4. ('39) 26 A I R 1939 Nag 20 = 180 I C 370, Pandurang v. Vishwanath.

5. ('39) 26 A I R 1939 Bom 309 = 183 I C 785 = 41 Bom L R 538, Moti Lal Ram Kumar v. Akbar Bhai Fukhrudin.

sion Bench composed of Sir John Beaumont C. J. and Rangnekar J. No doubt the learned Judges there did not accept the principle enunciated by Lord-Williams J. in such general terms as laid down by him but they did recognize that there were exceptions to the general rule that a stranger cannot sue. Beaumont C. J. at p. 981 remarked :

No doubt there are many cases in the books in which persons who are not in terms parties to a contract have been allowed to sue upon it. But those cases are based on the view that the plaintiff is claiming through a party to the contract, that he is in the position of a *cestui que trust* or of a principal suing through an agent, that under the old procedure he could have filed a suit in equity, even if he could not have sued at common law. These cases are a recognized exception to the general principle that only parties to a contract can sue upon it.

Rangnekar J. in a separate judgment at page 995 observed :

It is settled law that a stranger to a contract cannot sue. But, as I have just pointed out, there are two exceptions made to this general rule. The first exception is where the contract is made by the trustee for the benefit of a beneficiary, in other words where there is a case of trust; and the other exception is where by acknowledgment or part payment or by estoppel privity may be established as a ground of agency. These two exceptions are also recognized by the decisions in this country. The Privy Council decision in 32 All 410¹ is relied upon as making a third exception. I do not think so. The underlying principle of that decision is that where a contract between A and B is intended to secure a benefit to C as a *cestui que trust*, C may sue in his own right to enforce the trust.

In A I R 1939 Nag 20,⁴ 32 All 410¹ was followed. In A I R 1939 Bom 309,⁵ effect was given to the exceptions stated in 60 Bom 954.³ Counsel for the respondent has referred to A I R 1932 Lah 66,⁶ AIR 1933 Lah 695⁷ and A I R 1935 Lah 354,⁸ but in none of those judgments it was said that the rule did not admit of any exceptions. It is open to a Court of law therefore to determine on the facts of each case whether it is covered by the exceptions or not, and here it is impossible to resist the conclusion that the Official Liquidator who entered into a compromise with the defendants was representing all the depositors, creditors and share-holders of the Bank and was in a way acting as their agent. It cannot be argued therefore that the plaintiff Surjan Singh who claims to be a depositor

of the Bank was a perfect stranger to the agreement and did not come within the ambit of the well-recognized exception based either on the ground that he claimed through a party to the contract or on that of agency, even if it be not possible to hold that an express or implied trust was created in his favour. There is another feature in this case which distinguishes it from all other reported cases. Here, a decree was made in terms of the compromise and the right of persons to whom the defendants were obliged thus judicially established. In my opinion, the decree alone afforded a proper cause of action to them and the defendants could not resist their claim. Further, I cannot reconcile myself to the view that persons giving a solemn undertaking in a Court of law on the basis of which certain benefits were gained by them and certain penalties avoided can subsequently disclaim all their obligations arising therefrom by merely raising a technical plea that the obligee was no party to the contract, especially when the contract was entered into with an official who is entrusted by law to safeguard such obligee's interests.

Besides, it is admitted that the compromise has been acted upon in some particulars and it is also not denied that the defendants have realized a part of the amount from certain debtors of the Bank mentioned in the deed. This part of performance no doubt was not made in favour of the present plaintiff as stressed by the trial Court, but it does indicate that the deed of compromise has been taken advantage of by the defendants themselves, and that it has been treated as an effective document. I have no hesitation in holding therefore that the suit is competent. I accordingly allow this petition, set aside the order of the Courts below on the issue relating to the competency of the suit and remand the case to the trial Court for disposal of the remaining issues in accordance with law. Parties have been directed to appear there on 25th June 1940. There will be no order as to costs before me.

D.S./R.K.

Petition allowed.

* A. I. R. 1940 Lahore 473

TEK CHAND AND BHIDE JJ.

Sukh Dev — Defendant — Appellant.

v.

Parsi, Plaintiff and others, Defendants — Respondents.

Letters Patent Appeals Nos. 91 and 92 of 1939, Decided on 3rd May 1940.

6. ('32) 19 A I R 1932 Lah 66=134 I C 100=32 P L R 876, Gurdit Singh v. Chuni Lal.

7. ('33) 20 A I R 1933 Lah 695=143 I C 753=14 Lah 675 = 34 P L R 601, Maghi Mal v. Dasha Singh.

8. ('35) 22 A I R 1935 Lah 354=158 I C 387=16 Lah 118=37 P L R 552, Ganesh Das v. Banto.

* **Cosharers**—One cosharer in exclusive possession of portion of undivided holding can transfer it subject to adjustment of rights of other cosharers at time of partition.

If a cosharer is in established possession of any portion of an undivided holding, not exceeding his own share, he cannot be disturbed in his possession until partition. Hence, a cosharer who is in such possession of any portion of a joint khata, can transfer that portion subject to adjustment of the rights of the other cosharers therein at the time of partition. Other cosharers' rights will be sufficiently safeguarded if they are granted a decree by giving him a declaration that the possession of the transferees in the lands in dispute will be that of cosharers, subject to adjustment at the time of partition: *Case law relied on.*

[P 474 C 2 ;
P 475 C 1]

Dr. Nand Lal — *for Appellant.*

Mehr Chand Sud — *for Respondent*
(*Plaintiff*).

Bhide J.—Letters Patent Appeals Nos. 91 and 92 of 1939 arise out of two suits of which the facts were similar and it will be convenient to dispose of them together. The material facts were briefly these: The plaintiff in these suits was a cosharer in an undivided holding along with the defendants. The defendants were in possession of two khasra numbers, viz., 959 and 1360, measuring 8 and 13 marlas. They sold these khasra numbers to two persons named Churamani and Sukh Dev respectively. Thereupon the plaintiff sued for possession of one-fifth of these numbers on the ground that the defendants were only cosharers in these khasra numbers and they had, therefore, no right to transfer the entire numbers as they did. The defence was that as the vendors were in exclusive possession of these numbers and as their possession could not be disturbed until partition, the transferees also acquired the same rights and the possession of the transferees could not be disturbed till partition. The trial Court rejected this plea and the plaintiff was given decrees for joint possession in both the suits. The defendants appealed and the learned Senior Subordinate Judge upheld their plea and dismissed his suits. On second appeal, however, the learned Judge in Chambers has again restored the decrees of the trial Court and from this decision the defendants have preferred the present appeals under Cl. 10, Letters Patent.

The sole point for decision is whether a cosharer in a joint holding, who is in exclusive possession of a certain plot of land, has a right to sell the same, and if so whether the transferee has a right to remain in possession of such a plot until partition. It

is not disputed on behalf of the respondent that the defendants could sell their share (or any fraction thereof) in the holding; but it is contended that no cosharer is entitled to sell any specific plot as he is not the sole owner thereof. In support of this contention the learned counsel relied chiefly on three rulings of the Allahabad High Court, viz., A I R 1920 All 111,¹ A I R 1928 All 59² and A I R 1935 All 771.³

The facts of the present cases seem to be however distinguishable as the defendants in selling the plots did not assert that they were exclusive owners thereof. The learned Judge in Chambers has remarked in his judgment that there was an assertion of exclusive title by the defendants in the present suits by sale of specific plots. But this does not appear to be correct. No sale deeds were executed; and it appears from the mutations that the defendants merely purported to transfer their interest in these plots as cosharers. As cosharers they had a right to remain in possession of these plots till partition subject to adjustment at the time of partition and they seem to have transferred the same right to the vendees. This is indicated by the fact that the sale is shown in the column of cultivation and not in the column of proprietorship according to the rules governing mutation proceedings. Moreover, the defendants have made it clear in their written statements also that they only claim to hold the plots sold "until partition subject to the rights of the other cosharers and subject to adjustment at partition. If the defendants merely transferred the plots subject to the rights of the other cosharers and subject to adjustment at the time of partition," it is difficult to see how the rights of the other cosharers can be prejudiced in any way. It is well settled that if a cosharer is in established possession of any portion of an undivided holding, not exceeding his own share, he cannot be disturbed in his possession until partition (*see A I R 1938 Lah 465⁴ and the other rulings cited therein*).

1. ('20) 7 A I R 1920 All 111=55 I C 94=18 A L J 129, *Jamna v. Jhalli*.

2. ('28) 15 A I R 1928 All 59=106 I C 656=25 A L J 983, *Mahomed Sher Khan v. Bharat Indu*.

3. ('35) 22 A I R 1935 All 771=155 I C 829, *Qutubuddin v. Mangala Dubey*.

4. ('38) 25 A I R 1938 Lah 465=177 I C 385=40 P L R 653, *Karam Chand v. Karam Dad Khan*.

As a result, it has been held that a co-sharer who is in such possession of any portion of a joint khata, can transfer that portion subject to adjustment of the rights of the other cosharers therein at the time of partition (see A I R 1925 Lah 518;⁵ A I R 1929 Lah 168⁶ and A I R 1939 Oudh 243.⁷ This view seems to be consistent with the principle embodied in S. 44, T. P. Act, regarding transfers of their 'interest' in joint property by cosharers. The learned counsel for the respondent urged that the defendants in these cases were not in possession for a very long time. It appears however that they were in possession for some years at least before the sales and there seems to be no good ground for holding that they could not transfer the plots unless their possession extended to 12 years or more as suggested by the learned counsel. The defendants did not claim to have acquired any adverse title. All that they claimed was that they were entitled to remain in undisturbed possession till partition. They were certainly in possession for some years before the sales as stated above and the learned counsel for the respondent has not been able to show that the other cosharers had any right to disturb their possession until partition.

In the circumstances stated above, the decree for joint possession granted by the learned Judge in Chambers does not seem to be justifiable. The plaintiff's rights will be sufficiently safeguarded if he is granted a decree in the form in which it was granted by this Court in a similar case in C. A. 1771 of 1921, viz., by giving him a declaration that the possession of the defendants in the lands in dispute will be that of co-sharers, subject to adjustment at the time of partition. The appeals are accordingly accepted, and in lieu of the decrees for joint possession the plaintiff is granted declaratory decrees as above. In view of all the circumstances parties will be left to bear their costs in this Court in both the appeals.

Tek Chand J. — I agree.

D.S./R.K.

Appeals allowed.

5. ('25) 12 A I R 1925 Lah 518=85 IC 553, Saad-Ullah v. Ibrahim.

6. ('29) 16 A I R 1929 Lah 168=116 IC 223, Harnam Singh v. Jagat Singh.

7. ('39) 26 A I R 1939 Oudh 243 = 183 IC 593=1939 O W N 773=15 Luck 15, Sripal Singh v. Mata Badal.

A. I. R. 1940 Lahore 475

BHIDE AND DIN MOHAMMAD JJ.

Mt. Sharifa Begam—Plaintiff

—Appellant.

v.

Court of Wards and others, Defendants

—Respondents.

First Appeal No. 447 of 1938, Decided on 23rd April 1940, from decree of Senior Sub-Judge, Gujrat, D/- 16th March 1938.

(a) **Caste — Proof — Certificate or bond containing person's own statement as to caste has little value.**

In the matter of caste, certificates containing a person's own statement as to his caste to the officials concerned by whom they were issued and who had no need to enquire at the time into the truth or falsehood of the assertion made by him, carry very little evidentiary value as they are no weightier than one's own admission. The same remarks apply to description of caste in bonds executed in a person's favour. [P 479 C 2]

(b) **Custom—Applicability.**

The fact that a person belonged to a particular tribe is no clear proof of the fact that he followed custom in preference to his personal law. [P 480 C 2]

(c) **Custom (Punjab) — Zamindara agricultural custom — Applicability — Mahomedan Qureshi family residing in Gujrat town from time immemorial and following urban pursuits — It is governed by Mahomedan law and not by agricultural custom.**

Where the Mahomedan Qureshi family of the parties to the suit is proved to have resided in the town of Gujrat in the Punjab and almost all the members of the family of the common ancestor of the parties are shown to have followed urban pursuits, then in the absence of evidence to show that any one of them followed agriculture as his avocation or the ancestor of the family belonged to any compact village community or that the succession in the family was ever regulated by custom it cannot be said that the family of the parties is not governed by Mohomedan law but by the zamindara agricultural custom whereby neither the widow nor the daughter is entitled to any inheritance: 124 P R 1908; 38 P R 1912; A I R 1927 Lah 642 and A I R 1931 Lah 446, Ref. [P 481 C 1]

(d) **Custom (Punjab)—Agricultural custom—Proof — Instances showing succession being governed by custom are not enough — Clear demand by female heir and its refusal must be established.**

In view of the fact that female heirs seldom contest their inheritance with male heirs and that mothers and sisters are always complaisant enough not to insist on their 'pound of flesh' instances showing that succession in the family was regulated by custom are not sufficient to determine that the parties do not follow their personal law unless there has been a clear demand by the female and refusal by the male: *Case law referred.* [P 484 C 2]

(e) **Limitation Act (1908), Art. 120 — Suit to establish right to inherit deceased's property even if moveable is governed by Art. 120.**

A suit to establish a right to inherit the property even though moveable of a deceased person is gov-

erned by Art. 120: 21 Cal 157 (P C), Rel. on; A I R 1924 Cal 142; A I R 1915 All 253; 32 Cal 527; A I R 1924 All 812 and 9 Beng L R 348 (P C), Disting. [P 484 C 2]

(f) Practice—New Plea—Limitation—Appeal—Plea raised in trial Court and given up cannot be reagitated in appeal—Nor can further evidence be allowed.

Where an objection on the ground of limitation is raised in the trial Court in the pleas but is given up before issues it cannot be reagitated in appeal nor can a party be allowed to lead any further evidence where the record is incomplete on the point: A I R 1931 P C 143, Rel. on. [P 485 C 1]

Achhru Ram and Indar Dev Dua—

for Appellant.

Barkat Ali and Shaukat Ali—

for Respondents.

Din Mohammad J.—The suit out of which this appeal has arisen was instituted in forma pauperis on 1st October, 1936 by Mt. Sharifa Begam, daughter of Khan Bahdur Captain Mahommed Zaman Khan, against the Court of Wards Punjab for possession of her share of the property left by her father consisting of land, houses and cash. It was alleged in the plaint that her father died on 2nd August 1930 leaving considerable amount of immovable property besides Rs. 1,80,000 in cash and ornaments worth Rs. 10,000. The deceased left him surviving his widow, Mt. Barkat Bibi, his two sons, Abdul Ghani and Mohammad Nawaz and the plaintiff who was his only daughter. The deceased was governed by Mahomedan law in matters of inheritance and the plaintiff as daughter was entitled to 7/40ths share in the property left by him. The widow was entitled to 1/8th and the two sons to 28/40ths share. Mohammad Nawaz died in January 1932 and Abdul Ghani in November 1933. They left certain children of their own and in their presence their mother, Mt. Barkat Bibi, succeeded to 1/6th share of the property left by them. Mt. Barkat Bibi died on 6th May 1935 and the plaintiff as her daughter was entitled to a half share in the property left by her. The total share therefore to which the plaintiff was entitled on the date of the suit was 71/240ths share. The sons and daughters left by the two deceased brothers of the plaintiff were placed under the Court of Wards and hence it was impleaded as the defendant in the case. It was added that excluding the period of notice sent to the Court of Wards the suit was within time.

In the pleas submitted by the Court of Wards it was admitted that the deceased left the immovable properties mentioned in the plaint, but it was denied that the Court

of Wards had come into possession of any ornaments. So far as cash was concerned, it was stated that only Rs. 1,60,000 had been collected by the Court of Wards. The allegation that the deceased was governed by Mahomedan law was controverted and it was contended that he was governed by the zamindara custom under which neither the widow nor the daughter of the deceased was entitled to any inheritance. It was further pleaded that both the widow and the daughter of the deceased had admitted in the course of an application filed by the two sons of the deceased for obtaining a succession certificate that the sons were the only proper heirs of the deceased. Inasmuch as the daughters of the two sons of the deceased had also been impleaded as defendants, it was averred that they had no share in the property left by their respective fathers. On the question of limitation it was urged that the suit in regard to the moveable property of the deceased was barred by time. On the pleadings of the parties the following issues were framed:

1. Are the parties bound by Mahomedan law in matters of inheritance?
2. If so, what is the plaintiff's share?
3. Is the plaintiff estopped by her conduct from claiming her share; if so, how?
4. What property was inherited by the defendant and what relief is the plaintiff entitled to?

It may be observed here that the onus of issue 1 was placed on the plaintiff solely on the ground that as alleged by the defendant she had conceded the right of her brothers to succeed to the property left by their father to her own exclusion. It may also be remarked that although an objection was raised in the pleas on the ground of limitation, no issue was framed as the objection was waived. Although there is no specific order to this effect, there is a reference made to it in the judgment of the Senior Subordinate Judge and counsel for the respondent does not challenge this position. The Senior Subordinate Judge came to the conclusion that the deceased was not governed by Mohamedan law and that even if he was so governed, the plaintiff could not claim her mother's share, inasmuch as the mother had during her lifetime expressly relinquished it in favour of her sons. Issue 3, which related to estoppel, was decided against the defendant and issue 4 relating to the amount of property left by the deceased was decided against the plaintiff. The suit was dismissed on the ground that the plaintiff was not an

heir to her father. From that judgment the present appeal has been preferred.

The most important question in the case is whether the deceased was governed by Mahomedan law or custom. On behalf of the plaintiff, it is alleged that the deceased belonged to a Qureshi tribe which had originally migrated from Arabia and that his ancestors had always lived in the town of Gujrat and followed urban pursuits. On the other hand it is contended that the deceased belonged to the Gondal tribe of Jats who had originally come from the Deccan, that his ancestors originally lived in Bohat, a village in the District of Gujrat, that he belonged to the compact community of that village and that consequently he was governed by the custom prevalent among the members of his tribe.

On behalf of the plaintiff reliance is placed on the following documents: (1) A deed of partition, dated 6th May 1868, between Ghulam Hasan and Mohammad Bakhsh, sons of Nur Mohammad, residents of Gujrat proper, who admittedly belonged to the family of the deceased, wherein they described themselves as Arab Ulema. This deed was produced in another case between some members of family inter se (Ex. P. 6, pages 54 and 55, Vol. I.) (2) An extract from the register of births relating to the town of Gujrat, wherein the birth of a son of Mohammad Zaman on 20th September 1882, is recorded. Mohammad Zaman is shown to be a resident of Kabuli Gate and a Qureshi Musalman by caste (Ex. P. 20, page. 57, Vol. 1). (3) A deed of mortgage, dated 18th April 1888 executed by Mohammad Bakhsh Gondal of Mauza Bagola, in favour of Mohammad Zaman, wherein his father is described as Mian and his caste is mentioned as Qureshi. It may be remarked that his father was present at the time of the registration of this deed (Ex. P. 8, p. 58 Vol. 1). (4) A deed of mortgage, dated 18th April 1888 executed by another Mohammad Bakhsh, who also was a Gondal, in favour of Mohammad Zaman, wherein similar entries appear (Ex. P. 10, p. 59, Vol. 1). (5) An extract from the register of births relating to the town of Gujrat, showing the birth of a son to Mohammad Zaman on 26th August 1890 wherein he is described as an Arab Hashmi (Ex. P. 21, p. 70, Vol. 1). (6) A deed of mortgage, dated 5th January 1895 executed by Imam Bakhsh and others, Jat Waraich of village Rawalki, in favour of Mohammad Zaman, wherein he is described as Babu, his father as Mian and by

caste a Qureshi, resident of Gujrat town (Ex. P. W. 6/5, p. 71, Vol. 1). (7) A copy of a mutation of sale executed by Imam Bakhsh and others of the Waraich caste, in favour of Mohammad Zaman by caste Qureshi, which was decided on 5th February 1896, (Ex. P. 16, pages 74-77, Vol. 1). (8) A deed of sale, dated 25th May 1897, executed by Qutub-ud-Din, a Jat Tarar, of Pindi Kalu, in favour of Mohammad Zaman by caste Qureshi (Ex. P. 9, p. 76, Vol. I). (9) A copy of mutation following on the sale stated above, again showing Mohammad Zaman as Qureshi (Ex. P. 27 pp. 80-83, Vol. I). (10) A copy of mutation relating to a mortgage, executed by Pira, a Jat of Pindi Kalu, in favour of Mohammad Zaman, which was decided on 4th March 1898, showing his father as Mian and his caste as Qureshi (Ex. P. 18, pp. 84-89, Vol. I). (11) An original manuscript in the handwriting of Hakim Khuda Bakhsh, a member of the family of the deceased, written in 1901, showing the family of the deceased Mohammad Zaman to be Arbi, Qureshi, Hashmi, Makki and also referring to him as a member of the family. (12) A pedigree attached to a printed copy of the same manuscript, claiming descent from Jafar Tayyar, a cousin of the Holy Prophet of Islam (Ex. P. 4, pp. 115-122, Vol. I). (13) A copy of a judgment of Sheikh Mohammad Akbar, Subordinate Judge second class in a suit between the members of the family inter se decided on 30th November 1928 in which it was held that the family of the deceased were Qureshis governed by Mahomedan law (Ex. P. 7, pp. 101-105, Vol. I). (14) A copy of a petition of plaint in a suit instituted by a member of the family named Mohammad Ji against a widow Mt. Sardar Begam and Mohammad Azim, in which it was alleged that the family was governed by Mahomedan law (Ex. P. 1, pp. 99-100, Vol. 1). (15) A copy of a deed of compromise filed in the suit mentioned at No. 14 by which the widow Mt. Sardar Begam was ousted from possession of the property of her late husband Mohammad Amin by Mohammad Ji and Mohammad Azim, the two brothers of her husband (Ex. P. 2, p. 106, Vol. I). (16) A copy of mutation attested on 17th November 1888 in which the caste of Mohammad Zaman was shown as Miana (Ex. P. 19, pp. 61-63, Vol. I). (17) Another copy of a mutation attested on 17th November 1888 in which the caste of Mohammad Zaman was similarly shown as Miana (Ex. P. 28, pp. 64-66, Vol. I.)

(18) A copy of a jamabandi of the year 1901-1902 relating to mouza Tarowali in which Mahommad Zaman is described as Qureshi (Ex. P. 15, pp. 90-95, Vol. I.) (19) A copy of a report made by Sardar Gurudit Singh, Naib Tahsildar, on 14th December 1904, to the effect that as Mohammad Zaman who had throughout been shown in the revenue papers as a Qureshi, had got himself entered as a Gondal, thorough enquiry be made (Ex. P. 33, page 96, Vol. 1.)

Besides, Mohammad Ji, P. W. 1, and Saadat Mand, P. W. 5, two members of the family appeared in Court and stated that they were Qureshis and governed by Mahomedan law. Mohammad Ji in addition, proved the plaint mentioned at No. 14 and the compromise at No. 15 above. He further stated that a daughter of Mohammad Zaman was married to the son of his brother Mohammad Azim. It may be observed that the relationship of these two persons with Mohammad Zaman is shown in the defendants' own pedigree Ex. D 1-A, at pp. 201 to 214, Vol. II. Munshi Abdul Ghani, P. W. 2, a muharrir patwari of Gujrat, stated that no land was ever shown in the revenue papers to have been owned by Said Mohammad, father of Mohammad Zaman.

As against this, the defendant produced a large number of documents in which Mohammad Zaman was either described as a Gondal or as a Jat Gondal. Of these, documents relating to the period subsequent to 8th June 1901, when the Punjab Alienation of Land Act (13 of 1900) came into force, may not be referred to individually, as it is admitted by counsel for the plaintiff that after the coming into force of the Land Alienation Act Mohammad Zaman always described himself as a Gondal. A word of explanation may be necessary here. Prior to the enactment of the Land Alienation Act, there was no restriction placed on the power of a person to acquire agricultural land. In 1900 however the Act was passed which enacted that none but those who were empowered under the Act could permanently acquire agricultural land. In the District of Gujrat a notification that was issued under the Act for the first time on 22nd May 1901, excluded Qureshis. They were however included later by Notification No. 63, dated 18th April 1904.

In view of the admission of the appellant's counsel, counsel for the respondent has particularly relied on the following docu-

ments only which all belong to the period prior to June 1901 : (1) A copy of a sale deed of a house, dated 13th June 1851, in which Mian Said Mohammad was shown both as an Arab and a Gondal (Ex. D. W. 13/1, p. 1, Vol. II). (2) An extract from the pedigree of the proprietors of Mauza Hardeo Bohat, prepared at the settlement of 1868 (Ex. D. 22, pp. 3-7, Vol. II). (3) A copy of the history of acquisition of ownership in the village Bohat as prepared at the settlement of 1868 (Ex. D. 23, p. 8, Vol. II). (4) A copy of a certificate granted to Mohammad Zaman on 24th August 1880, by the Settlement Officer, Pargana Chiniot, in the District of Jhang (pp. 9-10, Vol. II). (5) Copy of a certificate granted to Mohammad Zaman by the Financial Commissioner, Punjab, on 3rd January 1899 (Ex. D. 69, p. 11, Vol. II). (6) A bond dated 7th April 1901, executed by one Maula Dad in favour of Mohammad Zaman (Ex. D. 70, p. 11, Vol. II). (7) Copy of a mutation, decided on 17th May 1901, by which one Gahna, a Jat Gondal of Mouza Bohat, gifted 16 kanals of land to Mohammad Zaman on the ground of relationship (Ex. D. 24, pp. 12-13, Vol. II).

In my view, the evidence adduced on behalf of the plaintiff is more convincing on the question of the caste of Mohammad Zaman than that relied on by the defendant. Ex. D. W. 13/1 is more in favour of the plaintiff than of the defendant. In the first place, Said Mohammad, the father of Mohammad Zaman, is described as Mian and anyone who is acquainted with the implications of this appellation can under no circumstances attach an agricultural status to the holder of the appellation except in the cases of Arains and Rajputs who generally add this distinction to their name. Secondly, the words as used in the document are "*urf arab maruf gondal*." Both "*urf*" and "*maruf*" in Arabic language mean "*known*," but the distinction that was present to the mind of the scribe can be ascertained from the use of the term "*urf*" along with the vendor's name. There the term was used in the meaning of caste as the vendor was described as "*urf nalaindoz*," meaning thereby '*by caste a shoemaker*'. This document therefore shows that in 1851 Mian Said Mohammad who was commonly known as an Arab was also described as gondal, although apparently an Arab Gondal is a contradiction in terms inasmuch as no Gondal has ever claimed his descent from Arabia.

Turning now to Ex. D-22, it is no doubt a pedigree of the proprietors of the village Hardo Bohat, who were Jat Gondal, but it nowhere includes the names of Mohammad Zaman's ancestors. He, however, seeks to connect himself with Dhidu, the common ancestor of the residents of Bohat, through one Rashid, father of Nur Mohammad and Fatteh Mohammad, who are shown there as living in "Mauza Attawa Gujrat for the last four years." Their share of the land is said to be with the descendants of kah. In the pedigree propounded by Mohammad Zaman, Ex. D 1-A, he shows himself as a descendant of Nur Mohammad whose great-grandson is one Ghulam Hussain. Both parties agree that Ghulam Hussain was their common ancestor, but while according to the plaintiff this Ghulam Hussain traced his descent back to Arabia, according to the defendant Ghulam Hussain hailed from village Bohat. The assertion of the defendant as it stands is so absurd that it cannot be seriously entertained by any reasonable person. On the defendant's own showing the father of Mohammad Zaman flourished in 1851 and made an acquisition of a house by virtue of a sale deed, Ex. D. W. 13/1. According to Ex. D. 1-A, Said Mohammad was a great-grandson of Ghulam Hussain who, as stated before, was a great-grandson of Nur Mohammad who, as stated in Ex. D-22, was living in Mauza Attawa, Gujrat, having migrated there in 1864. How could a person seven degrees removed from the ancestor be his contemporary passes one's comprehension.

Counsel for the respondent realizing the impossibility of the situation envisaged in Ex. D-22, referred to a pedigree Ex. P-29 at p. 54 of Vol. I. This pedigree was prepared in the settlement of 1857 and here one Rashida was shown to have migrated to Mauza Attawa in the district of Gujranwala in the middle of the eighteenth century. But a mere comparison of the two pedigrees would make it clear that Ex. P-29 does not refer to the same Rashid whom Mohammad Zaman claims as his ancestor. No doubt the founder of both these families is known as Dhidu, but all other details differ. It may further be remarked that in spite of the fact that the defendant has relied on more than 80 documents in support of his case, no attempt has been made to produce the revenue records from either the village Attawa in the district of Gujrat or the village Attawa in the district of Gujranwala to show that any of the persons

claimed by him as his ancestors connecting him with the Jat Gondals of Bohat ever lived in those villages or owned land there. Barring the pedigree manufactured by Mohammad Zaman for his own purposes, there is no revenue record in the District of Gujrat which connects him with any of the Gondal families of the District. These pedigrees therefore are of no avail to the defendant to establish Mohammad Zaman's caste as Gondal. Ex. D-23 again helps the plaintiff more than it does the defendant. It shows that at the time when the village Bohat was founded people of Miana tribe among others also settled along with the founders and it is significant that the father of Mohammad Zaman was always described as Mian, an appellation which is synonymous with Miana, and that in Exs. P-19 and P-28 he was expressly stated to be of Miana caste. Anyhow this history is of no use to the respondent as it does not show that the remote ancestors of Mohammad Zaman ever hailed from the village of Bohat or that they had settled in the village with the founders.

The certificate granted to Mohammad Zaman in 1880 cannot carry the case of the defendant any further. It merely contains Mohammad Zaman's own statement to the officials concerned who had no need to enquire at the time into the truth or falsehood of the assertion made by him. In the matter of caste such documents carry very little evidentiary value as they are no weightier than one's own admission. The same remarks apply to Mr. Thorburn's certificate of 1899 (Ex. D-69) and Maula Dad's bond of 7th April 1901 (Ex. D-70). The only other document that remains to be considered is Ex. D-24. By virtue of this mutation one Gahna, as stated before, transferred 16 kanals of land situate at village Bohat to Mohammad Zaman stating that Mohammad Zaman was a collateral of his. Counsel for the respondent lays much stress on this document and describes it as his sheet anchor, inasmuch as in his view it unmistakably establishes the connexion of Mohammad Zaman with the compact village community residing in Mauza Bohat. The plaintiff on the other hand urges that there is inherent evidence in the document itself to indicate that it was a sort of a manoeuvre on the part of Mohammad Zaman to link himself with Gondal Jats of village Bohat and that though this mutation is ostensibly a voluntary surrender on the part of Gahna in favour of

Mohammad Zaman, it really was not so. It would appear that in the statement made by Gahna it is expressly stated that Mohammad Zaman by virtue of this acknowledged relationship would not be able to claim an inch of land more than what was being surrendered by Gahna.

Considering the fact that there is not a shred of evidence on the record to show that prior to this transaction any land was owned by the family of Mohammad Zaman in this village and also taking into view the patent fact that neither Gahna nor any other resident from village Bohat was produced in the Court below to substantiate the allegation made in this mutation that Mohammad Zaman was a collateral of Gahna and also in view of the fact that the name of Mohammad Zaman does not appear in any pedigree attached to the revenue records of that village, one is led to the inevitable conclusion that in order to gain the status of a Jat Gondal at a time when Qureshis were held at a discount so far as the acquisition of agricultural land was concerned, this admission was secured from Gahna by some means or the other and that the admission was really untrue. If Gahna had been paid a *quid pro quo* for the admission made, he did not stand to lose anything at all.

In the circumstances mentioned above, the documentary evidence produced by the defendant is inconclusive to show that Mohammad Zaman was a Jat Gondal. Even if any regard is paid to the fact that in some documents Mohammad Zaman was shown as a Gondal, it is not enough to hold that he was a Jat Gondal. In Census of India 1894, Vol. 21, dealing with the Punjab and its feudatories, by Mr. Maclagan, afterwards Sir Edward Maclagan, who came to be the first Governor of the Punjab, Gondal is not only shown as a sub-caste of Jat or Rajput tribe, but also as a sub-caste of Jolaha, Kumhar, Lohar, Nai, Tarkhan and Ulema tribes and it cannot be denied that the last mentioned tribes are all non-agricultural tribes.

The oral evidence led by the defendant is equally worthless. D. W. 1 Mohammad Shafi, Secretary, District Board, Gujrat, merely states that Mohammad Zaman and his sons professed to be Gondals. Mr. Kirpa Ram advocate calls them Arab Gondals and adds that the tribe to which they belonged had come from Arabia, and so does one Sayed Mohammad Raza who was examined on commission. It is significant that Jat

Gondals do not fall under this category. Mr. Kaikaus pleader states that, so far as he knew, Mohammad Zaman was a Jat Gondal but gives no reason for his knowledge and further admits that he does not know to which village Mohammad Zaman belonged. Ahmed Mukhtar, D. W. 4, an Overseer of the District Board says that Mohammad Zaman and his sons were Gondals and further states that he was told by a son of Mohammad Zaman that one Ahmad Khan Gondal was the son of the maternal uncle of Mohammad Zaman. Mr. Nasarullah Pleader, D. W. 5, Mufti Mohammad Din Pleader, D. W. 6 and Imam Din, a contractor of District Board, D. W. 7 also make statements to the same effect and so do D. W. 10 Jalal, D. W. 11 Qutab Din and D. W. 12 Jalal. It may be observed that although admitted by Jalal D. W. 10 that Ahmad Khan, whose name is utilized to set a seal on the status of Mohammad Zaman, is alive, he has not been produced in the witness box. The statements of a few pleaders who had no relationship with Mohammad Zaman and of a few employees of the District Board who too do not clearly describe the source of their knowledge are not enough to show that Mohammad Zaman was really a Jat Gondal. A brief history of every tribe residing in Gujrat District was attached to the *riwaj-i-am* prepared in 1868 and it is significant that although the names of some respectable persons belonging to the Gondal tribe are stated therein, no reference is made to the family of Mohammad Zaman. Similarly, in the Gazetteer of the Gujrat District prepared in 1921 by Mr. Williamson, Settlement Officer and Deputy Commissioner, it was said at pp. 44-45 that

it is a pity that at present there are practically no men of importance or influence among them (Gondal) to help in maintaining the position of the clan.

Had the authorities really believed that Mohammad Zaman, who was then a Khan Bahadur and a Captain besides being an Honorary Magistrate and President of Municipal Committee of Gujrat, really belonged to the Gondal tribe of Jats, the District Officer would not have made a remark to that effect.

Even if it were held for the sake of argument that Mohammad Zaman was a Jat Gondal, it is no clear proof of the fact that he followed custom in preference to his personal law. It is admitted on all hands

that from time immemorial the family of Mohamad Zaman resided in the town of Gujrat. It is further in evidence that almost all the known members of the family of Ghulam Hussain, the common ancestor of the parties, have always followed urban pursuits. In fact, as stated above, there is not an iota of evidence on the record to show that anyone of them followed agriculture as his avocation. It is also not proved that Mohammad Zaman belonged to any compact village community. There is abundant authority in support of the proposition that in circumstances like these it cannot be said that the family is governed by agricultural custom. Reference in this connection may be made to 124 P R 1908,¹ 38 P R 1912,² 9 Lah 120³ and 13 Lah 119.⁴ In 124 P R 1908¹ the Awans of Ludhiana City, who were for generations past dependent either upon service or other independent means of livelihood, were found to be governed by Mahomedan law and not by custom. In that case the ancestor of the parties had even attested the *riwaj-i-am*, but this circumstance was considered to be immaterial. In 38 P R 1912² the fact that the parties were residing in a town, that they owned no agricultural land and never carried on agriculture as a means of livelihood was considered as a material circumstance to determine this issue. In 9 Lah 120³ the ancestors of the parties had from time immemorial lived in the city of Lahore and none of them had actually followed agriculture as a profession, their main occupation being for generations service or trade. In these circumstances, it was held that although Kambohs were one of the dominant agricultural tribes of the Lahore District, the parties were governed by Mahomedan law and not by custom. 13 Lah 119⁴ related to Arains. The deceased was a Sub-Inspector of Police residing in Ambala Cantonment and it was remarked that unless it was proved that the family ever formed part of a village community or that the members of the family ever followed agriculture as a profession, it could not be said that they followed custom and not Mahomedan law.

Further, there are no instances on the record to prove that the succession in this family was ever regulated by custom. Counsel for the respondent mainly relies in this connexion on the information elicited in the cross-examination of Mohammad Ji, P. W. 1. The material portion of his cross-examination is as follows:

When my father died my mother was alive. She got no share in the property left by my father. We gave her maintenance. Nur Hussain, my uncle left two sons and two daughters; now one son and one daughter are alive. Nur Hussain had a house, which was inherited by his son and the daughter got no share in it nor any share was given to his widow in this house Mir Hussain left land and a house He left three sons and two daughters. The house and land went to his sons. The daughters or the widow got no share in this property. Gilani Bakhsh, my uncle, left one son and one daughter. He left land and a house. This property went to the son.

It is true that in all these instances Mahomedan law was not followed. But apart from the fact that the property to be partitioned was mostly a residential house and the people living in this part of the country are averse to having a partition in these circumstances especially according to Mahomedan law which introduces inconvenient fractions, it is well known that female heirs seldom contest their inheritance with male heirs and that mothers and sisters are always complaisant enough not to insist on their 'pound of flesh.' It is in such circumstances that this Court as well as its predecessor, the Punjab Chief Court, and Courts in other provinces too have held that such instances are not sufficient to determine that the parties do not follow their personal law unless there has been a clear demand and refusal. In 54 P R 1906⁵ Sir William Clark, C. J. and Reid J. of the Punjab Chief Court dealing with a case of Mahomedan Kashmiris of the city of Lahore engaged in trade or manufacture, approvingly referred to the remarks made by a Judge of the same Court in another case. Those remarks were as follows:

It is difficult, if not impossible, unless a case comes into Court, to say what were the particular circumstances attending each succession. There is no doubt a general tendency of the stronger to override the weak and many instances may occur of the males of a family depriving females of rights to which the latter are legally entitled. Such instances may be followed so generally as to establish a custom even though the origin of the custom were usurpation, but the Courts are bound carefully to watch over the rights of the weaker party and to refuse to hold that they have ceased to exist un-

5. ('06) 54 P R 1906 = 47 P L R 1907, *Maula Baksh v. Muhammad Baksh*.

1. ('09) 124 P R 1908 = 4 I O 638 = 3 P L R 1909, *Jamitunisa v. Hashmat-Ulnisa*.

2. ('12) 38 P R 1912 = 13 I O 50 = 19 P L R 1912, *Mehr Singh v. Devi Dial*.

3. ('27) 14 A I R 1927 Lah 642 = 9 Lah 120 = 29 P L R 154, *Muzaffarmuhammad v. Imam Din*.

4. ('31) 18 A I R 1931 Lah 446 = 131 I O 280 = 13 Lah 119 = 32 P L R 146, *Bashiram v. Muhammad Zahur*.

less a custom against them is most clearly established.

In 84 P R 1916,⁶ another Division Bench of the Chief Court independently of the case cited above observed that there are a few other witnesses of this tribe in Multan, who have given evidence to the effect that daughters and sisters in this family and other families of Tarkhans have been excluded by males. Now it appears that the females have not in some cases asserted their right of inheritance, but this is by no means a rare occurrence. It has been pointed out in more judgments than one that this practice of the males excluding the females cannot be elevated to the dignity of custom, unless there is clear and cogent evidence that it has been uniform and has existed for a sufficiently long period.

In 56 I C 478⁷ a Division Bench of the Lahore High Court remarked:

In order to establish a custom of this kind in which the interests of a female are in conflict with those of a male, it must be shown by clear and cogent evidence that there was actually an assertion of her claim by the female and a denial by the male. As observed already, mere inaction, which may be due to various causes, e. g., mutual good will or ignorance of the law, affords no indication of the fact that the rule of Hindu law has been abrogated and a custom at variance with it has taken its place.

In 4 Lah 85,⁸ another Division Bench of this Court remarked:

There is nothing to indicate the circumstances under which daughters or widows failed to get their shares in the rest of the cases. Generally a widow would not wish to have her name associated with that of her son in the revenue records because the latter is bound to maintain her and look to all her needs, and she does not care for more. Similarly sisters are averse to create strained relations with their brothers, and generally forego their right of inheritance. But from a few instances of this nature the existence of a custom against them cannot be inferred, specially when no instance is cited to show that a daughter or widow claimed her share but was refused.

In 8 Mad 464⁹ it was observed that a custom to be valid must be consciously accepted as having the force of law. In A I R 1925 Sind 207,¹⁰ remarks were made to the effect that the exclusion of females from inheritance could not be established unless it was proved that some of the females asserted their rights as heirs and were denied those rights. It was further added that to prove merely their passive acceptance of their position in cases where their male relations gave them all that was

necessary for their every day life and their not actively asserting their rights to any share in property was not enough. The principle enunciated in the judgments referred to above fully applies to the present case.

There is further evidence on the record that on two occasions when the members of the family went to Court it was found that they were Qureshis and were governed by Mahomedan law. Reference in this connexion may be made to Exs. P-7, P-1 and P-2 referred to above. In Ex. P-7 a clear issue was raised on the point and decided on that score. In P-1 and P-2 a widow, Mt. Sardar Begam, had taken possession of the entire estate left by her husband and a claim was made by her husband's brothers that as they were Qureshis and thus governed by Mahomedan law, the widow could not hold the entire estate of her husband. The compromise that followed deprived the widow of the estate and further provided that she would not forfeit whatever was given to her even on remarriage. It is obvious that this condition was inconsistent with the provisions of customary law.

Counsel for the respondent has further contended that the admission of Mohammad Zaman as contained in the application (Ex. D.1) submitted by him on 14th September 1905, for correction of the revenue entries relating to his caste as well as the admission of the plaintiff in the course of proceedings in regard to succession certificate applied for by the sons of Mohammad Zaman is enough to establish that Mohammad Zaman was a Jat Gondal. These admissions however do not improve the case of the respondent in any manner. So far as the application of Mohammad Zaman, Ex. D.1, is concerned, it is obvious that it is full of misstatements and baseless allegations and cannot therefore claim the same amount of sanctity as would otherwise be claimed by a statement made by a respectable person in a responsible document like an application to the authorities. In para. 2 of that application he states that Rashid and his sons left Bohat in 1868 and I have already exposed the absurdity of this statement. Rashid and his sons could under no circumstances have been in the land of the living in 1868, if they were the ancestors of Mohammad Zaman. In the same paragraph he further says that a high officer of the Sikh Government sent for his ancestors and asked them to take possession of their houses and land, but on the present

6. ('16) 3 A I R 1916 Lah 166 = 33 I O 742 = 84 P R 1916, Murad Khatun v. Muhammad Bakhs.

7. ('20) 7 A I R 1920 Lah 224 = 56 I C 478, Ganesh Devi v. Darshan Singh.

8. ('23) 10 A I R 1923 Lah 184 = 76 I C 267 = 4 Lah 85, Hajra Bibi v. Janat Bibi.

9. ('85) 8 Mad 464, Mira Bivi v. Vellayanna.

10. ('25) 12 A I R 1925 Sind 207 = 78 I O 23 = 18 S L R 149, Usman v. Asat.

record there is not an iota of evidence to support this allegation.

Further, as already remarked, not an inch of land stands in the name of any of the ancestors of Mohammad Zaman in the revenue records relating to the village Bohat. In para. 4 he refers to the deed of 1851, but that deed, as shown above, describes his father as pre-eminently an Arab and then a Gondal. In para. 5 he again refers to Nur Mohammad and Fatteh Mohammad, sons of Rashid, and states that they had been living for one hundred years in Mauza Attawa, Gujrat. This recital, too, is wrong. The period of one hundred years is mentioned only in Ex. P-29 at p. 54 of Vol. I, but that Rashida who is shown to be an absentee and a resident of Mauza Attawa, District Gujranwala, is not the Rashid who is shown in Ex. D-22, pp. 3-7 of Vol. II. Moreover, no person from either Attawa in the District of Gujranwala or Attawa in the District of Gujrat has been produced to show that the alleged ancestors of Mohammad Zaman ever lived in those places. The allegations made by him in paras. 6, 7, 8 and 9 of his application have already been animadverted upon and it will be no use travelling over the same ground again. In paras. 10 and 11 he has made a clear admission that some members of his family claimed to be Qureshis and this lends a good deal of support to the plaintiff's assertion in this case. In para. 13 he has claimed relationship with the Gondals, Tarars and Waraichs, but not a single person has been produced in the present case to show that he is so related. On the other hand the plaintiff has stated on oath that her sister was married to a Qureshi Hashmi and so was her father's sister. The admission, therefore, made by Mohammad Zaman in this application that he is a Jat Gondal carries no weight. Counsel for the respondent has urged in this connexion that inasmuch as Qureshis too had been notified as members of an agricultural tribe in 1904, Mohammad Zaman did not stand in need of establishing his status as a Gondal in 1905 for the purposes of the Land Alienation Act. It is no doubt true that Qureshis were so notified, but inasmuch as Mohammad Zaman had already committed himself too far in claiming to be a member of the Gondal tribe, it appears that being a Government servant he wanted to be consistent and consequently to avoid any suspicion as to the falsity of his claim put forward prior to 1904 he adhered to the old ground.

The admission of the plaintiff in the succession certificate proceedings is equally valueless. The Subordinate Judge has already held against the defendant on that point and in my view his judgment in that respect is not open to any objection. The written statement attributed to Mt. Sharifa Begam in those proceedings was filed on 13th August 1931. It purported to be signed by her as well as by a counsel of the name of Mufti Mohammad Din. Mt. Sharifa Begam states that she was asked to sign a blank paper at two places and that an admission on her behalf was manufactured afterwards. Counsel for the respondent admits that before any instructions were received from Mt. Sharifa Begam the document was drafted by Mufti Mohammad Din Vakil and that that document was subsequently sent by Mohammad Din to Sharifa Begam for her signatures. This Mohammad Din has appeared as D. W. 6 and the account that he has given of how Mt. Sharifa Begam signed the document is most unsatisfactory. He admits that he did not see her. He further states that it was only through a maidservant that instructions were received from Mt. Sharifa Begam and then a document was drafted on the score of those instructions. After writing the document it was again sent to Mt. Sharifa Begam through the same maidservant, and it was she who expressed her mistress's consent to the contents of the document. He does not remember who the maidservant was; he does not even know whether that maidservant is dead or alive; and he further states that he did not go to the house of Mohammad Zaman where Sharifa Begam was on the day when the document is said to have been written.

A similar document was prepared for Mt. Barkat Bibi by the same gentleman which is alleged to have been signed by her at Abbotabad on 10th August. It is in the same ink and the same style of writing and it was consequently on this account that counsel for the respondent was forced to admit that the account given by this lawyer was not strictly in accordance with truth. This lawyer, so far as Barkat Bibi's statement is concerned, does not appear to remember any detail whatever. Further, on the same date when the document was filed in Court, an order was made that the Court would examine Mt. Sharifa Begam personally at her house, but curiously enough on the day following this order was ignored and no statement of Mt. Sharifa Begam

was recorded. Mt. Sharifa Begam was admittedly a pardahnashin lady and at the time when the document is said to have been written she was living with her own brothers. The Senior Subordinate Judge in these circumstances has very rightly remarked that this document appears to have been procured from her by her brothers in circumstances which cannot create an estoppel against her.

Counsel for the respondent has next urged that the onus being on the plaintiff, any deficiency found in the evidence led by him may be allowed to be made up by a remand. This contention is devoid of force. The defendant was fully conscious of the fact that the question whether Mohammad Zaman was a Jat Gondal or not was a most vital question in the case and he not only examined oral evidence on the point, but, as stated above, produced more than 80 documents to substantiate his allegations. In these circumstances, it cannot be said that the defendant was handicapped in any way on account of the onus being on the plaintiff. I have no hesitation, therefore, in holding that it is not established on the record that Mohammad Zaman was a Jat Gondal or that he belonged to any compact village community, or that he was governed by custom and not by Mahomedan law.

Counsel for the appellant has frankly conceded that the appellant is not entitled to any share in her mother's property, inasmuch as the mother had relinquished her claim in favour of her sons during her lifetime. This being so, the plaintiff, in the absence of any other finding against her, will be entitled to succeed only to 7/40ths share of Mohammad Zaman's property and not to 71/240ths share as claimed by her.

Counsel for the respondent has finally urged that at any rate the appellant's suit so far as the moveable property was concerned is time barred and in this connexion reliance has been placed on 50 Cal 610,¹¹ 37 All 434,¹² 32 Cal 527,¹³ 75 I C 953¹⁴ and 9 Beng L R 348.¹⁵ In 50 Cal 610¹¹ it was held by a Division Bench that to a

suit against one of the heirs of a deceased person obtaining succession certificate for the collection of debts due to the estate of the deceased, by the other heirs for the recovery of their share in the money realized by him, Art. 62 applied and not Art. 120 or Art. 123. In 37 All 434¹² a similar decision was given in similar circumstances. In 32 Cal 527¹³ Art. 62 was applied to the suit of a cosharer in a mortgage against the co-mortgagee for his share of the money received by the latter from the mortgagor. In 75 I C 953¹⁴ Art. 62 was held to apply to a suit by a separated member of a joint Hindu family against the other members of the family to recover his share of money due on certain bonds and realised after separation. In 9 Beng L R 348¹⁵ their Lordships of the Privy Council held that the suit by one of the joint creditors against the other creditors for sums received by them in excess of their share was within time. These authorities are clearly distinguishable. In the first two cases the right of the plaintiff was not disputed and in the last three cases the point at issue was different. In fact certain observations made in 32 Cal 527¹³ were criticized in a later judgment of the same Court reported in 50 Cal 475¹⁶ and in the Privy Council case their Lordships came to the conclusion that the suit was not barred considering a document that had been executed between the parties later. In the present case the money had not been recovered by the sons of Mohammad Zaman on behalf of the plaintiff and her suit was really one to establish a right to inherit the property of a deceased person, which, as held by their Lordships of the Privy Council in 21 Cal 157¹⁷ was governed by Art. 120.

But even if it were held that Art. 62 applied, the terminus a quo in that Article is the date when the money is received and in the present case no attempt has been made by the defendant to show when the different items of cash were received. This date has not been proved even in the case of money recovered from the Imperial Bank on the basis of the succession certificate. In the circumstances, it is impossible to hold that the suit instituted by the plaintiff was more than three years after the receipt of the money. There is another

16. ('23) 10 A I R 1923 Cal 379=72 I C 1041=50 Cal 475, Ananta Ram Bhattacharjee v. Hem-chandra Kar.

17. ('94) 21 Cal 157=20 I A 155=6 Sar 374 (P O), Mahomed Riasat Ali v. Hasin Babu.

11. ('24) 11 A I R 1924 Cal 142=74 I C 1010=50 Cal 610=27 C W N 941, Abedunnissa Bibi v. Isuf Ali Khan.

12. ('15) 2 A I R 1915 All 253=29 I C 347=37 All 434=13 A L J 686, Abdul Gaffar v. Nur Jahan Begam.

13. ('05) 32 Cal 527=1 C L J 167, Mahomed Wahib v. Mahomed Ameer.

14. ('24) 11 A I R 1924 All 812=75 I C 953, Bhagwan Das v. Sukhdeo Korle.

15. ('71) 9 Beng L R 348=16 W R 20 (P C), Lootf Ali Khan v. Mt. Afzuloonissa Begam.

aspect of this question which may not be overlooked. Art. 62, as contended by counsel for the respondent, will apply only to those items which were received on the basis of a succession certificate and it is not alleged even by the defendant that any amount other than that recovered from the Imperial Bank was so received. On the ground however that it is not proved when the different amounts of money were received by the sons of Mohammad Zaman, it cannot be held that the plaintiff's suit in respect of these items is time-barred.

Besides, as stated above, the objection on the ground of limitation as then conceived, which was obviously of a different nature altogether, though raised in the pleas was given up before issues as stated by the Senior Subordinate Judge. This clearly disentitles the defendant to rearguing this question at this stage. The record, as it stands, is incomplete and without ascertaining further facts it is impossible to come to a definite finding on this matter and it would be against the express directions of their Lordships of the Privy Council as contained in 10 Pat 654¹⁸ to allow the defendant to lead any further evidence in the case. Holding therefore that Mohammad Zaman was governed by Mahomedan law and that the plaintiff's suit is within time, I would allow this appeal and decree the plaintiff's suit against the defendant to the extent of 7/40th share of Mohammad Zaman's property as admitted by the defendant. In the peculiar circumstances of the case, however, I would leave the parties to bear their own costs throughout.

Bhide J.—I agree.

G.N./R.K.

Appeal allowed.

18. ('31) 18 A I R 1931 P C 143=132 I O 721=58
I A 254=10 Pat 654 (P C), Parsotim Thakur
v. Lalmohar.

A. I. R. 1940 Lahore 485

YOUNG C. J. AND SKEMP J.

*Sher Khan Bher Zaman — Convict
Appellant*

v.

Emperor.

Criminal Appeal No. 698 of 1940, Decided on 21st June 1940, from order of Sess. Judge, Mianwali, D/- 26th April 1940.

Penal Code (1860), Ss. 302 and 34 — Shooting in revenge for insult — Accused member of shooting party of three firing but hitting none of opponents — His companions firing and killing deceased — S. 34 applies — Accused is guilty of murder.

The party of the accused consisting of three resorted to shooting the opponents in revenge for an insult of which the brother of the deceased was originally guilty. The accused did not hit any of his opponents himself although he fired but his two companions fired and killed the deceased :

Held that S. 34 applied and the accused was guilty of murder. But sentence of death should be reduced to one of transportation for life.

[P 486 C 1, 2]

Jamil Asghar — *for Appellant.*

R. C. Soni for Advocate-General —
for the Crown.

Skemp J.—Sher Khan, a Pathan of Chidru, has been convicted of murder by the learned Sessions Judge, Mianwali, and sentenced to death. He has appealed through jail, being represented in this Court by Mr. Asghar, while the Crown is represented by Mr. R. C. Soni. The sentence of death is also before us for confirmation. The murder in question was committed as long ago as 14th November 1938. Sher Khan was not apprehended till September 1939. The parties are Pathans of Chidru, a village in the police station of Musakhel in the Mianwali District. The affair took place on account of insults and counter-insults to the women of the various parties. The prosecution witnesses and the accused are nearly all related to each other more or less distantly.

The case for the prosecution is as follows: Eight days before the occurrence, Pathani, wife of Khan Mohammad, received an insulting offer from Muzaffar Khan. Muzaffar Khan met Pathani alone and wished to have sexual intercourse with her. She refused and told her husband. Five days later, that is, three days before the murder, Khan Mohammad, the husband of Pathani, met the wife and sister-in-law of Muzaffar Khan and by way of revenge made insulting counter-suggestions to them, so that they went away weeping and told their husbands. Khan Mohammad then thought it prudent to go to a relation of his, named Mohammad Khan, at a neighbouring village called Wandah Hathikhelanwala. There he remained till the day of the murder, 14th November 1938. Early that morning with his relation he came back home and found that his brother Sultan and cousin Gul Sher were at the threshing floor. There he went and after a short time these three were attacked by seven persons of whom Muzaffar Khan, Khalil Khan and Sher Khan were armed with guns, the others with spears. Khalil Khan had a gilti gun or rifle while Sher Khan and

Muzaffar had, twelve bore guns. According to eye-witnesses for the prosecution, all three fired but hit nobody. Then Sher Khan accused fired, the pellets going through Khan Mohammad's clothes. Khan Mohammad turned round and Khalil Khan fired and hit him, so that he fell down. Sultan was then followed by Muzaffar Khan who fired at and killed Sultan. This took place at the morning meal time and the matter was reported at the police station, distant six miles, at 2-30 P. M. by Khan Mohammad, who made a detailed report which fully corroborates the case as subsequently developed in the Sessions Court. All the seven persons mentioned in the first information report, except Sher Khan, were apprehended and committed to Sessions. The learned Sessions Judge convicted Muzaffar Khan and Khalil Khan and sentenced them to death. He gave the other four the benefit of the doubt and acquitted them. The appeals of Khalil Khan and Muzaffar Khan were dismissed and the sentences confirmed by a Bench of this Court consisting of Tek Chand and Abdul Rashid JJ. Sher Khan was arrested subsequently. The learned Sessions Judge has relied on three of the eye-witnesses, Khan Mohammad, Gul Sher and Mohammad Khan. He has pointed out that Khan Mohammad's story that Sher Khan fired at him—the pellets passing through his clothes only—is corroborated by the circumstance that Khan Mohammad's clothes bore pellet marks.

Mr. Asghar, the learned counsel for the appellant, has suggested that according to the prosecution Sher Khan was armed with a shotgun but when he was arrested he was found in possession of a gilti rifle. But he was not arrested until some ten months later. In my opinion, the evidence of the three eye-witnesses already mentioned proves that Sher Khan was one of the party which fired at Mohammad Khan, Sultan and Khan Mohammad. The learned Sessions Judge was of opinion that five persons were included in this party. In that case S. 149, I. P. C., would apply. In any case, if there were only these three, S. 34 would apply and Sher Khan is liable for the acts committed by his companions including the homicide of Sultan. He is therefore guilty of murder and the conviction under S. 302 is maintained.

As to sentence, according to the prosecution itself Sher Khan did not hit any of his opponents himself although he fired. The shooting was in revenge for an insult,

of which Khan Mohammad, brother of the deceased, was originally guilty. In the circumstances, I do not think it necessary to confirm the sentence of death but would pass the lesser sentence of transportation for life. The convictions under Ss. 307/149 and under S. 148 are altered to convictions under Ss. 307/148, I. P. C., and the sentences maintained. They will run concurrently with the principal sentence.

Young C. J. — I agree.

G.N./R.K.

Order accordingly.

* A. I. R. 1940 Lahore 486

TEK CHAND AND BHIDE JJ.

Om Parkash — Plaintiff — Appellant.

v.

Mukhtar Ahmad — Defendant —

Respondent.

Letters Patent Appeal No. 120 of 1939, Decided on 29th May 1940, from judgment of Sale J., in S. A. No. 76 of 1939, D/- 10th May 1939.

(a) Civil P. C. (1908), S. 100 — Question of law—Document being one of title and foundation of suit—Its construction is question of law.

Where a deed is the document of title in the case and is the foundation of the suit, the construction of such a document is a question of law, which can be raised in second appeal: *Case law referred.* [P 487 C 2]

(b) Mortgage — Simple — Characteristics of simple mortgage stated—Personal obligation to repay is implicit in simple mortgage.

The characteristics of a simple mortgage are: (1) that there must be a loan; (2) that the mortgagor must have bound himself personally to repay the loan; (3) that to secure the loan he has transferred to the mortgagee the right to have specific immovable property sold, in the event of his having failed to repay; and (4) that possession of the property has not been, and is not to be transferred to the mortgagee during the pendency of the mortgage. These stipulations may be express, or they may appear by necessary implication from the terms of the particular transaction. Thus, a promise to pay necessarily arises out of the acceptance of a loan and it need not be stated in so many words in the deed. It is implicit in the transaction itself that the obligor is under a personal liability to repay, unless this liability is excluded by the terms of the contract, expressly or impliedly, as for example in the case of a usufructuary mortgage or a mortgage by conditional sale, where the agreement is to repay out of a particular property or fund alone and in a particular manner: *A I R 1916 P C 119; A I R 1932 Lah 164, Rel. on; 10 Cal 740 (P C) and 22 Cal 434 (P C), Disting.* [P 489 C 1]

* (c) Registration Act (1908), Ss. 17 and 49 — Unregistered simple mortgage bond is admissible to obtain money decree.

In a simple mortgage the personal covenant to pay is distinctly divisible or separable from its hypothecation clauses and so regarded the bond is clear evidence of the debt. Hence, though a simple

mortgage bond creating charge on immovable property worth over Rs. 100 is unregistered the bond is admissible in evidence to support mortgagee's claim for a money decree : *Case law reviewed.*

[P 491 C 1, 2; P 492 C 1]

Aohhru Ram — *for Appellant.*

Barkat Ali — *for Respondent.*

Tek Chand J. — The suit which has given rise to this appeal was instituted by the plaintiff-appellant against the defendant-respondent for recovery of Rupees 1057-15-0, on the allegation that on 4th April 1936 the defendant had borrowed Rs. 1000 in cash from the plaintiff at Lahore agreeing to repay on demand the amount together with interest at 5 annas per cent. per mensem; that in order to secure the amount he had further agreed to hypothecate a house situate at Miani, District Shahpur; that the defendant then actually executed a document (Ex. P-1) in which the above facts were recited, and undertook to have it registered in the Shahpur district, where the house was situate, but subsequently he declined to have this done, and for this reason no charge was actually created on the house. The plaintiff averred that he had made several demands for repayment of the amount advanced and the interest, but the defendant had failed to pay. He accordingly prayed that a decree for Rs. 1000 as principal and Rs. 57-15-0 as interest be passed against the defendant. The defendant denied the plaintiff's claim. He admitted execution of Ex. P-1, but alleged that he did not receive the consideration. He further pleaded that the document, Ex. P-1, was a mortgage deed affecting immovable property, worth more than Rs. 100 in value, and being unregistered was not admissible in evidence for the purpose of supporting the plaintiff's claim for a money decree. He also denied that he had agreed to pay interest to the plaintiff.

The trial Judge found that Rs. 1000 had in fact been paid in cash by the plaintiff to the defendant. But he held that Ex. P-1 was inadmissible in evidence even for enforcing a claim for the amount advanced against the defendant personally, as this liability was indivisible from the transaction of the mortgage. On this finding, he dismissed the suit. The plaintiff appealed to the District Judge, who also came to the same conclusion. He held that the deed, Ex. P-1, contained no contract on behalf of the mortgagor to make himself personally liable for the mortgage money, apart from the property which was sought to be mortgaged and therefore it was inadmissible in

evidence to support a claim for a money decree. He accordingly dismissed the appeal without coming to any finding on the issues relating to consideration or interest.

On second appeal before a Single Bench of this Court, the question of the interpretation of Ex. P-1 was raised, and it was contended that on a true construction of the deed the transaction was divisible in the sense that the personal obligation to repay the money could be separated from the transaction of mortgage. But the learned Judge held that the interpretation of Ex. P-1 was not a matter which could be raised in second appeal. He observed that this question was concluded by the finding of fact recorded by the District Judge that upon a proper construction of the document the transaction was indivisible and did not contain a personal covenant to repay the loan. He then held that as the deed related to a single and indivisible transaction with a covenant that the mortgage money was recoverable from immovable property, over Rs. 100 in value, and as it was unregistered, it was inadmissible to prove the loan and therefore no money decree could be passed. In support of this proposition, the learned Judge relied upon 4 Cal 83,¹ 60 P R 1880,² 89 P R 1880,³ 17 P R 1881,⁴ 131 P R 1883⁵ and 92 P R 1890.⁶ He, accordingly, affirmed the decision of the Courts below dismissing the suit. On an application by the plaintiff, however, he granted a certificate for a further appeal under Cl. 10, Letters Patent.

The most important question in the case is the determination of the real nature of the transaction between the parties, as embodied in Ex. P-1 and therefore the decision of the case depends upon its construction. Admittedly, Ex. P-1 is the document of title in this case. It is the foundation of the plaintiff's suit, and it is well settled that the construction of such a document is a question of law, which can be raised in second appeal. In 19 W R 322⁷ it was held by Sir Richard Couch C. J. of Calcutta, as far back as 1873, that the misconstruction of a document, which is the

1. ('79) 4 Cal 83=2 C L R 428, *Mattongeny Dossee v. Ramnarain Sad Khan.*

2. ('80) 60 P R 1880, *Thakur Das v. Fatte Khan.*

3. ('80) 89 P R 1880, *Jai Sukh v. Mahomed Khan.*

4. ('81) 17 P R 1881, *Chuhar v. Wazira.*

5. ('83) 131 P R 1883, *Fatteh Singh v. Mian Singh.*

6. ('90) 92 P R 1890, *Ghansham Das v. Hem Raj.*

7. ('73) 19 W R 322=11 Beng L R 434 (FB), *Chander Coomar v. Namni Khanum.*

foundation of a suit, or which is in the nature of a contract or a document of title, is a good ground for second appeal; but a second appeal does not lie merely because some portion of the evidence is in writing and a mistake has been made as to its meaning. This has been followed in numerous cases in various High Courts: *see inter alia* 1 I C 530,⁸ 10 I C 325,⁹ 24 I C 87,¹⁰ 42 Bom 344,¹¹ 52 I C 119,¹² A I R 1929 Lah 38,¹³ A I R 1929 Lah 833,¹⁴ A I R 1930 Lah 139,¹⁵ A I R 1930 Lah 691,¹⁶ A I R 1934 Lah 35,¹⁷ A I R 1934 Lah 193,¹⁸ A I R 1939 Lah 264¹⁹ and 182 I C 982.²⁰ It must, at the same time, be stated that there are cases in which the distinction has not always been kept in view. The matter however is concluded by recent pronouncements of their Lordships of the Privy Council.

In 34 All 579²¹ the lower Appellate Court, on a construction of the *wajib-ul-arz* and other documentary evidence, had held that the plaintiffs were proprietors of the land. On second appeal to the High Court, it was sought to be contended that the Court was bound to accept this finding as conclusive, the question being one of fact; but the High Court rejected the contention and held that on a true construction of the documents the plaintiffs were tenants of the land and not proprietors as found by the lower Appellate Court. Their Lordships, in affirming this decision, held that the Subordinate Judge's decision had been

arrived at by inferences drawn from a misconstruction of the *wajib-ul-arz*; and that "the right construction of documents was a question of law" which the Court on second appeal was not precluded from considering. Again, in 29 C W N 131,²² Lord Sumner, in delivering the judgment of the Judicial Committee, emphasized the distinction between "documents which were instruments of title or otherwise the direct foundation of rights" and those which were "really historical materials." He observed that when the question to be decided was one of fact, it did not involve an issue of law merely because documents, which were not instruments of title or otherwise the direct foundation of rights, had to be construed for the purpose of deciding the question. This proposition was reaffirmed by another Board of the same high tribunal in the well-known case in 11 Lah 199²³ (at p. 207) in which the scope of S. 100, Civil P. C., was more fully discussed. In 11 Lah 199²³ their Lordships cited with approval the rule laid down by Sir Richard Couch C. J. in 19 W R 322,⁷ to which reference has been made above.

In view of this authoritative statement of the law and having regard to the fact that in the case before us, Ex. P-1 is the foundation of the suit, Mr. Barkat Ali for the respondent frankly conceded that its construction is a question of law which could be raised in second appeal and should have been decided by the learned Judge. Turning to the document, we find that in heading it is described as an "*ar rahn nama*" (simple mortgage deed). After giving the name and particulars of the executant and describing in detail the house owned by him, it is expressly stated that in lieu of the sum of Rs. 1000, which the executant had already received from the plaintiff, he had transferred the property as *ar rahn ya'ni bila qabza* (by way of simple mortgage, i. e. without possession). The executant then stipulates to pay the amount borrowed, together with interest thereon at 5 annas per cent. per mensem, *indultalab yak musht* (in one lump sum, on demand by the mortgagee), on payment of which the house would be redeemed. Lastly, there is the clause that in case the plaintiff was unable to realize the amount due by sale of

8. ('09) 1 I C 530=9 C L J 623, Dursan Singh v. Durbejoy Singh.
9. ('11) 10 I C 325=13 C L J 418=15 C W N 752, Buzlal Karim v. Satish Chandra.
10. ('14) 1 A I R 1914 Mad 685=24 I C 87, Palaniandi Chetty v. Kambaraya Chetty.
11. ('18) 5 A I R 1918 Bom 158=46 I C 734=42 Bom 344=20 Bom L R 654, Vithoba Madhav v. Madhav Damodar.
12. ('19) 6 A I R 1919 Pat 334=52 I C 119, Rudreshwari Prasad Singh v. Dhana Mahto.
13. ('29) 16 A I R 1929 Lah 38=115 I C 77, Dayal Singh Harnam Singh v. Beli Ram Nathu Ram.
14. ('29) 16 A I R 1929 Lah 833=120 I C 420, Ali Ahmad v. Khan Mahammad.
15. ('30) 17 A I R 1930 Lah 139=123 I C 593, Abdul Latif v. Rahmatullah.
16. ('30) 17 A I R 1930 Lah 691=125 I C 610, Allah Ditta v. Khuda Bakhsh.
17. ('34) 21 A I R 1934 Lah 35=149 I C 934, Ram Diyal v. Darbari Ram.
18. ('34) 21 A I R 1934 Lah 193=149 I C 1016=36 P L R 98, Kanshi Nath v. Chakar Dhar.
19. ('39) 26 A I R 1939 Lah 264=41 P L R 326, Hans Raj v. Tulsi.
20. ('39) 26 A I R 1939 Pat 364=182 I C 982=20 P L T 677, Ram Ranbijaya Prasad Singh v. Krishna Madho Singh.
21. ('12) 34 All 579=16 I C 67=39 I A 247=10 A L J 335 (P C), Fateh Chand v. Kishen Kaur.

22. ('23) 10 A I R 1923 P C 187=74 I C 482=29 C W N 131 (P C), Midnapur Zamindari Co. Ltd. v. Uma Charan Mandal.
23. ('30) 17 A I R 1930 P C 91=122 I C 316=57 I A 86=11 Lah 199 (P C), Wali Muhammad v. Mohammad Bakhsh.

the house mentioned above, or because of any defect in his title, the person and other property of the executant would be liable for the balance. These terms show unmistakably that the transaction was in fact, what it was described to be, namely that of a simple mortgage. In S. 58 (a), T. P. Act, 'mortgage' is defined as follows:

A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced, or to be advanced, by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability.

Clause (b) of this section contains the definition of a "simple mortgage":

Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary in payment of the mortgage money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

The characteristics of a "simple mortgage," thus, are (1) that there must be a loan; (2) that the mortgagor must have bound himself personally to repay the loan; (3) that to secure the loan he has transferred to the mortgagee the right to have specific immovable property sold, in the event of his having failed to repay, and (4) that possession of the property has not been, and is not to be, transferred to the mortgagee during the pendency of the mortgage. These stipulations may be express, or they may appear by necessary implications from the terms of the particular transaction. Thus a promise to pay necessarily arises out of the acceptance of a loan and it need not be stated in so many words in the deed. It is implicit in the transaction itself that the obligor is under a personal liability to repay, unless this liability is excluded by the terms of the contract, expressly or impliedly, as for example in the case of a usufructuary mortgage or a mortgage by conditional sale, where the agreement is to repay out of a particular property or fund alone and in a particular manner. This matter is now concluded by the highest authority. In 44 Cal 388²⁴ their Lordships of the Privy Council laid down the following propositions: (a) that a 'loan' prima facie involves a personal liability; (b) that such a liability is not displaced by the mere fact that security

24. (16) 3 A I R 1916 P C 119=38 I C 932=44 I A 87=44 Cal 388 (PC), Ram Narayan Singh v. Adhindra Nath.

is given for the repayment of the loan with interest; (c) but that the nature and terms of such security may negative any personal liability on the part of the borrower. As explained by Dalip Singh J., while delivering the judgment of the Division Bench in 13 Lah 259²⁵ at p. 266:

"In all mortgages a personal covenant to repay the mortgage must be presumed unless there is something in the nature and the terms of the mortgage deed to negative it. Of the various kinds of mortgages enumerated in S. 58, T. P. Act, two, namely a 'simple mortgage, and an 'English mortgage' necessarily connote that the mortgagor binds himself to repay the mortgage money. In the other four forms, namely 'mortgage by conditional sale,' usufructuary mortgage,' 'mortgage by deposit of title-deeds' and 'anomalous mortgage,' the Court would not necessarily come to any conclusion by deciding the nature of the deed as to whether there was, or was not, a personal liability. The terms of the deed will have to be examined and ultimately determined whether the personal liability has been, or has not been enforced."

It will be seen that the transaction described in Ex. P-1 contains all the characteristics of a simple mortgage. There is nothing in its terms which excluded the personal liability of the mortgagor, which is implicit in every transaction of simple mortgage. Nor is it stated that the obligee must look to the mortgaged house alone for recovery of his money. On the other hand, the personal obligation of the executant is clear from the undertaking to pay the money (*indul talab*) "on demand" by the mortgagee. It is further emphasized that this liability would subsist even after the house has been sold, if the sale proceeds are found to be insufficient to discharge the amount due as principal and interest. Mr. Barkat Ali referred us to two decisions of their Lordships of the Privy Council and urged that the plaintiff could not maintain the suit for a personal decree against the defendant. The facts of both these cases were however materially different. In 10 Cal 740²⁶ a taluqdar the management of whose taluq at the time, was vested in an officer under the Oudh Taluqdars' Relief Act, had made an instrument purporting to hypothecate the taluq to secure payment of money borrowed by him. On an examination of the terms of the instrument their Lordships held that the contract was to pay out of the hypothecated estate alone and there was no co-

25. (32) 19 AIR 1932 Lah 164=135 IC 33=13 Lah 259=33 P L R 586, Parsram v. Brij Mohan.
26. (84) 10 Cal 740=11 I A 83=4 Sar 522 (PC), Narotam Dass v. Sheo Pargash Singh.

venant to pay out of his personal property. The facts of the other case, 22 Cal 434,²⁷ are still more dissimilar. In that case their Lordships reiterated the general rule that an unqualified admission of a debt implies a promise to pay, but such a promise may be negated by an express promise appearing in a subsequent part of the deed to pay the amount in a particular manner and on the happening of a certain event. On an examination of the terms of the particular document before them, they found that the agreement was to repay the loan out of a particular fund and in a particular manner and that there was no personal obligation which could be separately enforced against the obligor.

The other cases cited by Mr. Barkat Ali, 3 I C 871²⁸ and 39 I C 849,²⁹ are equally inapplicable. In both of them the transactions in dispute were held to be mortgages by way of conditional sale, in which there can be no personal liability on the part of the mortgagor. This is not so in the case before us. Here the transaction is one of simple mortgage, which contained a personal covenant to pay as well as purported to create a charge on immovable property, admittedly over Rs. 100 in value. For the latter purpose, the document required to be compulsorily registered under Sec. 17, Registration Act, and, being unregistered, it cannot, as laid down in Sec. 49 of the same Act, be received as evidence of any transaction affecting such property. But that Section does not say that it is inadmissible in evidence even for the purpose of enforcing the personal covenant, which in a transaction of simple mortgage is separable and divisible. In this connexion reference may be made to 3 All 229,³⁰ which has been described as the leading case on the subject. In that case, as in that before us, the plaintiff sued to recover money on an unregistered hypothecation bond. The consideration had been received in cash, the obligor had agreed to repay the amount with interest within one year, and had also hypothecated immovable property as collateral security. The plaintiff did not seek to enforce the hypothecation contained in the bond for the reason that it was unregistered, but merely asked for a money-decree.

The defendant pleaded that the bond, being unregistered, was inadmissible in evidence even to enforce the personal obligation. The Full Bench repelled the contention and held that

in such cases the personal covenant in the bond is distinctly divisible or separable from its hypothecation clauses and, so regarded, the bond is clear evidence of the debt.

Two years later, the same question came up for consideration before a Full Bench of five Judges of the Calcutta High Court in 9 Cal 520.³¹ There, also, an unregistered hypothecation bond recited that Rs. 2600 had been received in cash at the time of the execution of the bond, that the obligor would "pay the amount peaceably" within a year; failing which the obligee would be entitled to sell the hypothecated property and then proceed against the other property of the obligor. The suit was for a simple money decree for the principal and interest. The Full Bench held that the bond, though unregistered, could be used in evidence to enforce the personal obligation. This ruling was followed in Madras in 15 Mad 253³² where a simple mortgage had been created by an unregistered bond and the agreement was to re-pay the amount on demand, failing which the mortgagee was entitled to bring the mortgaged property to sale. It was held that the mortgagee was entitled to sue on the personal covenant and obtain a personal decree. Similarly, in 20 Bom 553³³ at page 557, it was laid down that an unregistered bond for Rs. 100, or upwards, may be admissible in evidence to prove the simple debt or a personal obligation, though it is inadmissible to prove any right to immovable property. To the same effect are the decisions of the Rangoon High Court in 126 I C 655³⁴ and 153 I C 56.³⁵

That the personal covenant to repay is implicit in such transactions, and is separable and divisible from the charge created on the property, is the foundation of the decisions in another class of cases in which it has been held that where a document, which purported to be a mortgage but was not a mortgage owing to non-compliance with certain provisions of the law was admissible to prove the personal covenant to pay. It was held that the failure to comply with the

27. ('95) 22 Cal 434=22 I A 68 = 6 Sar 545 (PC), *Kalka Singh v. Paras Ram*.

28. ('09) 12 O C 275=3 I C 871, *Kuraishi Begam v. Mumtaz Mirza*.

29. ('16) 3 A I R 1916 Nag 120=39 I C 849 = 13 N L R 69, *Raghunath v. Sheolal*.

30. ('80) 3 All 229 (FB), *Sheo Dial v. Prag Dat*.

31. ('83) 9 Cal 520 = 12 C L R 209 (F B), *Ulfatunnisa v. Husain Khan*.

32. ('92) 15 Mad 253, *Gomaji v. Subbarayappa*.

33. ('96) 20 Bom 553, *Vani v. Bani*.

34. ('30) 17 A I R 1930 Rang 142 = 126 I C 655, *Maung Po Din v. Mg. Tha Saing*.

35. ('34) 21 A I R 1934 Rang 196 = 153 I C 56, *Motiram v. Daw Hnin E*.

statutory provisions could have no further effect than to invalidate the intended transfer of immovable property; it did not affect the validity of the contract to pay the debt: 30 Mad 284³⁶ and 32 Mad 410.³⁷ Another instance of the recognition of this principle will be found in cases like 48 Cal 509³⁸ where registration of a document was held to be invalid as registration had been effected in a district where no part of the property really sought to be mortgaged was situate. The document was therefore held to be inadmissible to support a claim on the basis of the mortgage transaction comprised in it but at the same time their Lordships recognized that the creditor could maintain "the alternative claim for a personal judgment for the mortgage debt" and they remanded the case to the High Court for investigation of the plea of limitation and other defences to this claim. This was followed by the Madras High Court in 46 Mad 435³⁹ where the facts were similar. In these cases the personal covenant which exists in every transaction of mortgage, was taken to be separable and divisible from the mortgage and the deed held admissible to prove it. In support of their decision to the contrary, the Courts below have relied principally upon 4 Cal 83¹ which has been described as the "basic ruling" on the subject. The terms of the document in question in that case were very peculiar and the learned Judges observed that it was

doubtful whether having regard to the terms of the loan the defendant was personally liable for the money and whether the only remedy of the plaintiff was not against the mortgaged property.

They observed that the document disclosed that the intention of the parties, in any case, appeared to be that the money was to be realized in the first instance from the property. Therefore they held that the loan and the pledge could not be separated and the transaction was not divisible in its nature. This case is therefore no authority for the broad proposition that, in the absence of a clear stipulation to the contrary, a transaction of a simple mortgage must be taken to be single and indivisible, and, consequently, the document held to be inad-

missible not only to affect immovable property but also to support a claim for recovery of the money from the obligor. As pointed out in 3 All 229³⁰ at pp. 232-3 by Straight J., 4 Cal 83¹ must be taken to have been decided on "the special language of the document involved in the suit before the Court." Indeed, it could not have been the intention of the learned Judges who decided 4 Cal 83¹ to lay down any such general proposition for (as pointed out in 5 Cal 611⁴⁰ at p. 613), they themselves in their judgment had distinguished the case before them because of the peculiar terms of the document, from the earlier Full Bench ruling of their own Court in 4 Beng L R 18⁴¹ where it had been held by Sir Barnes Peacock C. J. (with the concurrence of four other Judges), that an unregistered hypothecation bond, though inadmissible under S. 49 of Act 20 of 1866, affecting an interest in the land, was admissible to support a suit for recovery of money due on the bond. In 11 C L R 166⁴² at p. 167 another Division Bench of the Calcutta Court took the same view of 4 Cal 83;¹ and the matter appears to have been put beyond doubt by the Full Bench in 9 Cal 520,³¹ where Sir Richard Garth C. J., (who had delivered the judgment in 4 Cal 83¹) re-affirmed the Full Bench decision in 4 Beng L R 18,⁴¹ holding that no change in the law had been effected by the amendment made in S. 49 by Act 3 of 1877, and ruled that an unregistered bond containing a personal undertaking to repay the money borrowed and also a hypothecation of land above Rs. 100 in value as security may be used in evidence to enforce a personal obligation.

In the Punjab, the earliest reported case is 40 P R 1874,⁴³ in which it was held, in general terms, that though an unregistered deed of mortgage cannot be received in evidence to affect the property mortgaged, it is receivable in evidence to prove the debt for the purpose of granting a money decree. This rule appears to have been modified in some cases decided in the early eighties after the decision in 4 Cal 83.¹ The judgments in these cases are brief and the exact terms of the documents under consideration are not set out in detail. It is possible that the particular transactions were similar to that in 4 Cal 83,¹ and therefore the deci-

36. ('07) 30 Mad 284=17 MLJ 167, Saddu Kaur v. Tadepally Basaviah.

37. ('09) 32 Mad 410=1 I C 1=19 MLJ 584 (FB), Kunhu Moldu v. Madhava Menon.

38. ('21) 8 A I R 1921 P C 8=63 I C 770=48 I A 127=48 Cal 509 (P C), Mathura Prasad v. Ohandra Narayan.

39. ('28) 10 A I R 1928 Mad 447=73 I C 188=46 Mad 485=44 MLJ 373, Rama Rao v. Vedayya.

40. ('80) 5 Cal 611=5 C L R 43, Kirshto Lall v. Bonomalee Roy.

41. ('69) 4 Beng L R 18=12 WR 11 (FB), Lachmi-pat Singh v. Mirza Khairat Ali.

42. ('82) 11 C L R 166, Gour Churn v. Jinnut Ali.

43. ('74) 40 P R 1874, Bishen Singh v. Sunder.

sions proceeded on their special terms. An examination of the judgments however discloses that a distinction was drawn between (1) cases in which the deed contained either an acknowledgment of a pre-existing debt or a distinct and formal undertaking to repay the loans, and (2) those in which the deed merely recited that immovable property had been given as security for the debt. In the former class of cases it was held that the personal obligation was divisible and that a claim for a money decree could be maintained on the deed : 88 P R 1880,⁴⁴ 80 P R 1881⁴⁵ and 10 P R 1883.⁴⁶ In the latter class, however, it was laid down that the unregistered bond was not admissible, as in the absence of clear words to this effect the transaction mentioned must be taken to be a "mortgage and mortgage only;" it could not be said that "it comprised two distinct transactions—one the mortgage and the other a personal undertaking to pay": 60 P R 1880,² 89 P R 1880,³ 17 P R 1881⁴ and 131 P R 1883.⁵ This distinction however has not been recognized in subsequent rulings (*see e. g.*, 87 I C 609⁴⁷) and if I may say so with respect it can no longer be maintained in view of the pronouncements of the Privy Council already referred to, that every loan involves a promise to repay and that such a liability is not displaced by the mere fact that security is given for its repayment with interest, unless the nature and terms of such security negative any personal liability on the part of the borrower.

In the case before us there is nothing in Ex. P-1 which expressly or by necessary implication excludes the personal obligation of the defendant. On the other hand, as shown above, this obligation is recognized in the stipulation to repay the amount borrowed "on demand" (*indul-talab*) and is re-affirmed in the succeeding clauses. It must therefore be held that Ex. P-1 is admissible in evidence to support the plaintiff's claim for a money decree. I would accordingly accept this appeal, set aside the judgment of the learned Judge in Single Bench, and remand the case to the District Judge for decision of the issues as to consideration and interest which he had left undecided. Court-fee on this appeal as well as on the appeal before the Single Bench

44. ('80) 88 P R 1880, Muhammad Khan v. Jaisukh.

45. ('81) 80 P R 1881, Khuddu Mal v. Kunji Lal.

46. ('83) 10 P R 1883, Prem Singh v. Mula Mal.

47. ('25) 12 A I R 1925 Lah 356 = 87 I C 609, Basant Lal v. Jowahir Singh.

shall be refunded; other costs shall be costs in the cause. Counsel have been directed to cause their clients to appear before the District Judge, Shahpur (at Sargodha), on 24th June 1940 when a date for the hearing of the appeal will be fixed.

Bhide J. — I agree.

D.S./R.K.

Order accordingly.

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BHIDE AND DIN MOHAMMAD JJ.

Sardar Dhanwant Singh

v.

Sant Lal, Decree-holder, and another.

First Appeal No. 180 of 1939, Decided on 18th April 1940.

(a) Grant — Punjab — Conquest Jagir — Indication.

The term "Conquest Jagir" does not indicate any political services rendered to the British Government. [P 493 C 1]

(b) Grant — Punjab — Cis-Sutlej Jagirs and Conquest Jagirs are not analogous.

The Cis-Sutlej Jagirs cannot be treated as analogous to the "Conquest Jagirs" in the tract between the Beas and the Sutlej. [P 493 C 2]

(c) Pensions Act (1871), S. 11 — "Pension" implies periodical payments of money—Jagir is not pension.

The term 'pension' as used in the Pensions Act implies 'periodical payments of money to the pensioner.' A jagir cannot be held to be pension within the meaning of the Pensions Act : A I R 1931 P C 160, *Rel. on.* [P 493 C 2]

Harnam Singh and Harbans Singh —
for Appellant.

Achhru Ram and Chandar Gupta —
for Respondent 1.

Bhide J. — This was a suit by Sardar Dhanwant Singh, a Jagirdar of Moron in the Jullundur District, for a declaration that a 'Qila' described in the plaint, is part of the jagir granted by the British Government to his ancestors for political services and was therefore not liable to be attached and sold in execution of a decree of Sant Lal, defendant 1, against Sardar Balwant Singh (defendant 2), father of the plaintiff. The contesting defendant Sant Lal denied that the Qila was a part of a Government Jagir. The trial Court has found the issue against the plaintiff and dismissed his suit. From this decision, plaintiff has preferred this appeal. The only points which arise for decision in this appeal are (1) whether the Qila in question is a part of a jagir granted for political services as alleged in the plaint and (2) if so, whether it is liable to be attached and sold.

The plaintiff's evidence shows that his ancestor Sahaj Singh, who had conquered

a small tract of land near Moron became a vassal of Maharaja Ranjit Singh and was granted a muafi by him. On the establishment of British rule in the Punjab, muafi of certain villages including Moron was continued to the descendants of Sahaj Singh, but there is nothing on the record to show that the muafi was granted in lieu of any political services rendered to the British Government. The learned counsel has relied chiefly on the fact that the jagir is described as a 'Conquest Jagir.' It would appear however from paras. 85 and 87 of Douie's Land Administration Manual that jagirs in trans-Sutlej States (i. e. the territory under Maharaja Ranjit Singh towards the west of the river Sutlej which was ceded by the Lahore Durbar in 1846) which the existing holders had won by their swords before Maharaja Ranjit Singh established his ascendancy, were known as 'Conquest Jagirs.' The term 'conquest Jagir' does not thus indicate any political services rendered to the British Government. Secondly, all that the ancestors of the plaintiff were granted in lieu of the muafi enjoyed by them under Maharaja Ranjit Singh was an assignment of land revenue of certain villages (including Moron). There is no documentary evidence whatever to show that the Qila in dispute was a part of the Jagir, and the oral evidence on the point of a few witnesses whom the plaintiff has produced and who have no personal knowledge about the matter is obviously of no value whatever. The learned counsel for the appellant has further relied on a circular letter (Ex. P. W. 4/1) dated 26th February 1857 from the Officiating Commissioner and Superintendent, Cis-Sutlej States, to the Deputy Commissioner, Ludhiana, in which it was stated that all proprietary rights to any part of the land forming part of a Jagir, which may be held by a Jagirdar will be considered as pertaining to the Jagir and will go to the holder of the Jagir for the time being.

This letter relates to Cis-Sutlej jagirs and the learned counsel relied on it simply by way of analogy. But there is really no analogy between the Cis-Sutlej Jagirs and the 'Conquest Jagirs' in the Jullundur District. It would appear from the history of the Cis-Sutlej Jagirs given in para. 102 of Douie's Land Administration Manual that these Cis-Sutlej Jagirs stand on a very different footing. The holders of these Jagirs were descendants of persons who were independent rulers, who had come under the protection of the British Government, with

a guarantee, that they would remain in the exercise of their rights and their authority, while the holders of 'Conquest Jagirs' in the tract between the Beas and the Sutlej, whether originally independent or not, were the subjects of the Rajas of Lahore, before they came under the British rule. It follows, therefore, that the Cis-Sutlej Jagirs cannot be treated as analogous to the 'Conquest Jagirs' in the tract between the Beas and the Sutlej, under which category the plaintiff's father's Jagir falls. For the same reason, certain judgments relating to Cis-Sutlej Jagirs, which the plaintiff has produced, cannot help him.

It is significant that the plaintiff has not been able to produce any instructions regarding 'Conquest Jagirs' similar to those relating to Cis-Sutlej Jagirs, contained in Ex. P. W. 4/1. Moreover, even if any such executive instructions had been issued in 1858, it is doubtful, if they could have helped the plaintiff in any way. The question whether the property in dispute is liable to attachment and sale in execution of a decree has now to be decided on the basis of the statutory law in force and not of any executive instructions which may have issued in 1858. The appellant's contention was that the Qila in question falls under the term 'pension' as used in the Pensions Act, 1871, and is, therefore, exempt from attachment and sale under Sec. 11, Pensions Act. But it has been held by their Lordships of the Privy Council in 59 Cal 1¹ that the term 'pension' as used in the aforesaid Act implies 'periodical payments of money to the pensioner'. I have already stated above that it has not been shown at all that the Qila in dispute is a part of the Jagir granted to the plaintiff's ancestors and the appeal is liable to be dismissed on this ground alone; but, even if it were part of that jagir, it would appear from the above-mentioned decision of their Lordships of the Privy Council, that it could not be held to be a pension within the meaning of the Pensions Act. It is not suggested that the Qila would be exempt from attachment and sale under any other provision of statutory law in force at present. There seems to be no force in this appeal and it must accordingly be dismissed with costs.

Din Mohammad J. — I agree.

G.N./R.K.

Appeal dismissed.

1. Wasif Ali v. Karnani Industrial Bank, Ltd.
(31) 18 A I R P C 160=132 I C 727=58 I A
215=59 Cal 1 (P.O.)

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ABDUL RASHID AND RAM LALL JJ.

Amar Singh Kirpa Singh—Convict
Appellant

v.

Emperor.

Criminal Appeal No. 215 of 1940, Decided on 7th June 1940, from order of Addl. Sess. Judge, Amritsar, D/- 23rd January 1940.

Penal Code (1860), S. 302 — Cold blooded and brutal murder — Appropriate sentence is one of death — Fact that his co-accused's sentence of death was commuted by Executive Government is no consideration for not passing death sentence.

Where an accused is guilty of a cold-blooded and brutal murder carried out with considerable amount of determination, the only appropriate sentence for an offence of this character is one of death. The fact that the sentence of death passed on his co-accused was commuted by the Executive Government is no judicial consideration for not passing death sentence on the accused concerned.

[P 495 C 2; P 496 C 1]

Jai Gopal Sethi and Jhanda Singh —
for Appellant.

S. N. Bali for Advocate-General —
for the Crown.

Ram Lall J.—Amar Singh was tried by the Additional Sessions Judge, Amritsar, on charges under Ss. 302/34 and 324/511, I. P. C., in respect of the death of Natha Singh and injuries to one Thakar Singh. The learned Judge found Amar Singh guilty of both charges and sentenced him to transportation for life on the murder charge and 1½ years rigorous imprisonment on the charge of attempt to cause grievous hurt. The convict has appealed through Mr. J. G. Sethi and Mr. S. N. Bali has appeared for the Crown in support of the conviction. This incident took place on 1st June 1938, and the case for the prosecution is that there was a dispute at a watercourse between Amar Singh and his two brothers Basant Singh and Ganga Singh on the one side and Thakar Singh and his father Natha Singh on the other. The cause of the quarrel was that Amar Singh, appellant, was removing earth from the side of the watercourse adjoining the field of Thakar Singh and placing the earth on his side of the watercourse, and to this Thakar Singh was objecting. There was mutual abuse between Natha Singh and the appellant and his companions, when Basant Singh and the appellant left for the village abadi which is close by while Ganga Singh carried on the wordy dispute.

A short time afterwards, Amar Singh and Basant Singh returned, Amar Singh armed with a barchhi and Basant Singh with a gun. On seeing Amar Singh and Basant Singh coming so armed, Natha Singh tried to run away but Amar Singh prevented his escape with the barchhi. Basant Singh fired at Natha Singh from close quarters and hit him on the forehead. Thakar Singh came towards his father when Amar Singh, appellant, aimed a barchhi blow at him but Thakar Singh warded it off with his spade and at this stage Basant Singh fired at Thakar Singh but missed. Roda Singh, Udham Singh and Santa Singh, witnesses, were also present and they tried to intervene, with the result that Basant Singh fired a third shot and injured Udham Singh with it on the arm. Another son of Natha Singh, namely Saudagar Singh, was also present at the spot and he ran away to the village when his father Natha Singh fell down on receipt of the gunshot injury, and so apparently did his brother Thakar Singh.

Saudagar Singh and Thakar Singh shut themselves up inside their house and chained the door from inside when they saw the appellant and his two brothers coming towards them to attack them further. The appellant and his brothers climbed up on the roof of the house in which Thakar Singh and Saudagar Singh were hiding and broke open the ventilator of the room in which they were. Thakar Singh and Saudagar Singh then went into another room of the house and the culprits broke open the ventilator of that room also and further made a hole in the roof of that room. The intention obviously was to shoot at Thakar Singh and Saudagar Singh while they were hiding in their house. After some time, the culprits went away and Saudagar Singh and Thakar Singh came out of the house. In the meanwhile, Santa Singh, who had witnessed the occurrence, went to Thana Sarhali, which is at a distance of about ten miles from the spot, and at his instance a first information report was recorded at 1 P. M. Considering that this incident took place in the morning, it appears to me that the first information report was made immediately. That it was made immediately is also indicated by another circumstance, namely that it does not mention the incident of the three culprits making an attack on Saudagar Singh and Thakar Singh while they were in their houses and the informant stated that the culprits were still at the spot.

The police came to the scene of occurrence soon after the report was made and found that the appellant had absconded. His other brothers Basant Singh and Ganga Singh were tried and Basant Singh was convicted and sentenced to death while Ganga Singh was convicted under S. 323 and sentenced to six months' rigorous imprisonment. The sentence of death passed upon Basant Singh was confirmed by the High Court. Eventually, the appellant was arrested on 3rd June and tried. The case against him rests on the statements of five eye-witnesses, namely, Thakar Singh and Saudagar Singh, who are the sons of the deceased, and Santa Singh, Roda Singh and Udham Singh. Santa Singh, Udham Singh and Roda Singh appear to me to be wholly unconnected with the deceased and there is no reason on the record for holding that any of these three persons is falsely implicating the appellant. It is obvious from a perusal of their statements that a quarrel took place early in the morning about the clearance of the silt and that the appellant and his two brothers were present at this altercation. It is also evident from these statements that while Ganga Singh remained at the spot, his two brothers Amar Singh appellant and Basant Singh went to the village and came back after picking up highly lethal weapons and as soon as they returned to the scene of occurrence, Basant Singh fired three shots and Amar Singh appellant, who was armed with a barchhi, attempted to use this weapon against Natha Singh and his sons. In so far as Natha Singh is concerned, he tried to prevent his escape and in so far as Thakar Singh is concerned, he actually aimed a blow but this blow was not successful. The presence of Thakar Singh and Saudagar Singh is perfectly natural and in fact is not denied by learned counsel who appeared in this Court before us. The presence of Udham Singh again cannot be denied because he actually received a gunshot injury.

So far as Santa Singh and Roda Singh are concerned, there is no serious challenge regarding their presence and as I have said above there is no motive for these witnesses to give false evidence against the appellant. All that counsel for the appellant was able to urge against these witnesses was that in their police statements there are certain minor omissions regarding the part taken by Amar Singh, appellant, inasmuch as the police statements do not make mention of the attempted blow to Thakar Singh with

the barchhi or of the attempt of Amar Singh to prevent Natha Singh from escaping. These omissions appear to me to be of no significance. One man had been actually killed and the other injured with a gun. A third man had received an injury at the hand of Ganga Singh. In view of this, the unsuccessful attempt of the appellant to injure Thakar Singh with his barchhi would lose significance in the minds of the witnesses. The important part of the statement is that all the witnesses are agreed that the appellant left with Basant Singh and shortly after the two came back to the spot, one armed with a gun and the other with a barchhi. This shows both premeditation and determination to use these dangerous weapons and is a very clear indication of the common intention of both.

Regarding the other incident, it is clear from the statements of P. W. 11 and of the Sub-Inspector who reached the spot soon after the occurrence that there was a breach in the roof of the house of Natha Singh and two ventilators were broken. This supports the story of Thakar Singh and Saudagar Singh that while they were hiding, these dangerous culprits tried to injure them and for so doing actually broke open the roof and the ventilators of the rooms in which they were hiding. This again shows considerable amount of determination. Amar Singh produced one witness to prove an alibi but this was not even referred to by learned counsel who appeared before us. No attempt has been made before us to explain why the appellant absconded immediately after the offence was committed. It was suggested that the witnesses are implicating all three brothers as is the common practice amongst such witnesses, but I can see no reason why Santa Singh, Udham Singh and Roda Singh should lend themselves to this lie.

It appears to me to be proved beyond all reasonable doubt that in the middle of the wordy dispute between the three brothers and Natha Singh and his relations, the appellant and his brother left for the village, brought a gun and spear and as result of the common intention of these two Natha Singh was shot and killed, Udham Singh injured and a barchhi blow was aimed at Thakar Singh and thereafter all three brothers tried to injure Saudagar Singh and Thakar Singh while they were hiding in their house. It appears to me therefore that this case is one of a cold-blooded and brutal murder carried out with considerable

amount of determination. In my view, the only appropriate sentence for an offence of this character is one of death. The learned Additional Sessions Judge has refrained from imposing the normal penalty in such cases because he says that in the case of Basant Singh whose sentence was confirmed by the High Court the Executive Government commuted it to one of transportation for life. The Executive Government may have had excellent reasons for commuting the sentence of Basant Singh but that is no judicial consideration why a judicial officer acting on the judicial record—and that is the only material on which he can act—should not have imposed the only appropriate penalty in the case. In my view, the learned Additional Sessions Judge should have sentenced the appellant to death and left it to the Executive Government to take action under S. 401, Criminal P. C., if similar good reasons existed in his case as apparently existed in the case of Basant Singh. As there is no application for enhancement of sentence, I would merely content myself with dismissing this appeal. I also uphold the conviction and sentence under Ss. 324/511 and make the sentence concurrent with that imposed on the murder charge.

Abdul Rashid J. — I agree.
D.S/R.K. *Appeal dismissed.*

A. I. R. 1940 Lahore 496

BECKETT J.

Pandit Chanan Mal—Debtor-Insolvent
— Petitioner.

v.

Gobind Sarup—Creditor—Respondent.

Civil Revn. Petn. No. 193 of 1940, Decided on 3rd July 1940, for revision of order of District Judge, Gurdaspur, D/- 2nd January 1940.

Provincial Insolvency Act (1920), S. 6 (b) — Transfer of interest in immovable property is not itself act of insolvency—Debtor raising money by mortgage for business—No intention to defeat creditors proved—Subsequent loss of money raised cannot convert transaction into act of insolvency.

The debtor raised money for the purposes of his own business by mortgaging a house. No intention of delaying or defeating the creditors was proved on his part:

Held that the transaction did not in the least degree diminish the value of the debtor's assets but merely transformed them partly into a more liquid form and a subsequent loss of the money raised could not have the retrospective effect of converting the transaction into an act of insolvency when it was not an act of insolvency at the time when it took place: *A I R 1939 Lah 349, Expl. and Disting.* [P 496 C 2]

C. L. Aggarwal — *for Petitioner.*

Hem Raj Mahajan — *for Respondent.*

Order.—The respondent applied to have the petitioner declared an insolvent, on the ground that the latter had committed an act of insolvency by mortgaging a house with intent to delay and defeat his creditors. The Insolvency Court held that the mortgage had not been effected with any such intent and dismissed the application. On appeal, the District Judge agreed that no such primary intention had been proved. He held, however, that the effect of creating such a charge must necessarily be to defeat ordinarily the petitioner's creditors. Following *A I R 1939 Lah 349*¹ he held that this was sufficient to constitute an act of insolvency under S. 6 (b), Provincial Insolvency Act, 1920, and proceeded to declare the petitioner an insolvent. I am afraid that the learned District Judge has misunderstood the ruling mentioned. It cannot be read as intending to lay down that any transfer of an interest in an immovable property by a debtor must itself be regarded as an act of insolvency. In that particular case, the transferor assisted a third party by means of the transfer in question and this had the effect of reducing his own assets by a substantial amount. In the present instance the petitioner raised money for the purposes of his own business. The transaction did not in the least degree diminish the value of his assets but merely transformed them partly into a more liquid form. It appears that he subsequently lost the money which he had thus raised; but such a subsequent loss cannot have the retrospective effect of converting the transaction into an act of insolvency, if it was not an act of insolvency at the time when it took place. Even now, there does not appear to be any evidence on the record to show whether the petitioner owns any other property or not.

In these circumstances there are no legal grounds on which it can be held that the petitioner has committed an act of insolvency. The petition is accepted and the order declaring the petitioner to be an insolvent is set aside. For the reasons given by the Insolvency Court, the parties are left to bear their own costs throughout.

G.N./R.K.

Petition accepted.

1. ('39) 26 A I R 1939 Lah 349 = 185 I C 489 = I L R (1939) Lah 408 = 41 P L R 785, *Bhagwan Das v. Mahomed Nawaz Shah*.

A. I. R. 1940 Lahore 497

BECKETT J.

Sardar Begum — Defendant —
Appellant.

v.

Harsukh Rai, Plaintiff and others,
Defendants — Respondents.

Second Appeal No. 1871 of 1939, Decided on 11th July 1940, from decree of Addl. Dist. Judge, Lahore, D/- 14th August 1939.

(a) Limitation Act (1908), Art. 11 and S. 22 — Transferee from successful objector not party to objection proceedings under O. 21, R. 58, Civil P. C. — Neither Art. 11 nor S. 22 applies to transferee.

Neither Art. 11 nor S. 22 applies to a transferee from a successful objector who was not a party to the objection proceedings under O. 21, R. 58, Civil P. C. Consequently in a suit under O. 21, R. 63, Civil P. C., he can be impleaded as a party even after the expiry of the period prescribed by Art. 11: *A I R 1920 Lah 193 and A I R 1919 Cal 117, Rel. on.* [P 497 C 1]

(b) Civil P. C. (1908), O. 21, R. 58 — Order allowing objections under O. 21, R. 58 is not final within meaning of S. 52, Expl., T. P. Act, until suit contesting order is finally decided or limitation expires.

The Explanation to S. 52, T. P. Act, refers to final decrees or orders as terminating the period during which the bar on transfer continues. The acceptance of an objection in execution proceedings under O. 21, R. 58 is not a final order until either a suit to contest the order has been finally decided or the period of limitation has expired: *A I R 1915 Mad 495 and A I R 1939 Oudh 178, Rel. on.* [P 498 C 1]

(c) Civil P. C. (1908), O. 21, R. 63 — Successful suit by decree-holder under O. 21, R. 63 — Effect stated.

The effect of a successful suit by a decree-holder under O. 21, R. 63 is to restore the original attachment and to make any intermediate transfers invalid: *A I R 1939 Oudh 178, Rel. on.* [P 498 C 2]

Akbar Ali — *for Appellant.*

Duni Chand Kapur — *for Respondent*
(*Harsukh Rai.*)

Judgment. — Harsukh Rai, plaintiff, obtained a decree against Allah Bakhsh on 22nd December 1926. On 19th January 1928 Allah Bakhsh executed a sale deed in favour of his grandsons in respect of the property in suit. In 1936 the decree-holder had this property attached. The grandsons put in objections against this attachment. They were accepted and the land was released from attachment on 18th July 1936. The grandsons then sold the property to Mt. Sardar Begum, wife of Din Mohammad, on 14th November 1936. Harsukh Rai

brought the present suit under O. 21, R. 63 on 17th July 1937. In this suit he asked for a declaration that the property was in fact still owned by Allah Bakhsh, the supposed sale in favour of the grandsons having been an entirely fictitious transaction and that it was accordingly still liable to attachment in execution of his decree. Mt. Sardar Begum was not impleaded in the suit as originally framed, but was added as a defendant on 14th March 1938. It may here be observed that two ladies of the same name are parties to the suit, the other being a daughter of Allah Bakhsh. It is not suggested that the purchaser of the property from the grandsons of Allah Bakhsh has any connection of her own with the family. This lady and Harsukh Rai are now the principal parties in the suit. The suit was dismissed by the trial Court, which upheld the summary decision of the executing Court. On first appeal the Additional District Judge held that the transfer of the property in favour of the grandsons of Allah Bakhsh was entirely fictitious and granted the plaintiff a decree, declaring the property to be liable to attachment. Mt. Sardar Begum, wife of Din Mohammad, has appealed against this decree.

The principal ground urged in appeal is that Mt. Sardar Begum was impleaded only when the period of limitation for a suit against her had expired. A suit by a person against whom an order has been passed in execution proceedings for the purpose of establishing any right which he claims to the property comprised in that order is governed by Art. 11, Limitation Act. This allows one year from the date of the order. As already mentioned, objections were decided on 18th July 1936, whereas Mt. Sardar Begum was not impleaded till 14th March 1938. In 57 I C 52¹ it was held by a Single Bench of this Court (following a decision of a Division Bench of the Allahabad High Court which I have not been able to trace on the reference given) that Art. 11 does not apply as against a person who was not a party to the proceedings in which the order sought to be set aside was made. This case related to the impleading of an auction-purchaser. The same view was taken in 53 I C 260,² with reference to a suit by persons claiming through unsuccessful objectors. No decision to the contrary effect has

1. ('20) 7 A I R 1920 Lah 193=57 I C 52, Karm Narain v. Salamat Rai.

2. ('19) 6 A I R 1919 Cal 117=53 I C 260, Barkat Ali v. Das Kazi.

been cited before me. In 38 Mad 535³ it was held that a suit brought under O. 21, R. 63 is a mere continuation of the proceedings in a claim petition and all alienations during the continuance of the proceedings originated by the claim petition till the disposal of the suit brought to set aside the order passed thereon are affected by the doctrine of *lis pendens* formulated in S. 52, T. P. Act. The case related to the sale of property by a successful claimant after an order had been passed in his favour but before a suit had been brought to set it aside.

On behalf of the appellant it is urged that the position has been altered by the addition of an Explanation to S. 52, T. P. Act. This argument was based upon the remark of a commentator, but is not supported by any decided case. 38 Mad 535³ was followed in A I R 1939 Oudh 178.⁴ The Explanation refers to final decrees or orders as terminating the period during which the bar on transfer continues; and the acceptance of an objection in execution proceedings is not a final order until either a suit to contest the order has been finally decided or the period of limitation had expired. A similar question recently came up in a slightly different form before a Division Bench of the Patna High Court in A I R 1939 Pat 321,⁵ in which it was held that the auction-purchaser was not a necessary party. It had already been decided in 38 Mad 535³ that the Court was competent to pass a declaratory decree as between the original parties to the suit, who did not include a purchaser from the successful claimant in the previous execution proceedings, and that in such circumstances S. 22, Limitation Act, did not apply. It is clear that the authorities are all against the appellant on this question of limitation. On the merits the plaintiff's claim was that title in the property had never passed to the grandsons and that it remained the property of Allah Bakhsh. This has been upheld by the lower Appellate Court as a finding of fact. If Mt. Sardar Begum claims as a representative of the grandsons, her claim fails because they had in fact no title to pass. The position might have been different if the suit had

merely been one to set aside a voidable transaction. On the other hand, if she claims through Allah Bakhsh her claim is barred by S. 64, Civil P. C. As explained in A I R 1939 Oudh 178⁴ the effect of a successful suit by a decree-holder under O. 21, R. 63 is to restore the original attachment and to make any intermediate transfers invalid. For these reasons the appeal fails and is dismissed with costs. A Letters Patent certificate may be granted to the appellant on application.

G.N./R.K.

Appeal dismissed.

* A. I. R. 1940 Lahore 498

ABDUL RASHID J.

*Nidhan Singh and another —**Defendants — Appellants.*

v.

Prem Singh — Plaintiff — Respondent.

Second Appeal No. 1967 of 1939, Decided on 26th March 1940, from decree of Addl. Dist. Judge, Ferozepore, D/. 30th August 1939.

* Civil P. C. (1908), O. 2, R. 2 — Mortgage deed providing that mortgagee could secure payment of principal and interest by bringing mortgaged property to sale or he could secure payment of interest and compound interest by bringing separate suit therefor — Mortgagee suing for interest and obtaining decree — His second suit for principal and interest held not barred by O. 2, R. 2.

A mortgage deed provided that the mortgagee could at any time secure payment of principal and interest by bringing the mortgaged property to sale. In the second place, it provided that if the interest was not paid then the mortgagee would either allow the interest to accumulate for a period of 12 years, or he could secure payment of the interest and compound interest by bringing a separate suit therefor. So far as the payment of interest and compound interest was concerned, no reference was made to the mortgaged property in this clause of the deed. The mortgagee brought a suit for interest only and obtained a decree. He then brought a second suit for principal and interest:

Held that the first suit was based on a cause of action distinct from the one which formed the foundation of the second suit. The second suit was not therefore barred under the provisions of O. 2, R. 2 : A I R 1922 P C 23, *Disting.*; A I R 1922 P C 412; 21 Bom 267 and A I R 1925 Mad 1120, *Rel. on.* [P 500 C 2]

Held further that as the mortgage deed contained a separate personal covenant for the payment of interest and compound interest, such a covenant could not be ignored simply because in the previous suit this stipulation in the mortgage deed was not made the basis of the claim. [P 501 C 1]

Dwarka Nath Aggarwal — *for Appellants.*Mela Ram — *for Respondent.*

Judgment. — The suit, which has given rise to the present appeal, was instituted

3. ('15) 2 A I R 1915 Mad 495 = 25 I O 11 = 38 Mad 535 = 26 M L J 449, *Krishnappa Chetty v. Abdul Khader Sahab.*

4. ('39) 26 A I R 1939 Oudh 178 = 181 I C 362 = 14 Luck 548 = 1939 O W N 408, *Mt. Anandei v. Lala Ram.*

5. ('39) 26 A I R 1939 Pat 321 = 184 I O 508, *Mt. Nanrogi v. Najaf Ali Shah.*

on 31st August 1933, for recovery of Rupees 630 on the basis of a mortgage deed. On 8th November 1932, the defendants, Nidhan Singh and Hardit Singh, had executed a registered mortgage deed (Ex. P-2) in favour of Prem Singh, plaintiff, for a sum of Rupees 510, in respect of a house. The following passage from the mortgage deed may be reproduced in extenso :

The conditions are that the mortgaged house shall remain in possession of the mortgagors. The mortgage debt shall bear interest at Re. 1-9-0 per cent. per mensem. If we, the mortgagors, do not pay interest every year, we will be liable for compound interest It would be open to the mortgagee at his will to secure payment of the principal together with the balance of interest by bringing the mortgaged property to sale at any time. It would be open to the mortgagee to let the interest accumulate till the time provided by law for payment, or to obtain the payment of interest and compound interest by bringing a separate suit. In this contingency the principal mortgage amount shall remain secured on the mortgaged property. If any amount on account of principal or interest is still due after the sale of the mortgaged property, the other property and the person of the mortgagors shall be liable for this amount.

On 28th August 1936, the mortgagee sued the mortgagors for Rs. 236, consisting of interest and compound interest due from 8th November 1932, till 25th August 1936. It was prayed in this suit that a decree for Rs. 236 may be awarded to the plaintiff on the security of the mortgaged house. This suit was decreed, and it was provided in the decree that the mortgaged house shall be brought to sale in execution of the decree. The mortgagors, however, deposited the amount in Court soon after the final decree, and the mortgaged property was not brought to sale. The present suit was resisted by the defendants on the ground that it was barred under the provisions of O. 2, R. 2, Civil P. C. This contention was accepted by the trial Court and the plaintiff's suit was dismissed. On appeal the plaintiff was granted a decree for Rs. 510 by the learned Additional District Judge on the basis of the mortgage dated 8th November 1932. Against this decision the defendants have preferred a second appeal to this Court, while cross-objections in the sum of Rs. 120 have been preferred on behalf of the plaintiff.

It was contended by Mr. D. N. Aggarwal, for the appellants, that on 28th August 1936, when the plaintiff filed the previous suit for a sum of Rs. 236, he was entitled to claim the entire principal amount as well as interest. As he sued for the interest only, he cannot now be allowed to bring a

separate suit for the principal amount. It was urged by the learned counsel that under O. 2, R. 2, it is incumbent on the plaintiff to include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action in a single suit; and that he cannot split the relief due to him on one cause of action into two suits. If he chooses to include only a part of the cause of action in the first suit, he is not entitled to bring another suit for any relief that may be due to him in respect of the cause of action on which the first suit was based. The learned counsel contended that it was clearly stated in the Explanation to R. 2, O. 2, Civil P. C., that an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action. According to the learned counsel, the claim for Rs. 236 on account of interest and the present claim for Rs. 630 were successive claims in respect of one and the same cause of action, and as both of these claims were not included in the first suit, no second suit is competent with respect to the second claim, that is the sum of Rs. 630, consisting of Rs. 510 as the principal mortgage debt and Rs. 120 as interest thereon.

Reliance was placed in this connexion on a ruling of their Lordships of the Privy Council reported in 44 All 121.¹ In that case a simple mortgage executed in 1910 provided by cl. 2 that the interest should be paid monthly; and that if it was not paid for six months the mortgagee could realize either the unpaid interest only, or both the principal and interest, by bringing a suit, without waiting for the expiration of the time provided for repayment of the principal; by cl. 7 it was provided that if the principal and interest were not paid within three years, the mortgagee could sue for principal and interest, together with incidental expenses. In 1914 the mortgagee sued in respect of the interest due and obtained a decree. In 1915 he brought a second suit in respect of the principal and the interest then due. In these circumstances, it was held that the second suit could not be maintained, having regard to the provisions of O. 2, R. 2, Civil P. C. In this case it was observed by their Lordships that when the first suit was in-

1. (22) 9 AIR 1922 P O 23=65 I C 79 = 49 I A 9 = 44 All 121 (PC), Muhammad Hafiz v. Mirza Muhammad Zakariya.

stituted the cause of action was the default in the payment of interest. The same cause of action entitled the plaintiff to claim the principal also. At the date of the institution of the first suit it was open to the plaintiff to claim principal and interest and as he failed to claim the principal, he was not entitled to claim it in a subsequent suit, because the cause of action was the default which formed the foundation of both the suits.

The learned counsel for the appellants also relied on 4 Lah 32.² It was held in this case that if a mortgage deed provides for the payment of principal and interest as independent obligations, O. 2, R. 2, Civil P. C., 1908, does not preclude the mortgagee from suing to recover the principal by reason of his having previously sued for a personal decree for the interest due. But in the case of a mortgage deed which upon a default in the payment of interest gives the mortgagee the right to realize both the principal and interest, if, upon such a default occurring, the mortgagee sues to realize the interest from the property, the rule above referred to precludes him from afterwards suing to realize the principal due, even if by his plaint in the first suit he has purported to reserve the right to do so. In my opinion, on a proper construction of the mortgage deed in the present suit, both the Privy Council rulings alluded to above are clearly distinguishable. In the first instance, the mortgage deed provides that the mortgagee can at any time secure payment of principal and interest by bringing the mortgaged property to sale. In the second place, it provides that if interest is not paid then the mortgagee can either allow the interest to accumulate for a period of 12 years, or he can secure payment of the interest and compound interest by bringing a separate suit therefor. So far as the payment of interest and compound interest is concerned, no reference is made to the mortgaged property in this clause of the deed. It appears to me, therefore, that the parties intended that the mortgagee would have the option to secure payment of the interest separately irrespective of the mortgaged property. If he chooses this alternative, only the principal amount will thereafter remain as a charge on the property mortgaged. The following observations from the judgment of their Lordships

of the Privy Council in 4 Lah 32,³ at p. 36 are of great importance :

It does not appear to their Lordships that if the mortgage had provided, as mortgages always do in this country, for an independent obligation to pay the principal and the interest, that in a suit brought to obtain a personal judgment in respect of the interest alone the rule (O. 2, R. 2) would have prevented a subsequent claim for payment of the principal. In such a case the cause of action would have been distinct. The matter is, however, different if the non-payment of the interest causes the principal money to become due, as in that case the cause of action, the non-payment of the interest, gives rise to two forms of relief which the Code provides shall not be split.

In the present case the cause of action, so far as the first suit is concerned, was the non-payment of interest from 8th November 1932, till the 25th August 1936. A separate remedy is provided for in the mortgage deed so far as this cause of action is concerned. The first suit, therefore, was based on a cause of action distinct from the one which forms the foundation of the present suit. Reference may be made in this connexion to certain observations in 21 Bom 267.³ In that case the mortgage deed contained a covenant to pay interest each year. It was held that this covenant was distinct from and independent of the claim of the mortgagee to recover the principal sum, and its performance was secured in a different manner. It was held that this covenant was similar to the covenant to pay interest which is inserted in well-drawn English mortgage deeds for the purpose of enabling the mortgagee to sue for overdue interest without calling in the principal after the date fixed for the payment of the latter. Similar observations were made by Krishnan J. in 48 Mad 703.⁴ A number of other rulings were quoted on behalf of the respondent by Mr. Mela Ram, such as 1 Lah 457,⁵ 7 Rang 157,⁶ 64 I C 953,⁷ but it is unnecessary to refer to them as they are clearly distinguishable : A I R 1937 Lah 757⁸ was also relied upon by Mr. Mela Ram.

The learned counsel for the appellant also contended that as the previous suit

3. ('97) 21 Bom 267, *Yashvant v. Vithal*.

4. ('25) 12 A I R 1925 Mad 1120=91 I C 403=49 Mad 703=49 M L J 474, *Sawmy Rao v. Official Assignee, Madras*.

5. ('20) 7 A I R 1920 Lah 1=59 I C 71=1 Lah 457 (FB), *Parmeshri Das v. Fakaria*.

6. ('29) 16 A I R 1929 P C 103=115 I C 705=56 I A 140=7 Rang 157 (PC), *U Po Naing v. Burma Oil Co. Ltd.*

7. ('22) 9 A I R 1922 U B 1=64 I C 953=4 U B R 62, *Maung Kyin Pein v. Ma Pwa Me*.

8. ('37) 24 A I R 1937 Lah 757=175 I C 853=40 P L R 465, *Ganda Ram v. Shiva Nand Ganesh Das*.

2. ('22) 9 AIR 1922 P C 412=72 I C 187=50 I A 115=4 Lah 32 (PC), *Kishan Narain v. Pala Mal*.

had not been based by the mortgagee on any personal covenant embodied in the mortgage deed and as he had obtained a decree on the security of the mortgaged property, he was not entitled to institute the present suit again, asking for the sale of the property mortgaged for non-payment of the principal. In my opinion this contention is without any force. If the mortgage deed contains a separate personal covenant for the payment of interest and compound interest, such a covenant cannot be ignored simply because in the previous suit this stipulation in the mortgage deed was not made the basis of the claim. For the reasons given above, I hold that the present suit is not barred under the provisions of O. 2, R. 2, Civil P. C. I accordingly dismiss this appeal with costs.

There is no force in the cross-objections. It is stated in the mortgage deed that if a separate suit is brought by the mortgagee to secure payment of interest and compound interest, the principal mortgage amount shall remain secure. Rs. 510 being the principal mortgage amount, the learned District Judge was right in passing a decree in favour of the plaintiff only in the sum of Rs. 510. I accordingly dismiss the cross-objections also with costs.

D.S./R.K.

*Appeal dismissed.***A. I. R. 1940 Lahore 501****TEK CHAND AND BECKETT JJ.***Smt. Nanki Devi — Plaintiff —**Appellant.*

v.

*Madho Ram and others—Defendants—**Respondents.*

First Appeal No. 218 of 1939, Decided on 21st June 1940, from decree of Sub-Judge, First Class, Ambala, D/- 15th March 1939.

Hindu Law — Debts — Managing member of joint Hindu family engaged in trade borrowing money for payment of debts and mortgaging ancestral property — Mortgagee making his best to produce evidence with regard to nature of debts but other side deliberately withholding documentary evidence in form of accounts showing nature of debts — Debt presumed to be raised for payment of antecedent debt and held binding on family property.

The managing member of a joint Hindu family engaged in trade who was known to have conducted transactions on credit, borrowed money for the payment of debts, in respect of which pressing demands had been made from the family, and executed a mortgage of ancestral property. The mortgagee did his best to procure the necessary evidence with regard to the nature of those debts.

The documentary evidence in the form of accounts which was available had been deliberately withheld by the other side. Moreover the other side did not make any attempt to produce some evidence with regard to the circumstances under which the mortgage was created :

Held that these circumstances, taken together, were sufficient to raise a presumption that the mortgage debt was raised for payment of antecedent debts by the managing member and so was binding on the family property : *A I R 1919 Mad 444 ; A I R 1917 P C 6 ; A I R 1934 P C 55 and A I R 1926 P C 105, Rel. on.* [P 503 C 2]

Jagan Nath Aggarwal and K. C. Bedi —
for Appellant.

Mehr Chand Mahajan and Tek Chand —
for Respondents.

Beckett J. — This case is founded on a mortgage deed executed on 10th May 1927 in favour of Ram Chandar, deceased. The deed was executed by Gopi Ram on his own behalf and on behalf of his two minor sons and also by Madho Ram, another son of Gopi Ram, who had attained majority. The mortgage was for Rs. 6000, secured on certain house property in Ambala cantonment and carried interest. Interest payments continued up to 1934, about which time Gopi Ram died. Ram Chandar also died and the present suit, for realization of the mortgage debt with the balance of interest due, by sale of the mortgaged property, was brought by his widow on 4th April 1938. The suit was brought against the sons of Gopi Ram. Madho Ram did not attempt to defend the suit and proceedings against him were ex parte. Om Parkash, who subsequently attained majority, defended the suit on his own behalf and on behalf of his two minor brothers, of whom the younger appears to have been born after the execution of the mortgage deed. The defence was in the first place, that no mortgage was executed and no money received, and, secondly, that the property was ancestral and that there was no valid necessity for the mortgage. As regards the execution of the mortgage, it has been proved and is no longer in dispute. It is also not disputed that the mortgaged property was the ancestral property of joint Hindu family consisting of Madho Ram and those of the defendants who were then alive. The only question is whether necessity for the mortgage has been proved.

Gopi Ram was a shopkeeper in Kabari bazar in Ambala Cantonment, who carried on business with one Banu Mal for some years, and it is in evidence that he sometimes purchased timber on credit. The mortgage deed, Ex. P-1, recites that the

family owed money to different persons who were making pressing demands and that the money was being borrowed for the purpose of paying the debts due from it. The plaintiff produced her husband's books of account to prove payment of the debt money and subsequent payment of interest. To prove necessity of the mortgage she summoned, in the first place, the son of a neighbouring shopkeeper in the Kabari's Bazar. He stated that his father had kept accounts and that he had inherited his father's assets, but he could not produce the books of account. The plaintiff also summoned Ram Chandar, who admitted that Gopi Ram had paid money up to 1931 or 1932, and Banu Mal, Gopi Ram's previous partner. On two successive hearings, they failed to appear and put in medical certificates to excuse their absence. The trial Court held that the certificates were false and issued warrants for their arrest. Ram Chandar then appeared and stated that he kept regular accounts but was unable to produce his accounts for 1927, which must have been mislaid. Banu Mal also admitted that he kept accounts but stated that there had been a partition between him and another partner and that he could no longer produce them. Finally, the plaintiff summoned Madho Ram, the eldest member of Gopi Ram's family, to produce the family accounts. He failed to do so, and the plaintiff gave him up. In consequence of this failure on the part of the plaintiff to produce direct evidence of the debts, for the discharge of which the mortgage debt was raised, the trial Court has held that the mortgage cannot be treated as a valid charge on the joint Hindu family property. It has, however, held that the mortgage was a valid charge on the share of Madho Ram, who was personally a party to the transaction, and has granted a preliminary decree for the sale of one-fourth of the property only. The plaintiff has appealed against this decree, claiming that the whole property should be brought to sale. In 40 Mad 402,¹ their Lordships of the Privy Council made the following remarks:

A practice has grown up in Indian procedure of ~~ghost~~ in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing accordingly to furnish to the Courts the best material for its decision. With regard to third parties, this may be right enough: they have no responsibility for the

conduct of the suit; but with regard to the parties to the suit it is, in their Lordships' opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition. The present is a good instance of this bad practice. It is proved in the case by the first witness that 'the mutt has regular fair day-books; they are not now before the Court; ledgers are also maintained in the mutt.' These ledgers and day-books were in the possession of the defendants or those of them who were heads of the institution, and they are not put in evidence. The proposition that these defendants challenged was that the expenses incurred had been incurred for the mutt and were necessary for its purposes. The best assistance to a Court of Justice would have been a scrutiny of these documents, and their Lordships feel free to conclude that if they had been by their entries confirmatory of the defendants' view the defendants would have brought them into Court.

Reference to these observations was made in 42 Mad 629.² The circumstances of that case were described as follows:

It is contended for the appellant that the plaintiffs have not shown that the debt was contracted by the late Rathnaswami Nadar for purposes binding on the family. The members of the temple committee who advanced the loan are dead, the clerk whom they called (P. W. 8) was unable to speak from personal knowledge, and the witnesses connected with the defendants whom the plaintiffs put into the box were not anxious to help them, so that there is a dearth of direct evidence. The books of the defendants' firm if produced would show whether the money advanced was utilized in the business and the debt was treated as a family debt. The plaintiffs summoned the defendants to produce their books, but the defendants failed to produce them or to explain their failure, and also abstained from going into the box relying on the weaknesses of the direct evidence for the plaintiffs. The defendants were under a duty to produce their books when summoned or to account for their failure to do so; and, as they have done neither, a presumption arises under Sec. 114 (g), Evidence Act that the books if produced would have been unfavourable to their case and would have shown that the money was borrowed for the purposes of the business, which is in accordance with the general probabilities of the case.

After referring to the ruling of the Privy Council, Wallis C. J. went on to hold:

There was no doubt other evidence for the plaintiffs in that case, but the presumption against the defendants arises whether the plaintiffs have any evidence or not, and in my opinion it is clearly enough to shift the burden in this case assuming it to be on the plaintiffs and to throw on the defendants the onus of proving that the debts in question were not incurred for joint family purposes.

It was further suggested that in the case of a joint trading family it is open to question whether the presumption should not be that a debt raised by the managing member

1. ('17) 4 A I R 1917 P C 6=39 I C 659=44 I A 98=40 Mad 402 (P C), *Murugesam Pillai v. Guanasambandha Pandara Sannadhi*.

2. ('19) 6 A I R 1919 Mad 444=50 I C 775=42 Mad 629=36 M L J 568, *Gurusami Nadan v. Gopalaswami Odayar*.

of such a family is binding upon the other members. A similar case came before the Privy Council in 56 All 123,³ in which the judgment was delivered by Sir John Wallis. The head of a joint Hindu family executed a sale deed of part of the ancestral property; a son and a grandson witnessed the deed. About twelve years later several junior members of the family, mostly minors, sued to set aside the deed. At the trial no evidence was given of fraud and no member of the family who knew anything about the sale or the circumstances attending it was called. It was held that the facts disclosed raised at least a *prima facie* case that the sale was for family necessity and to discharge antecedent debts binding on the family. It was further held that the suit should be dismissed as being clearly collusive. In that case also, the sale deed recited that the managing member of the family was hard pressed for money to pay the debts which he had incurred. Again, in 48 All 518,⁴ a similar case was brought to set aside the sale of joint family property by the father of the plaintiff. It was held that the father, who was in collusion with his son, had deliberately withheld his evidence which would have shown how the rest of the consideration had been applied.

It will be seen that the circumstances of these cases present many striking similarities with the facts of the present case, particularly those in 42 Mad 629.² The only argument which Mr. Mehr Chand for the contesting defendants has been able to advance as a reason for not applying the same principle is that there is no direct evidence that Gopi Ram kept accounts of his own. It is however in evidence that account books were kept by other shopkeepers of the same class, with whom Gopi Ram traded, including his own partner in business. When Om Parkash appeared as his own witness, he only stated that he did not know whether his father kept any *bahi*. Incidentally, when examined at the beginning of the trial, he went so far as to say that he could not even indentify his father's handwriting. It is difficult to believe that all documentary evidence with regard to the circumstances leading to the mortgage could have entirely disappeared and there is nothing on the record to show

that the defendants made the slightest attempt to ascertain those circumstances, although they were in a very much better position to do so than the widow by whom the suit was brought. On the contrary, there are distinct indications that collusive efforts were made to suppress any evidence which might be of assistance to her in the case.

The circumstances in the present case are that the managing member of a joint Hindu family engaged in trade, who is known to have conducted transactions on credit, borrowed money for the payment of debts, in respect of which it was said that pressing demands had been made from the family, and the only other elder member of the family was a party to the transaction. The plaintiff did her best to procure the necessary evidence with regard to the nature of those debts. There is every reason to suppose that documentary evidence in the form of accounts was available and there is every reason to support that this evidence has been deliberately withheld by the other side. It is at least certain that the defendants could have produced some evidence with regard to the circumstances under which the mortgage was created and they have made no attempt to do so. We consider that these circumstances, taken together, are sufficient to raise a presumption that the mortgage debt was raised for payment of antecedent debts by the managing member and so is binding on the family property. For these reasons, we accept the appeal and grant the plaintiff a preliminary decree for the sale of the whole of the mortgaged property in realization of the mortgage debt. The plaintiff will receive her costs in both Courts.

D.S./R.K.

Appeal allowed.

A. I. R. 1940 Lahore 503

TEK CHAND AND BECKETT JJ.

Ghulam Ghauns and others

v.

Malang Khan.

Second Appeal No. 738 of 1939, Decided on 2nd July 1940.

Custom (Punjab)—Ancestral property—Property losing ancestral character by subsequent alienation and re-distribution—No presumption can be drawn that portion of land in Rajput proprietor's possession has descended from original ancestor by inheritance.

Where the original ancestral character of the property is lost by the subsequent alienation and re-distributions no presumption can be made that any portion of the land in possession of a Rajput

3. ('84) 21 A I R 1934 P C 55=147 I C 903 = 61 I A 150=56 All 123 (P C), Jogannath v. Shri Nath.

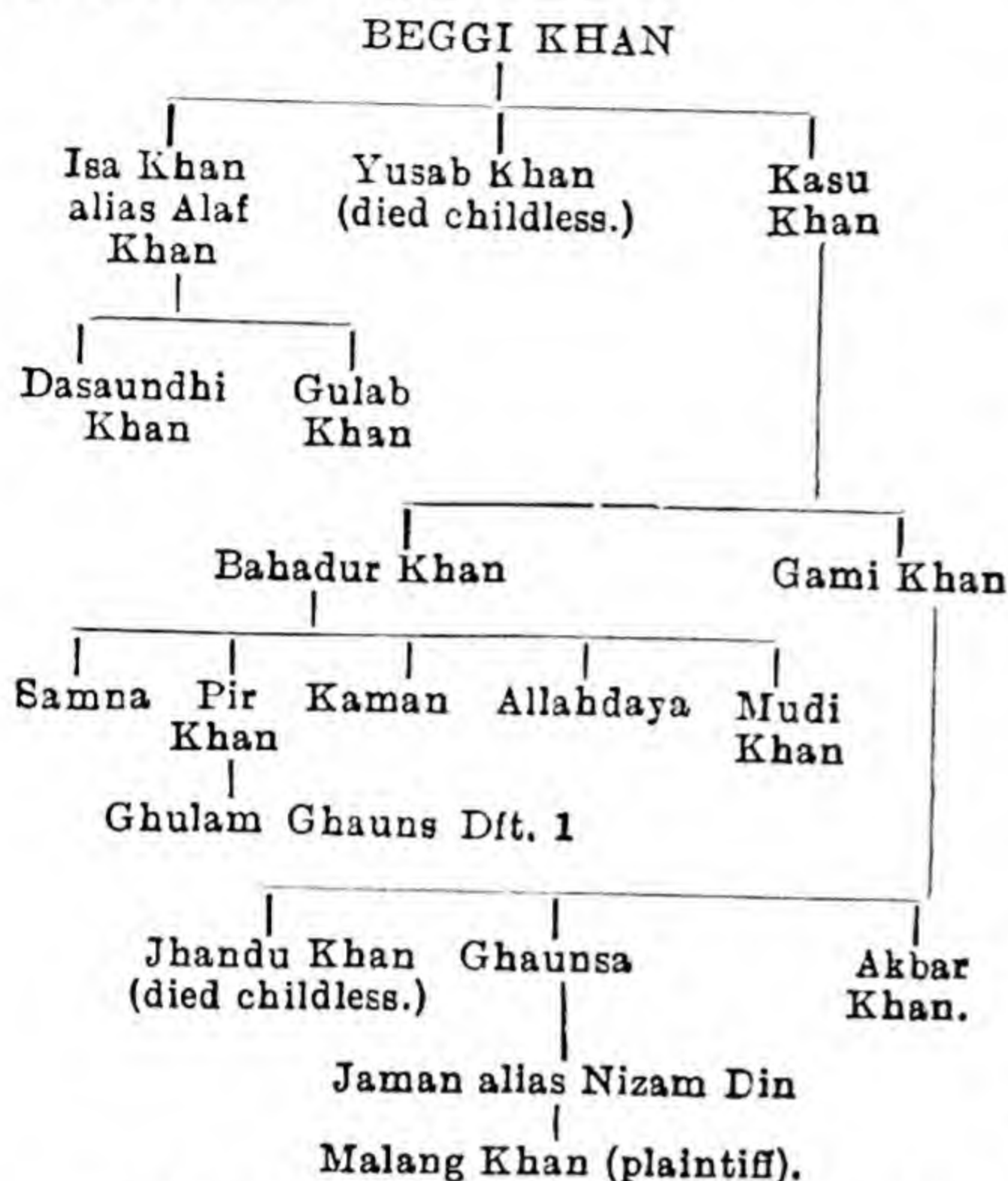
4. ('26) 13 A I R 1926 P C 105=93 I C 1031=53 I A 204 = 48 All 518 (P C), Masit Ullah v. Damodar Prasad.

proprietor has descended to him from the original ancestor by inheritance. [P 505 C 2]

M. M. Aslam Khan — *for Appellants.*

M. C. Mahajan — *for Respondent.*

Tek Chand J.—The following pedigree table will be helpful in understanding the facts of this case :



The land in dispute belonged to Ghulam Ghauns (defendant 1). He had a son who died long ago leaving a widow, Mt. Begam (defendant 4). In May 1937 Ghulam Ghauns gifted the land to his daughter, Mt. Azim-ur-Nisa (defendant 2), Yar Mohamad minor (defendant 3), who is his pre-deceased daughter's son, and Mt. Begam (defendant 4) who is the widow of his pre-deceased son. A few months later, the plaintiff Malang Khan, who is a collateral of Ghulam Ghauns in the fourth degree, instituted the present suit for a declaration that the land was ancestral, that Ghulam Ghauns had no right to gift it to defendants 2 to 4 and that the gift shall not affect his reversionary rights after the death of Ghulam Ghauns. The defendants resisted the suit pleading that the land was not ancestral qua the plaintiff and that Ghulam Ghauns was competent to gift the property in any way he liked. The trial Judge, in discussing the question as to whether the property was ancestral or not, divided it into three portions, described as group A, group B and group C. He found that the lands comprised in groups A and B were ancestral and those in group C were not

ancestral. On the question of custom he found that a Rajput proprietor in the Garhshankar Tehsil of the Hoshiarpur District had no power to gift ancestral immovable property but that there was no restraint on his power to gift non-ancestral property. On these findings he granted the plaintiff a decree for the declaration prayed for with regard to the lands comprised in groups A and B but dismissed the suit with regard to group C. Both parties appealed to the District Judge who upheld the trial Court's decision except with a slight modification as to the extent of the area of the land comprised in group A. He found that one khasra number, which was really a portion of group A, had been inadvertently omitted from the decree of the trial Court. He amended the trial Court's decree accordingly and dismissed both appeals in all other respects.

The defendants have come in second appeal and it has been contended on their behalf that the lands comprised in groups A and B have been held to be ancestral without any evidence on the record, on pure and unwarranted conjectures. After hearing both counsel and examining the record we are of opinion that this contention is well founded and must succeed. It will be seen on a reference to the pedigree table that only those lands can be held ancestral of Ghulam Ghauns and the plaintiff which were owned by their common ancestor Kasu Khan. It is conceded that there is no further evidence on the record, which shows that Kasu Khan held any part of the lands in dispute. The earliest entry is that of the settlement of 1852. In that year the lands comprised in group A were held by Bahadur Khan, son of Kasu Khan, and Jhandu Khan and Ghaunsa, sons of Gami Khan. The shares in which these three persons held these lands however were not given. It cannot therefore be said that they owned them in ancestral shares, as has been erroneously assumed by the learned Judges of the Courts below. Before the next settlement, which was held in 1863-64, a partition appears to have been effected between these three owners ; but here again it is not shown in what shares these lands were divided. There can therefore be no presumption that the lands in this group had descended from Kasu Khan. They might have been acquired by Bahadur Khan, Jhandu Khan and Ghaunsa themselves or, possibly, by Bahadur Khan and Gami Khan; but the presumption cannot be pushed fur-

ther so as to raise an inference that they had descended from Kasu Khan. The land in group B was shown in the settlement of 1852 as owned by Dasaundhi Khan and Gulab Khan, sons of Isa Khan, Bahadur Khan, son of Kasu Khan, and Jhandu Khan and Ghaunsa, sons of Gami Khan. The shares in which these persons held the land were not given. In the next Settlement of 1863-64, the land was still held jointly by the persons mentioned above, and the shares were specified as follows :

Dasaundhi Khan, son of Isa Khan	2/6ths
Pir Khan and others, sons of Bahadur Khan	2/6ths
Jhandu Khan and Ghaunsa, sons of Gami Khan	2/6ths

Now, if the land had descended from the common ancestor Beggi Khan, the share of Dasaundhi Khan, son of Isa Khan, would have been one-half and that of the sons of Bahadur Khan and of Jhandu Khan and Ghaunsa, sons of Gami Khan, taken together one-half; but, as has been stated above, Isa Khan's descendants had only one-third share and the other two-thirds. This clearly negatives the suggestion that the property had descended from the founder of the village who was the remote ancestor of the parties. It is equally improbable that the land descended from Isa Khan and Kasu Khan. If that were so, Isa Khan's share again would be one-half and that of the sons of Bahadur Khan and of Gami Khan taken together one-half. The probability therefore is that this land was acquired by Isa Khan, Bahadur Khan and the sons of Gami Khan in equal shares. It cannot therefore be said to have been held by Kasu Khan.

Mr. Mehr Chand drew our attention to the history of the village as given in the "statements of the proprietors" recorded at the Settlement of 1884 (Ex. D. 2), which shows that the village had been founded in remote antiquity by one Makhan who was the ancestor of the Rajput proprietors of the village. An examination of this "history" indicates however that the ancestral character of the property was not maintained. The original founder was no doubt Makhan Rajput, who is said to have migrated from Bijwara and founded this village. Some years later a jagirdar got this village along with the neighbouring territory in jagir. His descendants are stated to have appropriated a portion of the village to themselves as owners. Subsequently, several of the Rajput proprietors are recorded to have alienated the land by gift and sale to third parties who also became owners in

the village. Later, during the Sikh time the land was again given to a jagirdar who redistributed the lands of the whole village. He divided it into 96 ploughs without regard to ancestral shares and "distributed it among various persons according to their capacity to cultivate" (*bila lihaz hissa jaddi baqadar taqat taraddadtaqsim kar di*). After this, further changes took place owing to alluvion and diluvion. It is thus clear from the "history" that the original ancestral character of the property was lost by the subsequent alienation and re-distributions and therefore no presumption can be made that any portion of the land in possession of a Rajput proprietor has descended to him from the original ancestor by inheritance. Having regard to the facts set out above, it must be held that the plaintiff, on whom the onus lay, has failed to prove that the land comprised in groups A and B was ancestral of Ghulam Ghauns and the plaintiff. This being so, he is not entitled to challenge the gift of any portion of the land by Ghulam Ghauns, defendant 1, in favour of defendants 2 to 4. We accordingly accept the appeal, set aside the judgments and decrees of the Courts below and dismiss the plaintiff's suit with costs throughout.

G.N./R.K.

Appeal accepted.

A. I. R. 1940 Lahore 505

TEK CHAND AND BECKETT JJ.

Mrs. Elizabeth Maud Baines and another — Defendant — Appellants.

v.

Ram Sahai Sethi, Plaintiff and another, Defendants — Respondents.

First Appeal No. 356 of 1938, Decided on 17th June 1940.

(a) Contract Act (1872), Ss. 17 and 19 — Principle under Ss. 17 and 19 extends to contract including element of transfer — Building contract — Owner's authorized agent whose decision regarding rates and measurements was to be final passing bill for payment — Owner mortgaging premises in lieu of balance due on bill — Suit by mortgagee — Preliminary decree for sale passed — Mortgage held could be avoided only if misrepresentation on part of owner's authorized agent could be proved.

Where building work is agreed upon to be executed to the approval of a third person, the general principle is that it is not open to the employer to complain of defects in work done after a final and conclusive certificate has been granted in respect of it. The conclusiveness of the architect's certificate is however subject to a possible exception in case of fraud or collusion: *Case law relied on.* [P 508 C 1, 2]

Section 17 read with S. 19 permits a contract to be avoided when based on representations made by one of the parties or his agent when these are known to be false by the person making, and the illustrations indicate that the principle is meant.

to extend to contracts which include an element of transfer such as sales or mortgages. The representations must however be made by one of the parties to the transfer or his agent. [P 508 C 2]

The parties to a building contract agreed to accept the decision as to rates and measurements by the owner's authorized agent to be final. After completion of the work the agent passed a final bill for payment. In lieu of balance due on aforesaid bill the owner executed a mortgage of his premises. In the suit by the mortgagee a preliminary decree for sale was passed. The mortgagor sought to avoid the mortgage on the ground that on the evidence of experts the original bill contained overcharges and that he was misled into accepting it to be correct and prayed for fresh calculation of original account :

Held that in the absence of circumstances sufficiently strong to indicate that the owner's authorized agent was in fact acting rather as an agent on behalf of the contractor, as might possibly be indicated by the amount or character of the overcharges, it was not open to the mortgagor to avoid the mortgage on the ground of fraud nor could the mortgage be avoided merely for inadequacy of consideration. [P 508 C 2]

(b) Evidence Act (1872), S. 45 — Expert or professional witness should be tested like any other witness — He should not be treated on same footing as person making profession of giving evidence — Nor should it be supposed that he is necessarily biased on account of his professional qualifications.

The evidence of an expert witness has to be tested like that of any other witness for even expert witnesses are liable to make mistakes. At the same time, if a person with special professional qualifications, such as a doctor or an engineer, is called in to make professional examination of a person or a building, and is then asked to give the results of his examination as evidence in Court, it is hardly fair to treat him as being on the same footing as those persons who may be said to make a profession of giving evidence; nor is it necessary to suppose that he must necessarily be suffering from undue bias merely because he has professional qualifications. [P 509 C 1]

J. G. Sethi — *for Appellants.*

Mehr Chand Mahajan, J. L. Kapur and
Gian Chand Sethi — *for Respondents.*

Beckett J.—The facts which have given rise to this appeal are as follows. Mrs. Baines, the principal defendant-appellant, was the owner of certain buildings situated at No. 180, Creagh Road, Rawalpindi Cantonment. In the beginning of the hot weather of 1933 she was anxious to extend these buildings for the purpose of using them as a hotel. At the instance of Captain James, an engineer of her acquaintance, she gave the work of constructing these additional buildings to Lala Ram Sahai Sethi, plaintiff-respondent. The terms of this agreement, Ex. P.5, provided that the work was to be carried out in accordance with the instructions of the owner's authorized agent, Captain James, and was to be completed to

the owner's satisfaction. The rates were to be the Rawalpindi Cantonment Board rates, less 20 per cent. abatement, for work carried out as ascertained by measurements on bills passed by Captain James, whose decision regarding rates and quantities was to be final. The work was to be completed by 1st September 1933. This agreement was executed on 3rd May 1933. A few days later, on 9th May, Mrs. Baines made a gift of the premises to her daughters, Mrs. A. D. Wilson and Mrs. M. N. C. Roberts, the remaining defendant-appellants. The work was then taken in hand. According to the plaintiff's evidence, difficulties were experienced in carrying through a work of this kind within the short time specified, which included the rainy season. The work was, however, completed, and on its completion met with the approval of both Mrs. Baines and Captain James. The final bill was prepared in the form of the register of measurements, rates and amounts due under each head, Ex. A. The entries in this were made by Prithi Raj, a subordinate supervising the work under Captain James. An abstract was then prepared by Captain James, after certain corrections, and the bill was passed by him for Rs. 81,639 on 28th October 1933. On 30th October 1933 the plaintiff accepted the details in the register, while remarking that he had no knowledge of their correctness or otherwise.

Towards the sum thus due, Mrs. Baines had already made payments amounting to Rs. 51,000 leaving a balance due to the plaintiff of Rs. 30,639. A further sum of Rs. 2000 was paid on 7th November, leaving a balance of Rs. 28,639, still due. No further payments were made during 1933, although the plaintiff was pressing for payment. On 16th January 1934 the debt was adjusted by the execution of two documents to which all the defendants were parties. A mortgage of the premises at No. 180, Creagh Road, was executed in favour of the plaintiff for Rs. 20,000 carrying interest at 6 per cent. per annum. A promissory note was executed for the balance of Rs. 8639. The promissory note has since been discharged in full. On the mortgage-debt, however, only two payments have been made towards interest, one of Rs. 500 on 3rd October 1935 and one of Rs. 1000 on 5th December 1935. The plaintiff accordingly brought the present suit on 25th August 1936 for the realization of a sum of Rs. 21,630 by sale of the mortgaged property. He has been granted

a preliminary decree by the trial Court. Two of the defendants, Mrs. Baines and Mrs. Wilson, have appealed. The execution of the mortgage deed, in the circumstances mentioned above, is admitted. The case of the defendant-appellants is that they were misled into supposing that a balance of Rs. 28,639 was still due under the terms of the contract on the date when the mortgage deed and the promissory note were executed. They claimed that, on a proper measurement and valuation of the work done, the amount charged should have been less by Rs. 17,258.3.0 than the amount of the bill passed by Captain James. They ask that the original account should be made the subject of a fresh calculation and that a decree should be passed only for the realization of such sum as may be found due on the assumption that the value of the work was not more than Rs. 84,000.

It is said that Mrs. Baines became dissatisfied with the quality of the work done during the cold weather following its completion. There is on the record a letter from Captain James, Ex. D-5, dated 13th February 1934, in which he wrote to Mrs. Baines, saying that he had been informed by Ram Sahai that she was under the impression that supervision of the new building had been inadequate or entirely lacking. He expressed surprise at hearing such a statement and pointed out that the fact that the structure had been completed in such a short time under adverse conditions showed that there had been adequate supervision. He added that he had also been informed that Mrs. Baines was dissatisfied with the bill, and to remove any possible hesitation, he suggested that she might refer the bill for check to any Gazetted Officer of the Military Engineering Service whom she might care to employ. It may here be remarked that it appears from the official copy of the Cantonment Board rates which have been placed upon the record that Captain James himself held the post of Cantonment Engineer at or about this time. It appears from the evidence that Mrs. Baines had already consulted Mr. Sewell (D. W. 1), a Sub-divisional Officer in the Military Engineering Service, whom she asked to look at the building in October 1933. Mr. Sewell states that he then made a preliminary check in October or November of that year and prepared some rough notes. He did not complete his measurements however, because he would have required permission from his Department to continue

the check, and this permission was refused.

Mr. Sewell then handed over his notes to Mr. Eccleston, an Executive Engineer in the Buildings and Roads Branch of the Public Works Department, who had been asked by Mrs. Baines to check the register, Ex. A. Mr. Eccleston had a statement prepared, Ex. C D 1. The statement was drawn up by Lala Krishan Lal, Overseer, but was prepared under Mr. Eccleston's directions. This statement was sent to Mrs. Baines with a letter dated 9th August 1934, informing her that she had been grossly overcharged by the contractor. The amount overcharged, according to Mr. Eccleston, was at least Rs. 17,258 on the basis of his calculations. It is not clear when the contents of this document were first communicated to the plaintiff. He continued to send in his requests for payment of the amount due; but the first written document on the record definitely protesting the correctness of the account is Ex. P-14, dated 11th February 1936. In this letter the lawyer employed by Mrs. Baines informed Lala Ram Sahai that she had been informed by competent engineers that his bill was in excess of the actual amount due for the work done by at least Rs. 17,258.3.0. On the assumption that the cost of the work should have been not more than Rs. 64,381, it was stated that a sum of Rs. 1242 only was still due. It was alleged that the quantity of work passed for payment was far in excess of that actually done, that inferior materials were used, that the rates allowed were unduly high and that there had been charges for work never done. The passing of the original bill in these circumstances was imputed to the gross negligence of Captain James. The present suit, as already stated, was brought a few months later.

After the institution of the suit, two further statements of the supposed overcharges were prepared on behalf of Mrs. Baines. One was completed by Mr. Sewell, who had since obtained the necessary permission on 1st April 1937. His estimate has been placed on the record as Ex. D.1 and shows an excess of Rs. 20,000. The other statement was prepared by Mr. Holmans, D. W. 4, a Professional Associate of the Chartered Surveyors' Institution, who has special experience of this class of work. His estimate has been placed on the record, Ex. D. W. 4/1, and shows an excess of Rs. 25,281. Mr. Eccleston, Mr. Sewell and Mr. Holmans have supported their estimates by evidence in Court. Captain James,

for reasons which have not been satisfactorily explained, does not appear to have been summoned by either party: though his subordinate, Prithi Raj, who prepared the bill, appeared as P. W. 10 to support the original measurements and valuation. On the strength of this professional evidence with regard to the over-charge the defendants claim that they are entitled to have the mortgage debt reduced. In support of this proposition, their counsel relied upon two reported cases. One is (1881) 44 L T 697,¹ in which a Local Board was allowed to re-open a settled account in view of proved collusion on the part of their Engineer by whom the bill had been passed for payment. The other is 43 I C 871² in which it was held that a mortgage debt could be reduced when it was based upon an account which the mortgagors had been misled into accepting. It is to be observed that in the present instance there is no direct evidence of fraud or collusion. Reliance is placed merely upon the amount of the supposed over-charges and the nature of some of the items, such as charges for work now alleged not to have been done, as circumstances from which it can be inferred that there must have been some sort of collusion, without which it would not have been possible for the defendants to be imposed upon.

As against this, counsel for the plaintiff relies chiefly on the principles laid down in *Hudson on Building Contracts* with regard to engineer's or architect's certificate, in cases where work is agreed upon to be executed to the approval of a third person, and the cases cited therein. The general principle is that it is not open to the employer to complain of defects in work done after a final and conclusive certificate has been granted in respect of it. This principle was laid down in (1866) 35 L J C P 12³ and (1867) 15 L T 571,⁴ which was followed in (1875) Edn. 4, Vol. 11, p. 36⁵ and (1877) 36 L T (N S) 733.⁶ As mentioned above the agreement between the parties provided that the decision of Captain James re-

garding rates and quantities was to be final and it is claimed that this precludes the defendants from questioning the final bill, in which he himself drew up the final abstract after making certain adjustments and recorded that the bill, which gave full measurements and rates, had been inspected, checked and passed by him for payment.

In the cases just mentioned, however, it does not appear that fraud or collusion was imputed so that these cases do not do much to meet the legal position set up on behalf of the defendants. In fact, in (1875) Edn. 4, Vol. 11, p. 36⁵ the principle regarding the conclusiveness of an architect's certificate was stated subject to a possible exception in case of fraud. In India, S. 17, Contract Act, read with S. 19, permits a contract to be avoided when based on representations made by one of the parties or his agent when these are known to be false by the person making, and the Illustrations indicate that the principle is meant to extend to contracts which include an element of transfer such as sales or mortgages. The representations must, however, be made by one of the parties to the transfer or his agent. One of the difficulties, with which the defendants are faced in the present case, is that the bill was prepared by persons who purported to be acting as the agents of Mrs. Baines and was merely accepted as a correct estimate by the plaintiff. Unless there are circumstances sufficiently strong to indicate that either Captain James or Prithi Raj was in fact acting rather as an agent on behalf of the plaintiff, as might possibly be indicated by the amount or character of the overcharges, it is not open to the defendants to avoid the mortgage on the ground of fraud. There does not appear to be any legal ground for the proposition which has been tentatively put forward on their behalf, that the mortgage could be avoided merely for inadequacy of consideration and this defence would be further barred in respect of quantities or rates by the certificate given by Captain James.

It is from this aspect that the evidence of the professional witnesses produced on behalf of the defendants has to be viewed and it has to be shown by Mrs. Baines that the items in dispute are in themselves such as to lead to a clear presumption that she was induced to accept the bill by a deliberately false representation of the facts with regard to the construction of the additional buildings, not merely that she might have had the work done more cheaply

1. (1881) 44 L T 697, *Wakefield and Bansley Banking Co. v. Normanton Local Board*.

2. (19) 6 A I R 1919 Mad 1117=43 I C 871, *Venkata Perumal v. Subbaraya Pillai*.

3. (1866) 35 L J C P 12=1 H & R 67, *Good Year v. Weymouth and Melcombe Regis Corporation*.

4. (1867) 15 L T 571, *Harvey v. Lawrence*.

5. (1875) Edn. 4, Vol. 11, p. 36, *Bateman (Lord) v. Thompson*.

6. (1877) 36 L T (N S) 733, *Dunaberg and Witepsk Ry. Co., Ltd. v. Hopkins*.

through another contractor. [His Lordship, after discussing the evidence, proceeded.] It is impossible not to feel that many mistakes and misunderstandings might have been avoided if the professional witnesses had completed their calculations either after conducting their examination in the presence of the plaintiff or after allowing him an opportunity for explanation, such as he would presumably have been given if he had been constructing one of the buildings which they are accustomed to inspect. This is all the more unfortunate as the trial Court has been led to make a number of remarks with regard to their qualifications which are more strongly worded than were necessary or advisable. The learned Subordinate Judge appears to have been influenced by certain judicial comments which have been made from time to time on the evidence of expert witnesses. The evidence of an expert witness has to be tested like that of any other witness and even expert witnesses are liable to make mistakes. At the same time, if a person with special professional qualifications such as a doctor or an engineer, is called in to make professional examination of a person or a building, and is then asked to give the results of his examination as evidence in Court, it is hardly fair to treat him as being on the same footing as those persons who may be said to make a profession of giving evidence; nor is it necessary to suppose that he must necessarily be suffering from undue bias merely because he has professional qualifications. In the present instance, while it appears that some mistakes have been made it is necessary to remember the limited nature of the tests upon which an expert ordinarily has to rely in carrying out work of this kind; and the larger part of the estimate of excess payment had to be rejected because the experts were stating what they thought to be the correct rate in the ordinary way, and it is impossible to say on the present record whether the contract rates are or are not excessive when compared with ordinary market rates. It is to be observed that if the amount claimed in this case is deducted from the gross total in the measurement book the result would give a net total which does not differ greatly from the net payment actually claimed by the plaintiff.

In any case, as already observed, there does not appear to be any evidence at all of false representation on behalf of the plaintiff, although there are a few minor mis-

takes or miscalculations on both sides of the account. Nor can it even be said with any certainty that there was any great overcharge for the work done in the time allowed. For these reasons there is no option but to dismiss the appeal with costs.

Tek Chand J. — I agree.

G.N./R.K.

Appeal dismissed.

* A. I. R. 1940 Lahore 509

TEK CHAND AND DALIP SINGH JJ.

Jagat Singh and others — Plaintiffs — Appellants.

v.

District Board, Amritsar — Defendant — Respondent.

Letters Patent Appeal No. 158 of 1939, Decided on 28th March 1940, from judgment of Bhide J., *Reported in A I R 1940 Lah 18.*

* Easement — Punjab — Licensee, acting on license building works of permanent character — Licensor cannot revoke license even on payment of compensation : *A I R 1940 Lah 18, Affirmed.*

In a province like the Punjab where the Easements Act is not in force, where a licensee acting on the license has built works of permanent nature, it is not open to the licensor to revoke license at his option and resume the land even on offer of compensation : *Case law discussed; A I R 1940 Lah 18, Affirmed.* [P 511 C 1; P 512 C 1]

Barkat Ali — for Appellants.

Kishan Chand — for Respondent.

Tek Chand J. — This appeal has arisen from a suit for possession of 3 kanals and 19 marlas of land in mauza Raya, District Amritsar, instituted by the plaintiff-appellants against the respondent, the District Board of Amritsar. It was alleged in the plaint that the plaintiffs are the owners of the land, that 11 years ago they had given it temporarily to the District Board, Amritsar, for the purposes of an agricultural farm attached to the Board School at Raya on the condition that they would be entitled to resume possession at their option, at any time they liked. They averred that they required the land for their own purposes and had demanded possession from the District Board but the latter had refused to surrender it. The defendant Board resisted the suit on various grounds. It was denied that the land had been given temporarily to the defendant and could be resumed by the plaintiffs at their pleasure. On the other hand, it was pleaded that the plaintiffs had gifted the land to the Board for the purpose of an agricultural miniature farm

attached to the school. It was further alleged that in order to make the land fit for use as a farm the Board had spent large sums of money on constructions of a permanent character including a well, boundary wall and a pucca gate and that the plaintiffs never objected to these constructions and, therefore, they were estopped from maintaining the suit.

The trial Judge held that the land had not been given temporarily to the defendant but there was an out-and-out gift for the purpose of starting a miniature farm, and that as the land was being used by the defendant for that purpose the plaintiffs were not entitled to recover possession at their pleasure. He also held that the plaintiffs were estopped from maintaining the present suit. On these findings he dismissed the suit. On appeal, the learned Senior Sub-Judge concurred with the trial Judge in holding that there was a permanent gift and so long as the school at Raya continued and used the land in question for the farm, or for purposes akin to it, it could keep the land. He accordingly dismissed the appeal.

On second appeal to this Court, the learned single Judge found that in finding that there was an out-and-out gift the Courts below had ignored important evidence on the record and had misread the depositions of some witnesses. He, therefore, held that this finding was not conclusive. He accordingly, examined the evidence himself and came to the conclusion that there was no out-and-out gift, but the plaintiffs had retained the ownership in themselves and had granted permission to the District Board to occupy the land and use it for the purposes of the school. He held that this possession was in the nature of a 'license' as defined in S. 52, Easements Act. He further found that though such a license is ordinarily revocable but it is not so if the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in its execution, as laid down in S. 60 of the Act. As the District Board had sunk a well on this land and erected compound walls, which were works of a permanent character, the learned Judge came to the conclusion that the Board was not liable to be ejected on account of the undertaking given by the plaintiffs that they would not claim the land so long as it was required for the school and also on account of works of a permanent character having been executed by the Board, acting on that promise. In the result, he dismissed

the appeal, leaving the parties to bear their own costs. He, however, granted a certificate to the plaintiffs for a further appeal under Cl. 10 of the Letters Patent.

Before us, counsel for the defendant-respondents challenged the finding of the learned Judge on the merits and contended that the transfer was in the nature of an out-and-out gift. After hearing him, however, I can find no force in this contention, and agree with the learned Judge that the grant was in the nature of a license, as defined in S. 52, Easements Act. The main contention raised by Mr. Barkat Ali on behalf of the plaintiff-appellants is that the Indian Easements Act is not in force in the Punjab and, therefore, the rule laid down in S. 60 is not applicable, and that in this province the rule of English law should be followed, according to which even where the licensee, acting on the license, has executed works of a permanent character, the licensor is entitled to revoke the license and recover possession of the land on payment of compensation to the licensee for the expenditure incurred by him in executing these works. In support of this contention the learned counsel relied upon (1845) 13 M & W 838=67 R R 831¹ and three Calcutta cases, to which I shall refer presently. In (1845) 13 M & W 838¹ the facts were materially different and the decision does not really touch the point before us. There, the licensor, on receipt of money, had allowed the plaintiff to go to a stand in his enclosure and witness the races; the plaintiff had gone to the enclosure but was asked to leave and on his refusal to do so was forcibly ejected; and he brought an action for assault and false imprisonment. The case was decided primarily on the ground that according to the law, as administered in England at the time (1845), the right to come and remain for a certain time on the land of another could only be granted by deed; and that a parol license to do so, though money had been paid for it, was revocable at any time and without paying back the money.

This common law doctrine, however, was not allowed to prevail in equity; and ever since the Judicature Act the Courts in England have been giving effect to equitable considerations, and (1845) 13 M & W 838¹ has not been followed in its integrity: see the judgment of Lindley L. J. in (1915)

1. (1845) 13 M & W 838=14 L J Ex 161=9 Jur 187=67 R R 831, Wood v. Leadbitter.

1 K B 1² (at pp. 6 to 10) and (1901) 2 Ch D 598,³ see also Gale on Easements (Edn. 11), pp. 69 and 70. Further in (1845) 13 M & W 838¹ a distinction was drawn between what is called a "naked license" and a "license coupled with a grant." Alderson B., who delivered the judgment in that case observed at pp. 844 and 845 :

A mere license is revocable, but that which is called a license is something more than a license; it often comprises or is connected with a grant, and then the party who has given it cannot in general revoke it so as to defeat the grant, to which it was incident.

It cannot be said that in the case before us the license was a mere "naked" license. The case cited, however, does not deal with the principle underlying S. 60, Easements Act, and therefore it is not necessary to discuss it further. That principle appears to be based on equitable considerations and is really an application of the rule of estoppel to the case of a licensor, and I have not been able to find anything in English law, to the contrary. Indeed, the following passage from Goddard on Easements (Edn. 8) p. 529 sums up the English law in words, which are almost identical with S. 60 of the Indian Act:

A license is also irrevocable if the licensee acting upon the permission granted, has executed a work of a permanent character, and has incurred expenses in its execution. This rule of law seems to be based upon the injustice which would be inflicted upon the licensee if, after he had laid out money and executed a permanent work, the licensor were permitted to revoke his licence and make him waste the money expended, or if he ever allowed to treat him as a wrongdoer and recover damages for the very act for which he gave permission.

Of the three Calcutta cases cited by Mr. Barkat Ali, 16 Cal 640⁴ is clearly distinguishable, as in that case no work of a permanent character had been executed; the plaintiff had merely been given the right to go to a corner of the defendants' land and use it as a privy and, following (1845) 13 M & W 838,¹ it was held that this being a "naked license" to use the land of the defendant, not coupled with a grant, was revocable at the will of the licensor, subject to the right of the licensee to damages if revoked contrary to the terms of any express or implied contract. The other two cases certainly support Mr. Barkat Ali's contention and have the high authority of

Sir Asutosh Mookerjee behind them. In 12 C L J 443 = 8 I C 793⁵ it was observed that where a licensee acting upon the license has executed works of a permanent character and has incurred expenses in their construction, the grantor of the license is entitled to revoke it, if he makes compensation to the licensee for the loss he may incur by reason of the revocation of the license. The learned Judge based this conclusion upon certain English authorities, mentioned therein. This view was reiterated by the same learned Judge in 19 C L J 321⁶ (at p. 323). But as pointed out by Sulaiman C. J. in 149 I C 389⁷ (at page 391) the rule has been expressed in too wide terms in these Calcutta cases and is not supported by the English decisions cited therein. In one of these cases, (1884) 9 A C 699,⁸ the license was held to be irrevocable and the compensation actually granted to the licensor was not for revoking the license but for acquisition of certain other interests which he held in the land.

Similarly, in (1853) 16 Beav 630 = 96 R R 288⁹ the Court gave full effect to the rule of estoppel and refused to the licensor the injunction asked for, as he had acquiesced in the construction of costly works by the licensee. The decision in (1870) 10 Eq 141¹⁰ turned on its peculiar facts and it was held on the evidence that the undertaking given by the licensor did not form the foundation of an equitable right and therefore neither an injunction nor compensation was granted. In (1807) 8 East 308 = 9 R R 454¹¹ an action in a case for nuisance was dismissed, as the license executed was held to be not countermandable, though it was remarked obiter that after the licensee had incurred expenses the license could not be recalled "at least not without putting him in the same position as before, by offering to pay all the expenses which had been incurred in consequence of it." No compen-

5. ('10) 12 C L J 443 = 8 I C 793, Surnomoyee Peshakar v. Chunder Kumar Das.

6. ('14) 1 A I R 1914 Cal 173 = 19 I C 853 = 19 C L J 321, Moti Lal Rai v. Kalu Mondar.

7. ('34) 21 A I R 1934 All 517 = 149 I C 389 = 56 All 975 = 1934 A L J 698, Mathuri v. Bhola Nath.

8. (1884) 9 A C 699 = 53 L J P C 104 = 51 L T 475 = 49 J P 116, Plimmer v. Mayor, Councillors, etc. of Wellington.

9. (1853) 16 Beav 630 = 22 L J Ch 604 = 17 Jur 1001 = 96 R R 288, Rochdale Canal Co. v. King.

10. (1870) 10 Eq 141 = 39 L J Ch 809 = 23 L T 137 = 18 W R 639, Bankart v. Tennant.

11. (1807) 8 East 308 = 9 R R 454, Winter v. Brockwell.

2. (1915) 1 K B 1 = 83 L J K B 1837 = 111 L T 972 = 30 T L R 642 = 58 S J 739, Hurst v. Picture Theatres, Ltd.

3. (1901) 2 Ch D 598 = 70 L J Ch 783 = 85 L T 195 = 50 W R 87 = 17 T L R 763, Lowe v. Adams.

4. ('89) 16 Cal 640, Prosonna Coomar v. Ram Coomar.

sation was however actually granted and the verdict was entered for the defendant. Again in (1831) 7 Bing 682=33 R R 615¹² in an action for tort it was held that the license was not countermandable and injunction was refused: it does not appear from the judgment that compensation was in fact granted. The last case referred to is (1894) 2 Ch 437,¹³ in which a parol license by a lessor to the lessee to open ventilators in the walls of a building demised by the lease was held to be revocable, and on the lessor closing the ventilators the lessee's action for injunction to restrain the obstruction was dismissed, but an enquiry was ordered to ascertain the amount of damage (if any) which he had suffered by reason of the obstruction. In the judgment emphasis was laid on the circumstance that the license was not by deed but was parol and (1845) 13 M & W 838¹ was followed the authority of which (as already stated) has since been shaken, so far as the particular matter is concerned.

In England, the present rule is as expressed in the passage from Goddard on Easements reproduced above and is substantially the same as that contained in S. 60, Easements Act. This rule being in consonance with equity, justice and good conscience should be given effect to in provinces like the Punjab, where the Act is not in force. This was done by Sulaiman C. J. in 149 I C 389⁷ in a case in which the license had been granted before the Easements Act was extended to the United Provinces and by the Judicial Commissioner of Central Provinces in 94 I C 923,¹⁴ to a case from Berar where the Act is not in force. The contention of the learned counsel for the appellant is without force and must be repelled. It is not denied that the land in dispute is being actually used by the District Board for the purpose for which it was given. It is also proved that more than ten years ago the defendant, acting on this license had sunk a well, erected a boundary wall and a pucca gate at considerable cost. These are works of a permanent character and therefore applying the rule laid down above, it is not open to the appellants to revoke the license at their option, and resume the land on offer of payment of compensation. I would

accordingly affirm the judgment of the learned Judge and dismiss the appeal, but having regard to all the circumstances would leave the parties to bear their own costs throughout.

Dalip Singh J. — I agree.

D.S./R.K.

Appeal dismissed.

A. I. R. 1940 Lahore 512

BHIDE J.

Court of Wards Estate of Malik Amir Khan — Defendant — Appellant.

v.

Lala Tehla Ram — Plaintiff — Respondent.

Second Appeal No. 1094 of 1939, Decided on 14th February 1940, from decree of Dist. Judge, Mianwali, D/- 4th May 1939.

Punjab Court of Wards Act (2 of 1903), S. 32 — Modification of order.

Awarding additional and future interest would not amount to modification of the order of the Deputy Commissioner. [P 513 C 1]

Mohammad Monir — *for Appellant.*

V. N. Sethi — *for Respondent.*

Judgment.—This is a second appeal arising out of a suit for recovery of Rs. 1400 and a declaration to the effect that the plaintiff was entitled to charge interest on the principal sum in a bond, dated 1st March 1930, on which the plaintiff based his suit. The defendant Khan Sahib Malik Amir Khan, who had executed the bond, had come under the guardianship of the Court of Wards and the claim was notified by the plaintiff to the Deputy Commissioner; but the Deputy Commissioner allowed only the principal sum with interest at one per cent. per mensem from 1st March 1930, the date of the bond, to 9th March 1933. The plaintiff thereupon instituted the present suit to establish his claim to additional interest on the basis of the bond referred to above. The trial Court allowed him a decree for Rs. 1211. On appeal the learned District Judge raised the decretal amount to Rs. 1400. He also awarded future interest at Re. 1-9-0 per cent. per mensem. From this decision the present appeal has been preferred on behalf of the Court of Wards. The learned counsel for the appellant had challenged in the grounds of appeal the increase of the decretal amount by Rs. 189 by the learned District Judge on appeal, but this point was given up by him at the hearing. In view of the relinquishment of this claim the objection as to deficiency in the court-fee which had been

12. (1831) 7 Bing 682=5 Moore & Payne 712=9 L J O P 202=33 R R 615, *Liggins v. Inge*.

13. ('94) 2 Ch 437=63 L J Ch 601=8 R 352=71 L T 119=42 W R 453, *Aldin v. Latimer Clark Muirhead and Co.*

14. ('26) 13 A I R 1926 Nag 376=94 I C 923, *Dayaram v. Deorao*.

raised on behalf of the respondent was not pressed. It may also be mentioned here that the respondent has made up the deficiency in the court-fee on the appeal in the lower Appellate Court as directed by my order dated the 7th February 1940.

On merits the learned counsel for the appellant has now raised only one point, namely that the additional interest which had been allowed by the Courts below amounts to an interference with the order passed by the Deputy Commissioner and the Courts had therefore no jurisdiction to allow this interest. The Courts below have held that they had power to allow the interest under Sec. 32, Court of Wards Act. The learned counsel for the appellant contends that according to S. 32, Punjab Court of Wards Act, a civil Court has no jurisdiction to set aside or modify the order of a Deputy Commissioner fixing a date for the payment of such claim or regulating the order in which claims against the ward or properties under the superintendence of the Court of Wards shall be paid.

The learned counsel contended that awarding additional and future interest would amount to modification of the order of the Deputy Commissioner as the Deputy Commissioner may find it necessary to pay the amount due to the plaintiff earlier than he intended to avoid accumulation of interest. It seems to me that this is a far-fetched interpretation to place on the wording of S. 32, Punjab Court of Wards Act. The section clearly gives a right to the plaintiff to agitate in the Civil Court any claim which has been duly notified to the Deputy Commissioner but which has been disallowed by him wholly or in part. In the present instance the claim for interest which has been allowed by the Courts below, was duly notified to the Deputy Commissioner and was disallowed by him. Civil Courts had therefore jurisdiction to adjudicate on the plaint. In my opinion the contention of the learned counsel is not tenable in view of the language of S. 32. I therefore disallow it and dismiss the appeal with costs.

D.S./R.K.

Appeal dismissed.

A. I. R. 1940 Lahore 513

TEK CHAND J.

Kesar Chand — Plaintiff — Petitioner.

v.

Bulaqi Ram and another —

Defendants — Respondents.

Civil Revn. No. 405 of 1939, Decided on 14th June 1940, from decree of Senior Sub-Judge, Sialkot, D/- 22nd February 1939.

1940 L/65 & 66

(a) Limitation Act (1908), S. 20 — Payment of sum larger than amount due as interest at time of payment — Part of payment must be presumed to have been made towards principal.

Where the payment made by the debtor to the creditor is of a sum larger than the amount due at the time of payment as interest, a part of it must necessarily be presumed to have been made towards the principal and therefore the payment will save limitation : *A I R 1940 P C 63, Rel. on.* [P 514 C 2]

(b) Limitation Act (1908), S. 20 — Debtor making payment through his son—Son is authorised agent within meaning of S. 20.

Where the debtor sends the amount for payment to the creditor through his son, the latter must be deemed to be his authorised agent within the meaning of S. 20 for the purpose of making the payment. [P 514 C 2]

M. L. Puri — *for Petitioner.*

Shamair Chand — *for Respondents.*

Order. — The plaintiff Kesar Chand instituted a suit against Bulaqi Ram and his son Raja Ram, proprietors of a joint Hindu family trading business known as Bulaqi Ram-Raja Ram, for recovery of Rs. 270, alleged to be the balance due on a loan advanced by the plaintiff to the defendants. It was stated in the plaint that on 21st January 1934 the defendants after going through a previous account, which they had with the plaintiff, struck a balance for Rs. 2717 in his bahi. On that date the defendants borrowed another sum of rupees 2000 in cash, the total amount due on that date thus being Rs. 4717. It was agreed that this amount would bear interest at 12 annas per cent. per mensem. In this account the defendants made a payment of rupees 3500 on 24th July 1935. The payment was recorded in the plaintiff's bahi in the handwriting of Raja Ram, defendant 2. On 12th September 1936, the defendants paid another sum of Rs. 1800. This amount was sent through one Labh Chand and the payment was recorded in the plaintiff's bahi by Labh Chand in his own handwriting. On 18th December 1937 the plaintiff brought the present suit for recovery of Rs. 270 which he alleged was the amount due after giving credit for the sums of Rs. 3500 and Rs. 1800 which had been repaid on 24th July 1935 and 12th September 1936 respectively. It was claimed in the plaint that the suit was within limitation by reason of these payments under S. 20, Limitation Act. The defendants admitted that Rs. 4717 was due by them to the plaintiff on 21st January 1934 and that this sum carried interest at 12 annas per cent. per mensem. They also admitted having repaid Rs. 3500 and Rs. 1800 respectively on the

dates mentioned above. They, however, pleaded that the suit was barred by time, as neither of the two payments had been made by the defendants towards interest as such or in part payment of the principal and, therefore, S. 20 did not save limitation. The trial Judge overruled this plea and granted the plaintiff a decree for the sum claimed. On appeal the learned Senior Subordinate Judge came to the contrary conclusion on the question of limitation. He held that S. 20 did not apply and that the suit, having been brought more than three years after 21st January 1934, was barred by limitation.

The plaintiff came up to this Court in revision and as the rulings bearing on the point were conflicting, the case was referred to a Full Bench. Before the hearing of the case by the Full Bench, the question of law involved had been authoritatively settled by their Lordships of the Privy Council in A I R 1940 P C 63.¹ The Full Bench therefore returned the case to the Single Bench for disposal in accordance with the rule of law laid down in the case above mentioned. In A I R 1940 P C 63¹ their Lordships not only decided the particular case before them but they examined in detail the provisions of S. 20 and laid down several propositions dealing with various aspects of part payments by the debtor. These propositions may be summarised as follows:

(1) If it is claimed that the debtor has made a payment towards interest, this can only save limitation if it is shown that interest was paid by the debtor as such, that is to say, the intention of the debtor must be shown to have been that the payment should go towards interest: (a) it is however not necessary that this intention should have been made clear at the time of the payment; (b) it may be proved not only by statements made by the debtor at the time of payment but in any other manner as may clearly appear from the circumstances.

(2) If the debtor at the time of payment specifies that the payment was towards principal, this would obviously save limitation under S. 20.

(3) If however the debtor makes an "open payment", that is, a payment without appropriation by him (debtor) either towards interest or in part payment of the principal, the creditor may appropriate it towards

principal or interest: (a) if the creditor appropriates it towards interest, limitation will not be saved because the payment is not made as such; (b) if however the creditor appropriates the payment towards part payment of the principal, limitation will be saved provided the appropriation is made before expiry of limitation. Such appropriation need not be made at once but it must be made before the limitation has expired; (c) if the appropriation is once made by the creditor towards interest, he cannot transfer it subsequently towards principal.

(4) If the payment made is of a sum larger than the amount due at the time of payment as interest, a part of it will necessarily be presumed to have been made towards the principal and therefore this payment will save limitation.

(5) If the debt does not bear interest, the payment again must necessarily be in part payment of the principal and therefore limitation will be extended under S. 20.

Applying these rules to the case before me, there can be no doubt that S. 20 is applicable and that the suit was brought within limitation. The first payment of Rs. 3500 was made on 24th July 1935. It is common ground that on that date rupees 640-4-0 only was the amount due as interest. The balance must necessarily be taken to have been paid in part payment of the principal. The fact of the payment is noted in the plaintiff's *bahi* in the handwriting of Raja Ram, defendant 2. The requirements of the proviso to sub-s. (1) of S. 20 are thus fully satisfied. Bulaqi Ram, defendant 1 stated in the witness-box that he had sent the amount through his son Raja Ram. Raja Ram was therefore the authorized agent for the purpose of making the payment, and time is therefore extended both against Bulaqi Ram and Raja Ram under cl. (b) of sub-s. (3) of S. 21. I accept the petition for revision, set aside the decree of the Senior Subordinate Judge and restore that of the trial Judge granting the plaintiff a decree for Rs. 270. Having regard to all the circumstances, I leave the parties to bear their own costs throughout.

G.N./R.K.

Petition accepted.

* A. I. R. 1940 Lahore 514

SKEMP J.

Oudh Behari Lal v. Emperor.

Criminal Revn. No. 1223 of 1940, Decided on 21st September 1940.

* Penal Code (1860), S. 205—Security bond lodged for purpose of succession certificate is not act in suit.

1. ('40) 27 A I R 1940 P C 63=187 I C 293=I L R (1940) Kar 194=67 I A 160 (P C), Rama Shah v. Lal Chand.

By the ordinary rule of construction all the acts detailed in S. 205 are acts "in any suit or criminal prosecution." Proceedings under the Succession Act and some other proceedings are not acts in any suit, and hence security bond lodged for the purpose of a succession certificate is not an act in a suit. [P 515 C 2]

A. R. Kapur — *for Petitioner.*

Nand Lal Slooja, for Advocate-General—
for the Crown.

Order.—Oudh Behari Lal has petitioned for revision of his conviction under S. 205 read with S. 109, I. P. C., and his sentence of two years' rigorous imprisonment. The facts of this unusual case as found by the Courts below are as follows: Hazari Lal son of Sant Lal died insured for about Rs. 20,000: his father Sant Lal applied for a succession certificate which was granted to him on condition that he filed surety for about 20,000. The parties had difficulty in getting security for so much and one Raman Lal, giving his name as Joti Prasad, gave the security. The Subordinate Judge appointed a pleader to verify the surety. Raman Lal disappeared and the fraud was detected. It is the case for the Crown that the whole affair was engineered by Oudh Behari Lal, a pleader's munshi. Four persons were tried on charges under Ss. 199 and 205, I. P. C. Raman Lal was convicted under S. 205, Oudh Behari Lal and two others, Kanhaya Lal and Nawab Ali Khan, who attested the security bond, under Ss. 205 and 109. Raman Lal and Oudh Behari Lal were each sentenced to two years' rigorous imprisonment, the other two to one year's rigorous imprisonment: they were acquitted of the charge under S. 199. This judgment was passed on 8th April 1940. The learned Sessions Judge on 23rd May 1940, rejected the appeal. Oudh Behari Lal has come here on revision through Mr. Amolak Ram. Mr. Amolak Ram invites attention to the wording of S. 205 which runs as follows:

Whoever falsely personates another, and in such assumed character makes any admission or statement, or confesses judgment, or causes any process to be issued or becomes bail or security, or does any other act in any suit or criminal prosecution, shall be punished.

His argument is that the case in which the false security bond was given was a proceeding under the Succession Act and not a suit. He refers to remarks of Sir Shadi Lal C. J., in the well-known Full Bench ruling, 5 Lah 288¹ at p. 292:

1. ('24) 11 A I R 1924 Lah 425=84 I O 259=5 Lah 288 (F B), Lal Chand Mangal Sain v. Behari Lal Mehar Chand.

It is beyond question that 'case' is not synonymous with 'suit'. While every suit is a case, it cannot be said that every case is a suit. The word 'case' is a more comprehensive expression and includes not only a suit but other proceedings which cannot be described as a suit, e. g., proceedings under the Guardians and Wards Act, Probate and Administration Act, Succession Certificate Act, Provincial Insolvency Act, Religious Endowments Act, etc.

(The Probate and Administration Act and the Succession Certificate Act are now embodied in the Succession Act). Mr. Amolak Ram also referred to 22 Mad 256² which appeared to hold that a suit must commence with a plaint, and a proceeding which is capable of terminating in a decree or an order having the force of a decree cannot, on that account alone, be deemed to be a suit within the meaning of the Code, if it has not commenced with a plaint.

In my judgment Mr. Amolak Ram's argument is well-founded and this security bond lodged for the purpose of a succession certificate was not an act in a suit. I think that by the ordinary rule of construction all the acts detailed in S. 205 are acts "in any suit or criminal prosecution." Proceedings under the Succession Act and some other proceedings are not acts in any suit. Perhaps the section requires amendment but fortunately cases of this kind are rare. I accept the revision, set aside the conviction and sentence passed on Oudh Behari Lal and direct that he be acquitted and set at liberty. The same point of law appears to govern the cases of the other three convicts who have not petitioned for revision. In their cases I issue notice to the Crown: in the meantime they are to be enlarged on bail to the satisfaction of the District Magistrate, Delhi. In my opinion, the sentences in this case were unnecessarily severe.

D.S./R.K.

Revision allowed.

2. ('99) 22 Mad 256, Venkata Chandrappa v. Venkatrama Reddi.

A. I. R. 1940 Lahore 515

BHIDE AND DIN MOHAMMAD JJ.

*Sayed Zavar Hussain Shah and
another — Defendants — Appellants.*
v.

*Mian Saleh Mohammad Shah —
Plaintiff — Respondent.*

First Appeals Nos. 104 and 105 of 1939, Decided on 27th May 1940, from decree of Senior Sub-Judge, Jhang, D/- 28th February 1939.

(a) Custom (Punjab)—Sayyads of Jhang District — Unmarried sister succeeds as limited owner and she has no right of alienation.

Among Sayyads of Jhang District whenever an unmarried daughter or sister succeeds, she succeeds till marriage and this evidently means that her estate is limited and not absolute. A sister, however, in the matter of alienation does not stand on the same footing as a daughter and has no power of alienation whatever. [P 518 C 1, 2]

(b) Custom (Punjab)—Sayyads of Jhang District—Unmarried sister cannot alienate property so as to prejudice rights of married sister.

A female heir who succeeds until marriage cannot destroy the estate so long as any person who is eligible to succeed is alive. Hence, so long as a married sister is alive, an unmarried sister in possession of the property cannot alienate the property so as to prejudice the right of a married sister. [P 518 C 2 ; P 519 C 1]

(c) Pardanashin lady — Gift by pardanashin lady—Donee must prove that donor had independent advice and that she understood deed.

In case of a gift by pardanashin lady the donee must prove that donor had independent advice, freedom and comprehension and that the scheme and substance of the deed were originally and clearly conceived and desired by her : *A I R 1925 P C 204; A I R 1929 P C 3 and A I R 1931 P C 100, Rel. on.* [P 519 C 2]

(d) Pardanashin lady — Meaning explained.

A 'pardanashin' lady is one who does not expose her face to the public. Among Sayyads woman who take a vow of celibacy generally lead a secluded life and are to all intents and purposes 'pardanashin.' [P 520 C 1]

(e) Pardanashin lady — Gift—Person deposing to her disposing state of mind should be sure of her identity.

In a case where the issue is whether a certain lady had a disposing mind or not, it is essential that persons deposing to her state of mind should first be sure of her identity. [P 520 C 1]

(f) Custom (Punjab)—Sayyads of Jhang District — Married sisters succeed in absence of collaterals within five degrees.

Among Sayyads of Jhang District married sisters have right to succeed to the property of their deceased brothers if collaterals within five degrees did not exist. [P 520 C 1]

(g) Custom (Punjab) — Succession—Sayyads of Jhang District—Right of representation.

The right of representation is permissible under the Customary law applicable to the Sayyads of Jhang District. [P 520 C 2]

(h) Custom (Punjab)—Sayyads of Jhang District—Only sisters married to collaterals within fifth or sixth degree can claim preference to sisters married to strangers.

Among sayyads of Jhang District sisters in order to claim preference to sisters married to strangers must be married to collaterals within fifth or sixth degree. Those sisters who are married to collaterals remoter than six degrees or strangers stand on an equal footing. [P 521 C 1]

Dr. Shuja-ud-Din, Achhru Ram, Mohd. Monir and H. L. Soni—*for Appellants.*
J. N. Aggarwal and Mehr Chand Mahajan
—*for Respondent.*

Din Mohammad J.—This judgment will dispose of Regular First Appeals Nos. 104 and 105 of 1939, which have arisen in the following circumstances. One Hassan Shah had married five wives—Mt. Jindwadi, Mt. Nur Bhari, Mt. Sat Bharai, Mt. Allah Jiwai and Mt. Mahmud Khatun. Of these, Mt. Nur Bhari and Mt. Allah Jiwai were issueless. Mt. Mahmud Khatun gave birth to a son Allah Yar Shah. Mt. Sat Bharai had a daughter, Mt. Sardar Bibi and Mt. Jinwadi gave birth to two daughters, Mt. Bakht Bhari and Mt. Sat Bharai. Mt. Sat Bharai the mother of Mt. Sardar Bibi, predeceased her husband. Hassan Shah died in 1893 leaving him surviving Allah Yar Shah who was still an infant and the three daughters along with the four widows mentioned above. The whole of his estate according to custom devolved on Allah Yar Shah. Within a year of his succession Allah Yar Shah also died and the estate left by him was on 9th April 1895 mutated in equal shares in favour of Mt. Jindwadi, Mt. Nur Bhari and Mt. Allah Jiwai, the three widows of Hassan Shah, and Mt. Sardar Bibi as a representative of her mother, Mt. Sat Bharai. The fourth widow, Mt. Mahmud Khatun, had died in the meanwhile. Mt. Allah Jiwai died in 1905 and her share was mutated in the names of Mt. Jindwadi, Mt. Nur Bhari and Mt. Sardar Bibi in equal shares. Mt. Sardar Bibi had however married in the meantime and, consequently, on 20th May 1905, Mt. Jindwadi instituted a suit for possession of Mt. Sardar Bibi's share both on her own account and on account of her co-widow alleging that Mt. Sardar Bibi had lost her right on marriage.

This suit was decreed and the revenue entries were brought in accordance with this decision. In 1911, Mt. Jindwadi died and on 5th February 1911, her share went to her unmarried daughter, Mt. Sat Bharai, alone till marriage (p. 83 Vol. II). Mt. Bakht Bhari, the other daughter of Mt. Jindwadi, had predeceased her mother, leaving behind a son, Saleh Mohammad Shah but his claim was not considered at the time. In 1918, Mt. Nur Bhari died and as Mt. Sat Bharai was still unmarried and thus the only eligible heir in existence, Mt. Nur Bhari's share was also mutated in the name of Mt. Sat Bharai until marriage. Mt. Sat Bharai died on 1st or 2nd May 1934, and the question arose as to who should succeed to the estate. The revenue officers mutated the property half and half in favour of Mt. Sardar Bibi, the only sur-

viving sister of Allah Yar Shah, and Saleh Mohammad Shah, the only son of Mt. Bakht Bhari, another sister of Allah Yar Shah. Thereupon, Saleh Mohammad Shah instituted a suit for a declaration that he was entitled to the whole of the property left by Mt. Sat Bharai on the basis of a gift said to have been made by her in his favour on 1st May 1934. In the alternative, he contended that inasmuch as his mother had married a collateral of Allah Yar Shah and Mt. Sardar Bibi was married to a stranger, he had a preferential right to succeed to the estate left by Mt. Sat Bharai. On 7th April 1936, Mt. Sardar Bibi put forward a counter claim in the shape of a separate suit seeking to oust Saleh Mohammad Shah from inheritance altogether. The main basis of her claim was that under the Customary law a sister excluded a sister's son. Both these suits were tried together by the Senior Subordinate Judge, Jhang, and disposed of by one judgment. Saleh Mohammad Shah's suit was decreed and the suit instituted by Mt. Sardar Bibi was dismissed.

After the decision of the suits mentioned above, Mt. Sardar Bibi died leaving her surviving her two sons, Zavar Hussain Shah and Hassan Shah, and these appeals have been preferred by them against the judgment and decree of the Senior Subordinate Judge. R. F. A. No. 104 relates to the suit instituted by Saleh Mohammad Shah against Mt. Sardar Bibi and R. F. A. No. 105 relates to the suit instituted by Mt. Sardar Bibi against Saleh Mohammad Shah. The questions arising for determination in this case are: (1) Whether Mt. Sat Bharai was competent to make the gift relied on by Saleh Mohammad Shah? (2) Whether she had a disposing mind at the time when the gift is said to have been made? (3) Whether Mt. Sardar Bibi as a married sister of Allah Yar Shah can at all succeed on the death of Mt. Sat Bharai? (4) Whether Saleh Mohammad Shah's claim is superior to that of Sardar Bibi or vice versa? and (5) Whether at the present stage of the case the appellants Zavar Hussain Shah and Hassan Shah are on an equal footing with Saleh Mohammad Shah? In order to determine, whether Mt. Sat Bharai was competent to make a gift or not, it seems necessary to determine first of all the nature of Mt. Sat Bharai's estate, that is, whether she was a limited or an absolute owner. If the former, the gift will be invalid; if the latter, it will not be open to any objection. It is not now

disputed that the status of Mt. Sat Bharai was that of a sister of Allah Yar Shah, the last male holder, and not that of a daughter of Hassan Shah, the father of Allah Yar Shah. In the latest *riwaj-i-am* of the Jhang District, compiled in 1929, questions 74 and 79 relate to the succession of a sister. Question 74 is shown in this *riwaj-i-am* as corresponding to question 20 in the *riwaj-i-am* compiled in 1909, but the answer to question 20 does not provide for the succession of a sister. Question 79 corresponds to question 25 in the previous *riwaj-i-am*. In the answer to question 74 providing for succession in the absence of male lineal relatives within certain degrees and of the mother, widows, daughters or daughters' sons of the deceased, Sayyads stated that the property in the circumstances would go to sisters or their issue, provided that there were no collaterals of the third or fourth degree in existence. Question 79 reads as follows :

In the presence of sons do sisters inherit? If so, what is their share with reference to daughters? If sisters are excluded by male collaterals, must the latter be within a particular degree or relationship? Do sister's sons (or husbands) ever succeed? If so, how are their shares computed.

The answer to this question is couched in the following terms :

All tribes.—In the presence of sons sisters do not inherit.—In the absence of male lineal descendants, widows, daughters, mother of deceased and unmarried sisters succeed successively till marriage. Sisters have the same rights as unmarried daughters till their marriage as laid down in answer to question 89.

In the absence of collaterals, sisters get their full shares and if they die, their sons succeed by representation to their mothers' shares. Among Mahomedans those sisters who have been married to the collaterals of their brothers have prior rights compared with sisters married in different families or castes.

In cases when inheritance could devolve on sisters, in their absence, sisters' sons succeed to their mothers' shares. The husband of a sister however is not entitled to succeed in any case.

The old question 25 and the answer thereto appearing in the *riwaj-i-am* of 1909, which was compiled in Urdu, may be translated as follows :

Q. Do sisters or sisters' sons ever succeed? If so how are their shares calculated?

A. In the absence of sons, daughters, widows, brother and mother of the deceased, an unmarried sister succeeds until marriage and her rights and privileges are the same as a daughter's. If however there is no uncle or first cousin, a sister does not lose her estate even by marriage. In such circumstances, even a sister's son succeeds and when sisters' sons succeed, their shares are determined inter se according to the number of their mothers and not according to their own number.

In the answer to question 39 which is referred to in the answer to question 79, it is stated that except in the case of Qureshi Hashmi residents of village Shorkot and Faqir Mujawars of Atharan Hazari, Tahsil Jhang

succession in the first place goes to the sons and their direct male lineal descendants, failing them to the widows till death or re-marriage, failing these to the collateral descendants of the common male ancestor. In the absence of male collateral kindred within five degrees, daughters, their sons, sisters and their sons succeed in the order given. If the deceased leaves a widow and unmarried daughters from another wife, half the property goes to the widow and half to the daughters.

In the answer to question 63 which relates to the succession of daughters, it is stated that in the absence of sons, daughters succeed until marriage, and when they are married, the collaterals of their deceased father succeed to the property. From the questions and answers reproduced above, it is clear that whenever an unmarried daughter or sister succeeds, she succeeds till marriage and this evidently means that her estate is limited and not absolute. Consequently, when Mt. Sat Bharai succeeded to the estate of her brother Allah Yar Shah both after the demise of her mother, Mt. Jindwadi, and of her step-mother, Mt. Nur Bhari, who, as stated above, had come into possession of the property as step-mother of Allah Yar Shah, she succeeded merely to the usual estate of a limited owner and not to the absolute estate of an unlimited owner.

On behalf of the respondent reliance is however placed on question 69 and the answer thereto which defines the powers of alienation of daughters inheriting their father's estate on account of failure of collaterals within seven degrees. It is stated there by all Mahomedans that in such cases they have full powers of alienation. In other cases, they cannot sell or mortgage except for necessity. Unfortunately, the answer to this question is not happily worded and unless reference is made to other questions and answers, it is difficult to determine what it really means. In the answer to question 63, referred to above, it is stated in unambiguous terms that in the absence of sons, daughters succeed until marriage. In the answer to question 39, it is said that in the absence of male collateral kindred within five degrees, daughters, their sons, sisters and their sons succeed in the order given. In the answer to question 15 of the *riwaj-i-am* compiled in 1909 at p. 46, it is stated that daughters

inherit in the absence of sons and widows. The answer is further made clear by stating that they succeed until marriage even in the presence of uncles and first cousins and that if uncles and first cousins be not in existence, they do not lose their right even on marriage. This being so, it can reasonably be urged that the compiler did not refer to unmarried daughters when he stated in the answer to question 69 that those daughters who inherit on account of failure of collaterals within seven degrees enjoy full powers of alienation. This interpretation is supported by the answer to question 18 at p. 47 of the *riwaj-i-am* of 1909, printed at p. 55 of Vol. II of the present record. It reads as follows :

Unmarried daughters who succeed until death or marriage have no powers of alienation of any sort, whether temporary or permanent. Married daughters, however, who succeed, as stated in the answer to question 15, have full powers of alienating their property.

Question 69 is shown in the *riwaj-i-am* as corresponding to question 18, and the two answers read together leave no doubt in my mind, that the power of alienation was vested in married daughters only and not in unmarried daughters who succeeded only till marriage. If unmarried daughters have no such power, much less can an unmarried sister exercise it. I further consider that a sister in the matter of alienation does not stand on the same footing as a daughter and has no power of alienation whatever. All that is contended by counsel for the respondent is that in the answer to question 79 it is stated that sisters have the same rights as unmarried daughters till their marriage, but even if this is so it is only within a limited sphere that this rule applies. It is clearly stated in the answer to question 79 that sisters enjoy the same rights as unmarried daughters till their marriage as laid down in the answer to question 39, and question 39 does not refer to the power of alienation at all. In the answer to no other question it is stated that a sister enjoys the same privileges as a daughter under question 69. It may be observed that the answers and questions appearing in the *riwaj-i-am* of 1909 are shown to have been given by the Sial tribe, but it is not disputed that Sayyads had adopted the same custom as Sials.

I am further disposed to think that a female heir who succeeds until marriage cannot destroy the estate so long as any person who is eligible to succeed is alive. Question 69 no doubt refers to seventh

degree collaterals alone, but it cannot be said that a power that cannot be exercised in the presence of a seventh degree collateral can be freely exercised if a nearer heir like a married sister is alive. As already remarked in the answer to question 74 Sayyads have clearly stated that sisters are to be preferred even to a fifth degree collateral and inasmuch as a sister's issue is also contemplated in that question, it is not unfair to conclude that not only unmarried sisters but married sisters too are preferable to the fifth degree collaterals. The status of a married sister being higher than that of a fifth degree collateral, it follows that so long as she is alive, an unmarried sister in possession of the property cannot alienate the property so as to prejudice the right of a married sister. Counsel for the respondent refers to the *wajib-ul-arz* of 1856 relating to mauza Kariwala, where it is stated generally that a gift can be made in favour of a sister's son, and to the *riwaj-i-am* of the Jhang District which favours gifts in the absence of near collaterals. These statements were obviously not made concerning limited owners and female heirs coming into possession of an estate for life or till marriage. If however it be assumed that every kind of owner is covered by the rule, the gift relied upon can only be governed by question 127 and not by question 125 of the *riwaj-i-am* of 1929, inasmuch as it was a gift made on death-bed. Question 3 of the *riwaj-i-am* of 1909 to which question 127 corresponds was answered as follows :

There is no fixed rule relating to death-bed gifts. Moveable property can be gifted by way of charity to poor relatives, ulema and indigent persons but not to such an extent as to prejudice the heirs. Immovable property cannot be gifted at all.

The answer to question 127 was modified a little in this respect and it was provided that a small proportion of moveable property might be gifted with the consent of kindred for religious and charitable purposes. No instances have been brought on the record to support the contention raised by the respondent that an unmarried sister in the circumstances existing in the present case has unfettered powers in the matter of gift and consequently neither the Customary law as stated in the Manual nor custom as practised in the tribe helps the respondent. I am inclined to hold therefore that Mt. Sat Bharai could not make the gift in question. But even if she could make a gift, the respondent has failed to establish that she had a disposing mind at

the time when the gift is said to have been made. (After discussing evidence His Lordship proceeded.) Counsel for the appellant has in this connexion referred to 47 All 703,¹ 115 I C 733² and 131 I C 401³ and in my view the principles enunciated in those judgments afford a valuable guide in determining the question at issue. In 47 All 703,¹ their Lordships of the Privy Council, dealing with the case of a parda-nashin lady, remarked at page 710 :

The real question is, whether the appellant was so made cognisant of its contents and purport that it can be said that the respondents have discharged the onus of showing that she understood it so as to make it her deed.

At p. 711 their Lordships added :

The real point is, that the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act, of the person who makes it.

In the present case, in the words of their Lordships used at page 711, neither the donor's "freedom and comprehension" have been established, nor is it proved that the "scheme and substance of the deed were originally and clearly conceived and desired by her". In 115 I C 733,² their Lordships of the Privy Council approvingly referred to a passage in the judgment of Turner L. J., which *inter alia*, enunciated that

a person standing in a fiduciary relation to another could retain a gift made to him by that other only if he proved that the donor had independent advice, or that the fiduciary relation had ceased for so long that the donor was under no control or influence whatever.

In other words :

The donee must show that the donor either was emancipated, or was placed, by the possession of independent advice, in a position equivalent to emancipation.

Here, on the other hand, everything points to the conclusion that the lady was in the power of Saleh Mohammad Shah and his father, Khuda Yar Shah, and could not have freely exercised her independent will. In 131 I C 401,³ their Lordships of the Privy Council remarked that in the case of disposition of property by a parda-nashin lady it was for the person claiming the benefit of any such disposition to establish affirmatively that it was substantially understood by the lady and was really her free and intelligent act. Counsel for the respondent refers to a previous judgment

1. ('25) 12 A I R 1925 P O 204=89 I C 649 = 47 All 703=28 O C 388 = 52 I A 342 (P O), *Mt. Farid-un-nisa v. Mukhtar Ahmad*.
2. ('29) 16 A I R 1929 P O 3=115 I C 733 (P O), *Inche Noriah v. Shaik Allie*.
3. ('31) 18 A I R 1931 P O 100=131 I C 401 (P C), *Ramanamma v. Marina Viranna*.

of their Lordships of the Privy Council where they had remarked that Mt. Sat Bharai was not "pardanashin" in the real sense of the term. That opinion is entitled to all respect but it was given on the material existing on that record and did not determine the status of the lady for good. A 'pardanashin' lady is one who does not expose her face to the public and every one of the respondent's own witnesses has stated that she strictly observed this restriction. Further, among Sayyads women who take a vow of celibacy generally lead a secluded life and are to all intents and purposes 'pardanashin'. Anyhow, all the stranger witnesses have admitted that she did observe *pardah* from them. In a case where the issue is whether a certain lady had a disposing mind or not, it is essential that persons deposing to her state of mind should first be sure of her identity and the witnesses in this case could not be depended upon in this respect as they had never seen Mt. Sat Bharai's face before.

The result is that I would hold that it has not been proved that Mt. Sat Bharai had disposing mind at the time when the alleged deed of gift is said to have been executed by her and further that even if the deed was executed at her instance, she had no free hand in the matter. It is now to be considered whether Mt. Sardar Bibi as a married sister could at all succeed under the Customary law applicable to the parties. As has been explained above, Sayyads of Jhang District presumably influenced by the principles of Mahomedan law allowed married sisters to succeed to the property of their deceased brothers if collaterals within five degrees did not exist. Para. 4 of the answer to question 39 clearly contemplates succession of married sisters. Similarly, in the reply to question 74 it is stated that sisters or their issues succeed in the absence of the third or fourth degree collaterals. In the answer to question 79 too the succession of a married sister is unmistakably contemplated. In the *riwaj-i-am* of 1909 however the position is made very clear in the answer to question 25 at p. 50. That answer as stated above protects an unmarried sister from disinheritance on marriage if there is no uncle or first cousin. At the time when Mt. Sat Bharai died the only two relations of Allah Yar Shah who were alive were Mt. Sardar Bibi, a married sister, and Saleh Mohammad Shah, a son of a married sister. There were no collaterals within any of the degrees

specified in the *riwaj-i-am* and consequently Mt. Sardar Bibi even if married was eligible to succeed under the Customary law.

Her claim that on the basis of the answer to question 39 that sisters and their sons succeed in the order given she excludes Saleh Mohammad Shah is in my view untenable. There is ample material on the record to show that the right of representation is permissible under the Customary law applicable to the parties and this being so it cannot be said that Mt. Sardar Bibi excluded Saleh Mohammad Shah altogether. Similarly, Saleh Mohammad Shah's claim to exclude Mt. Sardar Bibi on the ground that he was descended from a daughter who was married to a collateral of Hassan Shah while Mt. Sardar Bibi was married to a stranger cannot hold good. In the first instance it is not clear that Saleh Mohammad Shah's father Khuda Yar Shah was a collateral of Hassan Shah and secondly, the rules of Customary law invoked by Saleh Mohammad Shah do not support his contention that even if his mother was married to a tenth degree collateral he came within the benefit of the rule. In order to prove Saleh Mohammad Shah's relationship with Hassan Shah reliance is placed on three pedigrees printed at pages 141-143, 10-11 and 12-13 in vol. II of the present record.

The pedigree printed at pages 141-143 relates to the Bukhari Sayyads of mauza Haidar, tahsil Jhang. In that pedigree it is shown that one Said Kamir had three sons, Ajmal, Hussain and Muzammal Shah. Below Ajmal's name there is an endorsement to the effect that his descendants hold land at village Kariwala. Muzammal Shah is shown to have seven sons, of whom one is Latif. Below his name there is an endorsement saying that his descendants live in mauza Salenwala and Thatha Jahania and own property at Latif Shah. The pedigree printed at pp. 10-11 relates to the family of Bukhari Sayyads of village Kariwala. It is headed "sons of Ajmal Shah founder." One Hassan Shah is shown as a descendant of Shah Jalla. The pedigree at pages 12-13 relates to Bukhari Sayyads of mauza Latifpur. The name of Khuda Yar Shah appears in this pedigree and it is stated that this Khuda Yar Shah is the father of Saleh Mohammad Shah. In my view, these pedigrees do not establish that Khuda Yar Shah was in any way connected with Hassan Shah. In the first place, there is no guarantee that Ajmal, whose name appears in the pedigree at

pp. 141-143, is the same as Ajmal Shah who is shown as the founder of the family of Hassan Shah in the pedigree at pp. 10-11. The name is so common that in this last pedigree it appears at least thrice. The various pedigrees produced on the record show that Sayyad families bearing no connection with one another are in the habit of using similar names. Here identity of names is not a safe criterion, therefore, to determine to which family a particular name belongs. Secondly, in a pedigree produced by the respondent himself and printed at pp. 95-97 of vol. II Hassan Shah is shown to have descended from one Ghulam Ali who was the son of Shah Sabz Ali, while the name of Ghulam Ali's father in the pedigree at pp. 10-11 is given as Ajmal Shah. The respondent has not been able to reconcile the pedigree at pp. 95-97 with the one at pp. 10-11 and it cannot therefore be ascertained with certainty whether the pedigree at pp. 10-11 relates to the Hassan Shah whose estate is in now dispute or the one at pp. 95-97.

Further, there is no guarantee that the Latif Shah who is shown as the founder of the family of Khuda Yar Shah in the pedigree at pp. 12-13 is the same as the Latif who is shown in the pedigree at pp. 141-143. The pedigree at pp. 12-13 relates to village Latifpur and not to village Latif Shah, and in the pedigree at pp. 141-143 the descendants of Latif son of Muzammal Shah are shown to own land at Latif Shah and not at Latifpur. That the two villages Latif Shah and Latifpur are different is borne out by the fact that there is a separate pedigree at pp. 14-15 which relates to village Latif Shah and there too the common ancestor is shown as Latif Shah. It is admitted that Khuda Yar Shah does not belong to the family of this Latif Shah, and this being so, it cannot be reasonably urged that Khuda Yar Shah son of Saleh Mohammad Shah was in any way related to Hassan Shah even if Hassan Shah was a descendant of Ajmal Shah. There being no consolidated pedigree showing that Khuda Yar Shah and Hassan Shah were descended from a common ancestor, and the pedigrees relied upon being so vague and irreconcilable, I would hold that it has not been proved that Khuda Yar Shah was a collateral of Hassan Shah.

But even if Khuda Yar Shah was in any way connected with Hassan Shah's family, he was not such a near collateral of his as to give his wife a preference over Mt.

Sardar Bibi or his son Saleh Mohammad Shah a preference over Mt. Sardar Bibi's sons. On behalf of Saleh Mohammad Shah it is urged that the Customary law provides that a sister who is married to a collateral of her brother, however remote, takes precedence over a sister who is married to a stranger. A close scrutiny of the Customary law relating to the subject, however, reveals that the rule is not stated in such broad terms. The oldest *riwaj-i-am* of 1880 used the term "near relation" as would appear from a judgment of this Court reported in 7 Lah 4⁴ at p. 7, and in the vernacular edition of the Customary law prepared in 1909 it was provided that only daughters married in the family of their father succeeded to the estate (question 15 at p. 46). In order to determine what was meant by the words "family of the father," especially in view of the fact that the earlier *riwaj-i-am* of 1880 had used the words "near relation," reference may be made to the answer to question 2 at p. 28, the material portion of which may be translated as follows:

Brother, father, son of an uncle, grandson and great grandson of a brother are considered as near relations. The relationship coming from a great-grandfather is considered remote.

In 1929, when the Customary law was for the first time compiled in English, in the answer to question 39, para. (b) (4) runs as follows:

Among Mahomedans those daughters and sisters who are married to male collateral kindred within five or six degrees have a preferential claim to inherit, to the daughters and sisters who have been married to remote male collateral relatives or strangers.

The answer to question 72 stands as follows:

Among Sayyads and Qureshis, if one has neither collateral kindred within third or fourth degree nor has male lineal descendants, daughter's sons succeed, provided they are collaterals within fifth or sixth degree.

In other words, the daughter should be married to a collateral of the fourth or fifth degree. Similarly the answer to question 73 is couched in the following terms:

Amongst Mahomedans, sons of those daughters get the share who are married to collaterals within fifth or sixth degree. The sons of those who have been married in different castes cannot succeed except when there are no collaterals within the sixth degree.

In the answer to question 79 it was stated:

4. ('26) 13 AIR 1926 Lah 171 = 93 I O 1009 = 7 Lah 4 = 27 P L R 214, Khizar Hayat v. Allah Yar Shah.

Among Mahomedans those sisters who have been married to the collaterals of their brothers have prior rights compared with sisters married in different families or castes.

Counsel for Saleh Mohammad Shah contends that the word "collaterals" as used in the answer to question 79 is general and that consequently any collateral, however, remote he may be, is contemplated therein. This, however, is not a correct way of interpreting this answer. The answer to question 79 must be construed in the light of the answer given before, especially the answer to question 39, which had clearly stated that sisters in order to claim preference must be married to collaterals within fifth or sixth degree. The rights of sisters being the same as those of daughters, the provision relating to daughters will be relevant in interpreting this answer. Reading the rule applicable to the subject in all the manuals of Customary law compiled on various occasions, the only conclusion that can reasonably be arrived at is that those sisters alone are preferred who are married to collaterals within five or six degrees and that all other sisters who are married to collaterals remoter than six degrees or strangers stand on an equal footing.

Counsel for Saleh Mohammad Shah relies in this connexion on the oral statements made by his witnesses which are to the effect that a sister married to a collateral in the kufy of her brother excludes a sister married to a stranger. He interprets the word "kufy" as "family" and argues that however remote a collateral may be to whom a sister is married, she would be preferred to the one who was not so married. In my view, however, no stress can be laid on the oral evidence led by the respondent and for that matter even on the oral evidence led by the appellant in this connexion. In the first place, the word "kufy" is not at all used in the manuals of Customary law of this district and it is not permissible to override the written law by interested verbal allegations. Secondly, different witnesses have put different interpretations on the word "kufy": some limit "kufy" to the seventh degree, some go up to the 20th degree and some place no limit whatever. Thirdly, almost all the witnesses admit that whatever is stated in the Customary law is a correct rule that governs them in this matter. The oral evidence thus being least helpful, the provisions of the written law must be preferred to the vague allegations made by these witnesses

and the written law, as stated above, does not support the rule relied upon by Saleh Mohammad Shah.

It may be observed here that inasmuch as all witnesses have stated as a last resort that they accept as binding whatever is stated in the Customary law, I have not considered it necessary to discuss in this judgment the oral evidence of either side on the question of custom, which was further indefinite, discrepant and interested. The instances cited by some of them have been left unsupported by documentary evidence and the few copies that have been produced are altogether irrelevant. Giving the whole matter my careful consideration, I am of opinion that even if Mt. Bakht Bhari's husband Khuda Yar Shah was a collateral of Hassan Shah in the tenth degree, as claimed by Saleh Mohammad Shah, Mt. Bakht Bhari and for that matter her son could not oust Mt. Sardar Bibi even though the latter was married to a stranger. By virtue of the answer to question 39 of the *riwaj-i-am* of 1929 both Mt. Bakht Bhari and Mt. Sat Bharai are on an equal plane and one cannot be preferred to the other.

It was stated by counsel for the respondent that inasmuch as Mt. Sardar Bibi has died, her suit has come to an end and that her sons as her legal representatives are not competent to continue it. I have not been able to appreciate the argument advanced by him. Mt. Sardar Bibi when alive and her sons after her death are entitled in their own right to succeed to the estate and Mt. Sardar Bibi's death therefore does not matter in the least. Further under O. 41, R. 33, Civil P. C., this Court is competent to make any decree that the case requires and now that Mt. Sardar Bibi's sons are on the record it would be but fair that their rights should be determined in this appeal. In the suit instituted by Mt. Sardar Bibi some houses were claimed in addition to the land and the residential house which were the subject-matter of Saleh Mohammad Shah's suit. Counsel for the appellant has not attacked the findings of the Senior Subordinate Judge in relation to these houses and consequently those findings must stand.

I would accordingly dismiss the suit of Saleh Mohammad Shah to the extent of one-half of the property enumerated in para. 1 of the plaint and decree the suit instituted by Mt. Sardar Bibi to the extent of one-half of the property already allotted to her by the revenue authorities. The order of the Senior Subordinate Judge dismissing her claim in

respect of houses dealt with in issues 1 and 2 of her suit will be maintained. To this extent these appeals will be allowed with the result that the status quo will be left intact. In the peculiar circumstances of the case parties will bear their own costs of these appeals before us.

Bhide J. — I agree with the conclusion reached by my learned brother Din Mohammad J., but would like to add a few remarks. In view of the answers to questions 74 and 79 of the Customary law of the Jhang District (1929) I am doubtful if the estate inherited by Mt. Sat Bharai was limited as there were apparently no collaterals in existence. However, even if the estate inherited by Mt. Sat Bharai was absolute, I agree that it has not been satisfactorily proved that she gifted her property in favour of Saleh Mohammad as alleged. I also agree that it has not been proved beyond doubt that Mt. Bakht Bhari was married to a collateral. In the circumstances, it would appear that according to the answer to question 79 of the Customary law of the district referred to above the parties to these suits would be entitled to inherit the property left by Mt. Sat Bharai in equal shares. I accordingly agree that the appeals should be allowed and decrees passed as proposed by my learned brother.

D.S./R.K. *Appeals partly allowed.*

*** A. I. R. 1940 Lahore 523**

YOUNG C. J. AND SKEMP J.

Emperor

v.

Mehdi Shahwali and others—Respondents.

Criminal Appeal No. 1053 of 1939, Decided on 10th July 1940, from order of Sess. Judge, Jhelum, D/- 7th July 1939.

* Penal Code (1860), S. 141, Fourth—Two parties fighting for land — Question whether land belonged to one party or other in doubt — S. 141 applies.

A party cannot be said "to enforce any right" where he is in undoubted possession of the land upon which an attack has been made and he defends that possession. In that case the right of private defence of property would arise. If, on the other hand, there was a real doubt whether the land belonged to one party or the other, then, if either party used force, that would amount to enforcing a right and there would be no right of private defence of property. S. 141 would be applicable to such a case: *Case law discussed.*

[P 526 C 1]

Mohammad Monir, Assist. to Advocate-General — *for the Crown.*

Mohammad Amin — *for Respondents.*

Skemp J. — This is a Government appeal against an acquittal. On 9th August 1938

a fight took place between two parties in village Dhudial, Tahsil Chakwal, District Jhelum. The cause of the fight was the making of a bund in the bed of a ravine. The most important member of one party, accused in the present case, was Mehdi and of the other Subedar Karam Dad. In the bed of the ravine are three fields of which khasra No. 1439 belongs to Mehdi and the adjacent Nos. 1486 and 1437 belong to members of the opposite party. The boundary between No. 1439 on the one hand and the other two is not clearly demarcated and in April or May 1938 both parties approached the girdawar and the patwari and asked them to demarcate the boundary. These officials unfortunately had not the necessary records and nothing was done. The case for the prosecution is that early on the morning of 9th August members of the Subedar's party came and asked Mehdi and others to come to the spot to demarcate the land in the presence of the girdawar and the patwari. Four men went there and were then attacked by 31 persons. Other members of Mehdi's party came up, and in the fight that followed 12 persons of the Subedar's party between them received 156 injuries. Of the injured persons one died at the spot and four subsequently. The opposite party escaped lightly, ten of them receiving 33 injuries of which only two were grievous.

Both parties were sent up for trial. In the present case Mehdi and 59 others were charged under the following sections of the Penal Code Ss. 302 read with 149, 326, 324 read with 149 and 302 read with 109. The learned Sessions Judge agreeing with the assessors found that the prosecution evidence was false and that in reality the accused were making a bund or bun on the boundary in dispute and the complainants went to stop them. This was the cause of the fight. After this fatal fight, the spot was demarcated by Raja Sajawal Khan, Settlement Tahsildar of Chakwal. He said:

On 23rd August 1938 I went to the spot and carried out measurements with the help of revenue papers. The place was in the bed of a ravine and difficult of demarcation. I came back and went to the spot once again on 25th August 1938 after obtaining the original Masavis from the sadar. I started measurements at about 4 p. m. on that day. I also worked all day on 26th August 1938 till I was satisfied regarding the correctness of my measurements . . . The bun at the spot was on the borders of parties' fields. It could not be said that either party had encroached on the land of the other. If I were asked as a revenue officer to make a bun at the spot in order to settle the dispute between the parties once for all, I would construct a bun at the identical spot where it now is.

The learned Sessions Judge found that as the bun was at the proper place the blame for the fight must be laid at the door of the complainant party,

and again

as the accused were making a bun on their own land and the complainant party went to stop them, the initial blame for the clash, as already stated, lies with the complainant party themselves. Individual members of the accused party could be punished if it could be shown that they had exceeded the right of private defence in respect of particular members of the complainant party.

This appears to be a finding that the accused were acting in the right of private defence, whether of person or property is not stated. There is no evidence who commenced the fight or struck the first blow and the Sessions Judge has not discussed this point further. I think the right of private defence to which he refers must from the context be right of private defence of property. That is the basis on which the argument took place before us. Mr. Mohammad Monir's able argument is that although title was subsequently found to be with the accused, this is not a case of defined and well established possession which the accused had a right to defend. At the most the act of the Subedar's party was a civil trespass, not a criminal offence. There was no right of private defence under S. 99, Penal Code, because there was time to have recourse to the protection of the public authorities even if the opposite party had demolished the bund. The act of the accused party fell under S. 141, *Fourth*, Penal Code. This runs as far as relevant:

An assembly of five or more persons is designated an 'unlawful assembly' if the common object of the persons composing that assembly is—Fourth: By means of criminal force, or show of criminal force, to any person . . . to enforce any right or supposed right.

He says that there was a fight between two parties both willing to fight. The party of the accused was an unlawful assembly and therefore by virtue of S. 149, Penal Code, every member of that assembly was liable for the murders committed in the fight. All that K. S. Mohammad Amin on behalf of the respondents can say in reply to this on the facts is that admittedly the prosecution witnesses have given false evidence and the prosecution case cannot be relied upon: therefore the statements of the accused must be relied upon together with the statement of a single defence witness named Sayed Zaman Shah. The story of Mehdi is that he and his party had gone into the ravine to construct a bund taking ploughs, karahs and cattle when the

party of the complainants, about 25 in number, came up. Subedar Karam Dad gave a signal for an attack by firing a gun and the others shouted that they would commit murder unless the accused stopped making the bund. Thereupon an aged man entreated the complainant party with folded hands not to fight, but the complainant party attacked them.

This argument is not worthy of serious notice. K. S. Shaikh Mohammad Amin also argued that accepting the finding of the Sessions Judge, the accused were fighting not to enforce but to maintain a right and he referred to A I R 1925 Lah 49¹ which follows 17 C W N 1132.² The learned Assistant to the Advocate-General referred to 11 Pat 523³ which is based on 16 Cal 206.⁴ The leading case is 16 Cal 206.⁴ The facts were that a party of men went either to repair or erect a bund across a river to cause the water to flow down a channel on to the lands of their employer. After working some time they were attacked by hundreds of men and some of them severely wounded. The attacking party wholly denied any right on the part of the other party to construct or repair the bund. The accused were convicted, their appeals dismissed and the Calcutta High Court dismissed the revision in a judgment which discusses English law and the previous authorities in India at length and with great learning. The judgment sets forth and refutes the defence argument as follows (page 219):

When the assembly went there in the afternoon, they went not to enforce a right; but to defend a right. They went to prevent the continuance of acts which altered the *status quo ante*. An assembly to alter is unlawful; an assembly to defend is not. This, as we understand, is the argument.

This argument possesses some attractive subtlety. But we do not feel able to accept it. . . . There are many rights of which it may be affirmed that when they are interfered with, the defence of them consists in exercising them in despite of the interference, that is or may be, in enforcing them. There are modes of enforcing a right which are not prohibited by S. 141. What it prohibits is the enforcement of a right or supposed right by criminal force or show of criminal force by an assembly of five or more persons. And rights, the defence of which can only be effected by enforcing them, may come within its provisions.

In 11 Pat 523³ a Bench presided over by the learned Chief Justice held that where

1. ('25) 12 A I R 1925 Lah 49 = 81 I C 113 = 25 Cr L J 625, *Bagh Singh v. Emperor*.
2. ('18) 17 C W N 1132 = 20 I C 623 = 14 Cr L J 463, *Ramnandan v. Emperor*.
3. ('32) 19 A I R 1932 Pat 215 = 139 I C 616 = 11 Pat 523 = 13 P L T 288 = 33 Cr L J 864, *Ghyasuddin Ahmad v. Emperor*.
4. ('89) 16 Cal 206, *Ganouri Lal v. Queen-Empress*.

the accused persons took part in an assembly the common object of which was to prevent the complainant from reaping a crop, but failed to prove that the crop was grown by or belonged to the complainant, the proved facts came within the statutory definition of rioting and the accused persons were guilty of that offence unless they had acted in the exercise of the right of private defence. There is no distinction between forming an assembly to enforce a right or supposed right within the meaning of S. 141 (fourth) and forming an assembly forcibly to maintain an existing right, in either case the assembly being an unlawful one.

In 17 C W N 1132² the complainant's party constructed, without the petitioners' permission, across a water way exclusively belonging to the petitioners, a bund or dam for their own purpose. The petitioners in attempting to cut the bund were opposed by the complainant's party and there was a fight. The dispute had been before the Courts and on the civil side the High Court had found that the bund constructed belonged exclusively to the petitioners and that the complainant's party had no right to go there. In that case a Bench of the Calcutta High Court said:

The phrase 'to enforce a right' can only apply when the party claiming the right has not possession over the subject of the right and therein lies the distinction between 'enforcing a right' and 'maintaining a right.' A party in possession is entitled to resist and repel an aggression and his action in so doing would be in the maintenance of his right.

This judgment made no reference to 16 Cal 206.⁴ The present appeal would be analogous to that case had the revenue authorities demarcated the boundary before instead of after the fight. As things are, I agree with the argument of Mr. Mohammad Monir that there was no well established and defined possession which the party of the accused had a right to defend. In A I R 1925 Lah 49¹ the dispute was about irrigation. The warabandi was not being, adhered to and one Bagh Singh took the water in good faith. The Bench said: "It does not much matter whether he was really entitled to take the water or not." The other party came to stop him by force from taking the water and Bagh Singh, who had a gun, shot one of them. The Bench quoted Section 141 and said:

At the time the appellants were in possession of the water and their intention was to maintain that possession and not to enforce any right or supposed right.

With all respect, the distinction there made seems to me to be no distinction at all. Bagh Singh and his party wished to continue to take the water: that was both to maintain their possession of the water and also to enforce their right. In my opi-

nion the learned Sessions Judge would have been right if the demarcation of the boundary had taken place before the fight. Then the case would have been analogous to 17 C W N 1132.² But at the time of the fight the boundary had not been ascertained by the authorities and both sides fought to enforce a right or supposed right. Like nations going to war, each party thought that it was in the right. In these circumstances I think that S. 141 (Fourth) applies and that there was no right of private defence. Each member of the party of the accused is therefore liable for the murders committed. The learned Assistant Advocate-General admitted that in view of the unsatisfactory character of the prosecution evidence only those respondents could be convicted who had admitted their presence or had received injuries in the fight. Mehdi son of Shah Wali, Ashraf son of Alaf Din, Sahib son of Tora, Fazal Ilahi son of Sahib, Haider son of Sahib, Feroze son of Sahib, Khan Bahadur son of Jafar Khan, Ghulam Abbas son of Jafar Khan, Feroze son of Ghulam Hussain, Mura son of Sarbuland and Fatta son of Mehra admitted their presence. Of these all except Mehdi, Ashraf and Feroze son of Ghulam Hussain bear injuries. Sahib gave his age as 75, but when he was examined by Capt. Abdul Haq, Assistant Surgeon, his age was taken as 58: see p. 24 of the paper book.

Two other persons, Qadar Bakhsh son of Allah Dad and Mohammad son of Ghakhar bear injuries. I would convict these 13 persons under S. 302 read with S. 149, Penal Code. The minimum sentence that we can pass is transportation for life and this sentence must be passed on each of them. These sentences, however, appear to be too severe as both parties fought in the bona fide belief that they were in the right; and the matter is referred to the Local Government under S. 401, Criminal P. C., with the recommendation that the sentences be reduced. Non-bailable warrants have already issued against these persons except Mohammad son of Ghakhar. He is to surrender to his bail bond. The appeal against the other respondents is dismissed.

Young C. J. — I agree with the conclusions arrived at by my learned brother. At first sight there may appear to be some confusion between the right of private defence of property as set out in Ss. 96 and 105, I. P. C., and the provisions of S. 141 (Fourth) of the same Code which make it an offence to "enforce any right." A party

cannot be said, in my opinion, "to enforce any right" where he is in undoubted possession of the land upon which an attack has been made and he defends that possession. In that case the right of private defence of property would arise. If, on the other hand, there was as in this case, a real doubt whether the land belonged to one party or the other, then, if either party used force, that would amount to enforcing a right and there would be no right of private defence of property. A consideration of the relevant sections of the Penal Code and all the authorities referred to in argument appears to establish this construction of the two sections of the Penal Code.

Young C. J. and Skemp J. — After pronouncing judgment we were informed that two of the respondents, namely Ghulam Abbas son of Jafar Khan, and Fatta son of Mehra, had not been served, that they were serving as soldiers and are now serving overseas. Under these circumstances, our judgment clearly is non-effective as against these two respondents. We therefore cancel our judgment regarding these two respondents and direct that their appeals be placed before a Bench for subsequent disposal.

D.S./R.K.

*Order accordingly.***A. I. R. 1940 Lahore 526**

BLACKER J.

*Jawala Parshad v. Ram Parshad.*Criminal Revn. Petn. No. 547 of 1940,
Decided on 27th May 1940.

(a) Criminal P. C. (1898), S. 476 — First application dismissed for non-appearance of applicant—Second application can be made.

There is no provision of law that a second application under S. 476 cannot be made where a first application has been dismissed for non-appearance of the applicant. The principle of "*nemo debet*" is not applicable where there has been no inquiry on the merits. [P 526 C 2]

(b) Criminal P. C. (1898), S. 476-B—S. 476-B does not give right of appeal against dismissal in default.

Section 476-B gives an appeal against a refusal to make a complaint, not against a dismissal in default. [P 526 C 2]

(c) Criminal P. C. (1898), S. 476—Order dismissing application under S. 476 for non-appearance is improper.

An application under S. 476 is entirely different from a complaint; it is merely the means of drawing the Court's attention to the fact that an offence appears to have been committed in proceedings before that Court, a fact, which it can in the majority of cases verify even without the help of the applicant. It is manifestly most improper for the Court to shirk its obvious duty of applying its mind to the question whether it should make a complaint or not, merely because the applicant does not appear in support of his application. There is no provision of law making it necessary to examine the applicant on his application as there

is in the case of a complaint. Further, Ss. 476-A and 476-B do not talk about dismissing an application but in one case of rejecting it and in the other case of refusing to act on it. It is, therefore, improper to dismiss the application merely because applicant is not present. However, there would be nothing wrong in rejecting the application on the ground that it does not give sufficient indication of facts and that the applicant is not there to supplement it: *A I R 1914 Lah 576, Rel. on.*

[P 526 C 2; P 527 C 1]

(d) Criminal P. C. (1898), S. 476—Application not made immediately may be entertained.

It cannot be said that there is a legal bar to the entertainment of an application not made immediately. [P 527 C 1]

Qabul Chand — *for Petitioner.*Gullu Ram — *for Respondent.*

Order.—The learned District Judge has in my opinion misdirected himself in law in holding that a second application under S. 476, Criminal P. C., cannot be made where a first application has been dismissed for non-appearance of the applicant. There is no such provision of law and the principle of "*nemo debet*" is not applicable where there has been no inquiry on the merits. Nor is the learned District Judge right in saying that the applicant's remedy is to appeal against the order of the Appellate Court under S. 476-B. That section gives an appeal against a refusal to make a complaint, not against a dismissal in default, an order which does not seem to have been contemplated by the law. Not only is there no provision for dismissing an application made under S. 476, Criminal P. C., in default but it is clearly improper to do so: *vide* 4 P R 1915 Cr¹ a case under the old law, the principles of which, however are still applicable.

The case is quite different from that of a complaint where the Magistrate is entitled to dismiss the complaint, if, in his opinion, there are no grounds for proceeding with it, and such grounds may well be the failure of the complainant to appear and substantiate his allegations. An application under S. 476 however is entirely different from a complaint; it is merely the means of drawing the Court's attention to the fact that an offence appears to have been committed in proceedings before that Court a fact, which it can in the majority of cases verify even without the help of the applicant. It is manifestly most improper for the Court to shirk its obvious duty of applying its mind to the question whether it should make a complaint or not,

1. ('14) 1 A I R 1914 Lah 576=28 I C 336=4 P R 1915 Cr=22 P L R 1916=16 Cr L J 208, *Rup Narain v. Mahadaya*.

merely because the applicant does not appear in support of his application. There is no provision of law making it necessary to examine the applicant on his application as there is in the case of a complaint. In fact an application might well be anonymous, if it were sufficiently precise and definite there would be no justification for not acting upon it. It is clearly the duty of a Court to which such an application is made either to make a complaint or to reject the application on the merits. This is also borne out to some extent by the language of Ss. 476-A and 476-B, Criminal P. C., which do not talk about dismissing an application but, in the one case, of rejecting it and, in the other case, of refusing to make a complaint upon an application. Therefore, the initial order dismissing the application on account of the non-appearance of the applicant is an improper order which there is no provision in law for making and, therefore, in my opinion, an order without jurisdiction. In parenthesis, however, I would observe that there would be nothing wrong in an order rejecting the application on the ground that it does not give sufficient indication of the facts, and that the applicant is not there to supplement it. What is wrong is the order dismissing merely because the applicant is not present. Such an order can clearly not bar a second application reminding the Court that it should do its duty and decide the matter before it. Furthermore, the learned District Judge is also wrong in holding that there could have been an appeal against such an order. The appeal is given only against an order making a complaint or refusing to make a complaint, not against an order declining to consider the matter at all. The learned District Judge seems to me to be equally at fault in holding that there is a legal bar to the entertainment of an application not made immediately. Of the rulings he has quoted, 88 P L R 1916² is under the old law and is not applicable to the present application and A I R 1930 Lah 316³ really only lays down that belated applications should not be encouraged. The point, however, is academic as the present application was not belated. The original application was made within a few days of the statement alleged to be false and the present application was made on

the same day that the application for restoration of the original application was rejected. There has, therefore, been no delay on the part of the petitioner. For these reasons the present order of the learned District Judge of Hissar appears to me to be bad in law and I set it aside and send the case back to him to hear the appeal on the merits.

D.S./R.K.

*Order set aside.***A. I. R. 1940 Lahore 527**

SKEMP J.

Sardar Dewan Singh Maftoon, Proprietor "The Riyasat," Delhi

v.

Emperor through C. I. D., Delhi.

Criminal Misc. Appln. No. 253 of 1940,
Decided on 25th June 1940.

(a) Criminal P. C. (1898), S. 526 — Fact that Magistrate disallowed questions in cross-examination without noting them on record is no ground for transfer.

The fact that when the Magistrate disallowed questions in cross-examination he made no note of the same on the record is no ground for transferring a case under S. 526 : *A I R 1920 Pat 25 and A I R 1918 L B 22, Disting.* [P 528 C 1]

(b) Evidence — Questions disallowed — How far should be noted by Judge, stated.

Where the cross-examination is irrelevant and unnecessarily lengthy a Judge is justified in disallowing questions. He need not however note on the record each question which is disallowed for such a procedure would defeat its own object which is to get on with the case. When a question disallowed is important or there is reasonable doubt whether it should not be allowed, it may be useful for the Judge to note the question and his reasons for disallowing it. [P 528 C 1]

(c) Criminal P. C. (1898), S. 526 — Fact that police officers of district are witnesses in case is no ground for transferring case to other district.

The fact that police officers of the district are witnesses in the case is no ground for transferring the case to another district : *A I R 1927 All 708, Not foll.* [P 528 C 2]

(d) Practice — Procedure — Counsel coming from outside to appear in case — Magistrate should give to case whole day or more at a time.

While admittedly a counsel who comes from outside has no right to be treated differently from a local counsel, it is reasonable that there should be "give and take" and in a case in which a counsel from outside appears the Magistrate should as far as possible give a whole day or more than one day at a time to it. [P 528 C 2]

J. G. Sethi — *for Petitioner.*

Vir Sen Sawhney *for Advocate-General*
— *for the Crown.*

Order.—This is an application on behalf of Sardar Dewan Singh Maftoon for transfer of a case now pending in the Court of the City Magistrate of Delhi to some other district. The application extends over nine printed pages of type and I have heard

2. ('16) 8 A I R 1916 Lah 259 = 88 P L R 1916 = 17 Cr L J 470, *Ram Nath v. Emperor.*

3. ('30) 17 A I R 1930 Lah 316 = 126 I C 794 = 31 Cr L J 1135, *Chothu Ram v. Emperor.*

lengthy arguments from Mr. J. G. Sethi and Sardar Bahadur Bhagwan Singh. After considering these arguments and the explanation of the Magistrate for the allegations which concerned him I am of the opinion that the applicant has not established that he has a reasonable apprehension of an unfair trial. A few weeks ago an application was made for bail on behalf of Sardar Dewan Singh Maftoon which was accepted by me. It is hard to understand why the application for transfer was not made at the same time. I have heard an explanation which does not seem to me satisfactory. It appears quite possible that if the application for bail had been rejected the application for transfer would never have been lodged. Briefly, I do not think the grounds in the application have been made out but certain points of general interest have been raised to which I will refer. One point made by Mr. Sethi is that when the Magistrate disallowed questions in cross-examination he made no note of this on the record. This is not required by statute law; the statute law dealing with the maintenance of a Magistrate's record is as far as relevant found in Ss. 357 to 360, Criminal P. C. These sections deal exclusively with the evidence of witnesses and say nothing about questions disallowed. Mr. Sethi referred to two criminal judgments, 55 IC 593¹ and 36 IC 468,² in which Judges laid down that the questions disallowed might have been noted, but they deal with particular cases and I think are not of general application. In any case they do not come from this Province. I have no experience of criminal work in other provinces but in this Province cross-examination is often irrelevant and unnecessarily lengthy and Magistrates are justified in disallowing questions. If they note on the record each question which is disallowed the procedure defeats its own object which is to get on with the case. When a question disallowed is important or there is reasonable doubt whether it should not be allowed it may be useful for the Magistrate to note the question and his reasons for disallowing it and there are instances on the present record where this has been done; but this is entirely a matter for the discretion of the Magistrate. If the accused (or the prosecutor) is dissatisfied, it is always open to him to put in an application to be placed

on the record saying that such and such a question was put but not allowed.

Another point urged was that a number of officers of the district are witnesses in the case and the ruling A I R 1927 All 708³ was quoted where Boys J., transferred a case from District Moradabad on the ground that where a number of officials in the district were personally concerned whether as witnesses or otherwise it was desirable that it should be tried elsewhere and the District Magistrate had admitted the propriety of this. In the present case Sardar Bahadur Bhagwan Singh has named five officers — three officers of the C. I. D., one the Deputy Superintendent Police of Delhi City, another an Inspector of the C. I. D., Delhi — who are witnesses in the case. It seems to me undesirable to transfer a case from a district because police officers of the district are witnesses in that case.

There is no force in the allegations about alleged illegalities and irregularities. Thus, the point was taken that Mr. Scott, Government Examiner of questioned documents, was not an expert on typing. The Magistrate dictated an order to the effect that he was. Subsequently, counsel after a reference to the Magistrates' private library drew his attention to the ruling on this point in the Meerut conspiracy case.* The Magistrate then followed the Meerut conspiracy case and reversed his previous order which was not brought on the record. I cannot see anything wrong in this or in other points which were discussed.

There is one point with some substance. The accused who is a Sikh is represented by Sardar Bahadur Bhagwan Singh who comes for each hearing from Ajmer, a distance of 275 miles from Delhi. The record shows that there have been 15 peshis to compile 119 pages of evidence and it is clear that Sardar Bahadur Bhagwan Singh has been brought from Ajmer oftener than was necessary. While admittedly a counsel who comes from outside has no right to be treated differently from a local counsel, it is reasonable that there should be "give and take" and I direct that in his future dealings with this case the Magistrate as far as possible give a whole day at a time to it; indeed, if possible, more than one day. The application for transfer is rejected.

G.N./R.K.

Application rejected.

1. ('20) 7 A I R 1920 Pat 25 = 55 I C 593 = 21 Cr L J 321, Rameshwar Dushad v. Emperor.

2. ('18) 5 A I R 1918 L B 22 = 36 I C 468 = 9 L B R 88, Deya v. Emperor.

3. ('27) 14 A I R 1927 All 708 = 106 I C 99 = 28 Cr L J 1011, Bhola Nath v. Vasheshwar Nath.
* See ('33) 20 A I R 1933 All 990, S. H. Jhabwala v. Emperor.

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